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# TRANSNATIONAL LABOR CITIZENSHIP

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## I. INTRODUCTION

On the parched plaza outside the U.S. Consulate in Monterrey, Mexico, hundreds of men and women lean against tree trunks or press their backs into the consulate wall, seeking any sliver of shade. They wait to be fingerprinted, interviewed, and—with luck—approved as one of the 175,000 guest workers admitted to the United States each year. An ordinary day in May 2005—or perhaps not quite. Under one tree, a meeting is underway. At the center of a circle stands a labor organizer, copy of a contract in hand. *Asegúrense que sus derechos sean respetados*, he urges the crowd, all of whom are bound for North Carolina. “Make sure that your rights are respected.” Another man, his crisp shirt and spotless jeans belying the previous sixteen hours spent on a bus from his hometown, stands up and offers advice to the others. *Cuidado con el patrón en Ranch Farm*. “Careful with the boss at Ranch Farm.” He continues: “He’s still trying to get away with piece rate when he’s supposed to be paying us by the hour. Call the union’s North Carolina office if it happens to you.” Others nod assent. After half an hour of sharing information and reestablishing bonds, the group disperses. Before the week’s end, they will be thinning tobacco plants in the hot Carolina fields. For the first time in

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history, guest workers are about to cross the border into the United States as union members.

Over one million new immigrants arrive in the United States each year.<sup>1</sup> This spring, Americans saw several times that number pour into the streets, protesting proposed changes in U.S. immigration and guest work policies.<sup>2</sup> As the signs they carried indicated, most migrants come to work, and it is in the workplace that the impact of large numbers of newcomers is most keenly felt. For those who see both the free movement of people and the preservation of decent working conditions as essential to social justice, this presents a seemingly unresolvable dilemma. In a situation of massive inequality among countries, to prevent people from moving in search of work is to curtail their chance to build a decent life for themselves and their families. But from the perspective of workers in the country that receives them, the more immigrants, the more competition, and the worse work becomes.

As an advocate for immigrant workers for over twenty years, I have often spoken from the heart of that dilemma.<sup>3</sup> This Article proposes a way out. In it, I develop the idea of “transnational labor citizenship,” a new approach to structuring cross-border labor migration that draws on, but goes beyond, current theories of transnational political citizenship. Transnational *labor* citizenship reconceptualizes the relationship among the governments of immigrant sending and receiving countries, civil society labor institutions, such as unions and worker centers, and private actors. Inspired by recent efforts to organize workers as they move across borders, transnational labor citizenship would link permission to enter the United States in search of work to membership in cross-border worker organizations, rather than to the current requirement of a job offer from an employer. It would facilitate the enforcement of baseline labor rights and allow migrants to carry benefits and services with them as they move. Its goal, heretofore elusive, is to facilitate the free movement of people while

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1. JEFFREY S. PASSEL & ROBERTO SURO, RISE, PEAK, AND DECLINE: TRENDS IN U.S. IMMIGRATION 1992–2004, at i–ii (2005), available at <http://pewhispanic.org/reports/report.php?ReportID=53>.

2. Luis Andres Henao, *After the Amnesty: 20 Years Later*, CHRISTIAN SCI. MONITOR, Nov. 13, 2006, at A3.

3. See, e.g., JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS (2005) [hereinafter GORDON, SUBURBAN SWEATSHOPS]; Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407 (1995); Jennifer Gordon, *Immigrants Fight the Power—Worker Centers Are One Path to Labor Organizing and Political Participation*, NATION, Jan. 3, 2000, at 16.

preventing the erosion of working conditions in the countries that receive them.

Labor organizations are central to this proposal. Historically, unions have been restrictionist in their approach to immigration, but today most unions in the United States welcome immigrants already present in the industries they organize, including the undocumented.<sup>4</sup> While this Article applauds this pro-immigrant position, it argues that to move forward on the immigration question from a social justice perspective, *and* to succeed in their goal of improving working conditions, unions must refashion themselves so they can accommodate an ongoing influx of new migrants. Simultaneously, the United States must reconfigure its approach to labor migration so that it sees workers' organizations as allies in the process.

This Article offers the new concept of "labor citizenship" as a lens for understanding the challenges unions face in taking the leap to an open attitude toward the future flow of migrants. By labor citizenship I mean the ways in which workers' organizations create membership regimes, set and enforce rules for those who belong, and approach their goal of improving wages and working conditions. Labor citizenship also encompasses the normative expectation of solidarity among workers and active participation by them in the democratic governance of their own institutions.

Strikingly, aspects of labor citizenship implemented by unions in the United States parallel the conventional national citizenship framework. Like countries, which apportion privileges based on national citizenship, unions offer a special set of benefits to their members alone.<sup>5</sup> At a

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4. I use the term "undocumented" to refer to noncitizens with no legal immigration status because it avoids the pejorative inherent in phrases like "illegal immigrant" or "illegal alien." The word also highlights a fairly recent emphasis on documentation at the intersection of U.S. labor and immigration law. It was not until 1986, with the passage of the Immigration Reform and Control Act and its employer sanctions provisions, that all job seekers in the United States were required to present "documents" proving their authorization to work before being hired.

5. For an accounting of the way nonunion workers also benefit from the efforts of unions, see *infra* note 50 and accompanying text. In this Article, I use the word "members" when referring to workers who are represented by a union. This should be qualified. First, in states that have passed so-called "Right to Work" legislation, workers are released from the obligation to join or pay dues to the union that represents them. For a typical "Right to Work" Law, see IDAHO CODE ANN. §§ 44-2003 (2003). In such states—currently numbering twenty-three—employees in a unionized workplace who do not wish to offer the union their financial support do not have to do so, although under the doctrinal duty of fair representation the union must always represent the interests of *all* workers in the bargaining unit. *Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944); U.S. Dep't of Labor, *State Right-to-Work Laws and Constitutional Amendments in Effect as of January 1, 2007 with Year of Passage*, <http://www.dol.gov/esa/programs/whd/state/righttowork.htm> (last visited Jan. 27, 2007). Furthermore, after the passage of the Taft-Hartley Act, although unions in non-"Right to Work" states can negotiate "agency shop" or "union shop" contracts that require that all workers in the bargaining unit pay dues, it

minimum, union boundaries separate those eligible to claim the higher wages guaranteed by union contracts from those beyond the contract's scope. In some organizing models, particularly in the building trades, there have been times when labor citizenship is treated as a limited commodity, denied to some workers in order to increase the share of those within the circle. This model echoes the way that nation-states circumscribe those who will be admitted to citizenship to facilitate the amassing and distribution of limited resources. As nations do, unions assert that this line drawing is normatively important, in addition to its instrumental value. From the union perspective, bounded citizenship aids in the development of democracy and solidarity within the union, and enhances the capacity of union members to realize full and equal citizenship outside the workplace as well. From the perspective of the nation-state, it is often said to be a precondition for the creation of community and the flourishing of democracy.

In the past decade, much has been written about the ways that political participation, once seen as a single-state phenomenon, has transformed into a transnational experience under pressure from massive migration around the globe.<sup>6</sup> Transnational scholarship describes immigrant remittances as the driving force behind many of these changes but is curiously silent on the conditions of the work that produces remittance income.<sup>7</sup> Such scholars

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is illegal to require workers to formally affiliate as members with the unions that represent them. *See, e.g., Int'l Union of Elec., Elec., Salaried, Mach. & Furniture Workers Local 444*, 311 N.L.R.B. 1031, 1041 (1993) (invalidating a clause in a collective bargaining agreement requiring all employees to become "members of the Union in good standing" because such a clause "fails to apprise employees of the lawful limits of their obligation" to the union and "would lead an employee unversed in labor law to believe that employees were obliged to join the Union and satisfy all of the requirements for membership as a condition of employment"). Thus, even in a "union shop" there may be workers represented by the union who are not technically members.

6. The literature on transnational citizenship is vast. Foundational works include *TOWARDS A TRANSNATIONAL PERSPECTIVE ON MIGRATION: RACE, CLASS, ETHNICITY, AND NATIONALISM RECONSIDERED* (Nina Glick-Schiller et al. eds., 1992) and *YASEMIN NUHOĞLU SOYSAL, LIMITS OF CITIZENSHIP: MIGRANTS AND POSTNATIONAL MEMBERSHIP IN EUROPE* (1994). Linda Bosniak's article, *Citizenship Denationalized*, 7 *IND. J. GLOBAL LEGAL STUD.* 447 (2000), offers an empirical and theoretical exploration of whether citizenship is an inherently national project, or whether it can and should be expanded across national borders. Roger Waldinger, David Fitzgerald, and Jonathan Fox, among others, have recently offered critiques of the argument that transnational citizenship represents a meaningful shift in the citizenship paradigm. *See* Jonathan Fox, *Unpacking "Transnational Citizenship"*, 8 *ANN. REV. POL. SCI.* 171 (2005); Roger Waldinger & David Fitzgerald, *Transnationalism in Question*, 109 *AM. J. SOC.* 1177 (2004). A recent volume of the *N.Y.U. Law Review* explores this phenomenon in detail including Anupam Chander's useful taxonomy of the emerging institutions of transnational economic and political citizenship. Anupam Chander, *Homeward Bound*, 81 *N.Y.U. L. REV.* 60 (2006).

7. There are a few exceptions, including the work of David Fitzgerald and Lynn Stephen, who have explored the links between labor unions and transnational political behavior. *See* David Fitzgerald,

have also been reluctant to take the leap from description of transnational activities to normative exploration of how the transnational framework might be reshaped so that it serves the ends of a more just labor and immigration system.<sup>8</sup> In exploring the potential for transnational labor citizenship, this Article takes on both tasks.

The same forces shifting the practice and structure of citizenship on the national level are also bearing down on unions. Yet the transnationalization of political citizenship emerging on the national level does not yet have a clear parallel in labor citizenship. I argue that unions' legitimate concerns about the effect of an oversupply of workers on working conditions has hampered their ability to reshape labor citizenship to respond effectively to ongoing immigration. To be sure, as of the late 1990s unions in the United States became much more open to organizing new immigrants, including the undocumented.<sup>9</sup> And, in the context of the global movement of capital, a number of unions have initiated cross-border efforts to support workers and unions in other countries.<sup>10</sup> But the core

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*Beyond "Transnationalism": Mexican Hometown Politics at an American Labour Union*, 27 ETHNIC & RACIAL STUD. 228 (2004); Lynn Stephen, *Mixtec Farmworkers in Oregon: Linking Labor and Ethnicity Through Farmworker Unions and Hometown Associations*, in INDIGENOUS MEXICAN MIGRANTS IN THE UNITED STATES 179 (Jonathan Fox & Gaspar Rivera-Salgado eds., 2004).

8. It is also important to challenge the idea that the shift from nationalism or transnationalism has been linear, universal, or complete. Borders are still tremendously important sites for the exercise of real and symbolic national power, as the 2006 congressional mandate for the construction of a 700-mile wall along the southern U.S. border illustrates. Secure Fence Act of 2006, H.R. 6061, 109th Cong. § 3 (2006). Within the United States, the state's capacity to exclude and deport immigrants increased over the course of the 1990s and 2000s. Changing laws drastically increased the facility with which legal permanent residents convicted of crimes could be stripped of their green cards, and ramped up surveillance and enforcement against those whose religion, ethnicity, or nationality placed them within the state's rubric of "suspected terrorists." See generally Muneer Ahmad, *Homeland Insecurities: Racial Violence the Day After September 11*, 20 SOC. TEXT 72 (2002); Leti Volpp, *The Citizen and the Terrorist*, 49 UCLA L. REV. 1575 (2002); E-mail from Sameer M. Ashar, Assistant Professor, City University of New York School of Law, to author (Aug. 2, 2006) (on file with author) ("[T]he post-9/11 reinforcement of national borders and immigration enforcement and the 1996 targeting of LPR's with criminal convictions seem to suggest a tiered system in which some populations are allowed to transnationalize, while others are targeted and put outside of our national borders."). In these ways, transnationalism is best understood as a phenomenon that is permitted for "desirable aliens" by some receiving country governments, but forbidden by them to a large swath of would-be migrants (some of whom nonetheless migrate or remain illegally, and create transnational forms of participation from the bottom up).

9. See *infra* Part III.B.1.c.

10. For a historical overview of labor's cross-border efforts, see BEVERLY J. SILVER, *FORCES OF LABOR: WORKERS' MOVEMENTS AND GLOBALIZATION SINCE 1870* (2003). Examples of concrete campaigns are set out in Terry Davis, *Cross-border Organizing Comes Home: UE & FAT in Mexico & Milwaukee*, 23 LAB. RES. REV. 23 (1995); Andrew Herod, *Organizing Globally, Organizing Locally: Union Spatial Strategy in a Global Economy*, in GLOBAL UNIONS? THEORY AND STRATEGIES OF ORGANIZED LABOUR IN THE GLOBAL POLITICAL ECONOMY 83 (Jeffrey Harrod & Robert O'Brien eds.,

model of labor citizenship has remained reliant on efforts to curtail the number of workers entering the labor market. In bringing undocumented immigrants into the fold of labor citizenship, most unions did not forgo the idea of boundaries. They merely extended their borders to include a new group. The idea that the future flow of migrants remain outside the reach of labor citizenship—and that union borders must be defended against them, or they will undermine the viability of that citizenship—remains essential to the vision of much of the labor movement today. And yet, new migrants continue to arrive.

Surprising many, Service Employees International Union (“SEIU”) and UNITE HERE, two leading members of the Change to Win Coalition made up of unions that withdrew from the American Federation of Labor and Congress of Industrial Organizations (“AFL-CIO”) in 2005, recently endorsed a new “guest work” program.<sup>11</sup> After the 1964 demise of the *bracero* program, which brought over 4 million Mexicans to U.S. fields over the two decades of its existence, the idea of addressing large-scale labor needs through guest work fell into disfavor.<sup>12</sup> But the idea of an expanded temporary worker program was revived by President George W. Bush in 2004<sup>13</sup> and has gained currency in some unexpected quarters, including some immigrant advocacy groups that had previously considered permanent legalization the only acceptable solution to the problems of the undocumented.<sup>14</sup> SEIU and UNITE HERE have joined that camp. Meanwhile, the AFL-CIO contends that a new guest work program would undercut every effort to organize low wage workers. In truth, as long as a guest worker program positions “guests” outside the paradigm of labor

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2002); Kenneth Zinn, *Labor Solidarity in the New World Order: The UMWA Program in Columbia*, 23 LAB. RES. REV. 35 (1995).

11. See *infra* Part IV.B. The ironies of using the term “guest” to describe workers brought in on a temporary basis to take a country’s most undesirable jobs under conditions of extreme exploitation are inescapable. However, because the phrase “guest worker” enjoys universal recognition and its potential synonyms—temporary worker, nonimmigrant worker—have multiple meanings, I will refer to “guest workers” throughout this piece.

12. For overviews of the *bracero* program, see generally KITTY CALAVITA, *INSIDE THE STATE: THE BRACERO PROGRAM, IMMIGRATION, AND THE I.N.S.* (1992); ERNESTO GALARZA, *MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY* (1964) [hereinafter GALARZA, *MERCHANTS OF LABOR*]; ERNESTO GALARZA, *SPIDERS IN THE HOUSE AND WORKERS IN THE FIELD* (1970) [hereinafter GALARZA, *SPIDERS IN THE HOUSE*]; MAE NGAI, *IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA* (2004).

13. President George W. Bush’s first guest worker speech was delivered on January 7, 2004. *Bush on Immigration; Excerpts from Bush’s Address on Allowing Immigrants to Fill Some Jobs*, N.Y. TIMES, Jan. 8, 2004, at A28.

14. For a full exploration of the guest work issue, see Part IV, *infra*.

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citizenship, such a program is doomed to undermine the quality of work despite whatever protections it technically provides for its participants.<sup>15</sup>

It is the central contention of this Article that the hard-bordered model of labor citizenship is untenable in the face of an increasingly global market for labor. Instead, I ask how we might productively reconceive of the relationship between labor citizenship and nation-state citizenship in a context of ongoing labor migration. Could a different *form* of labor citizenship better achieve the *norms* that the concept embodies? What approach to labor organization makes sense in a globally interconnected world, if the goal is to create good work—at a bare minimum, work that can support a family, does not endanger the worker's health, and provides adequate time off for other pursuits—in this country no matter who the worker is?<sup>16</sup>

In response, I call for a thought experiment in the transnationalization of labor citizenship.<sup>17</sup> I propose an opening up of the fortress of labor and of the nation-state to accommodate a constant flow of new migrants through a model that would tie immigration status to membership in organizations of transnational workers rather than to a particular employer. These memberships would entitle migrants to services, benefits, and rights that cross borders just as the workers do. In exchange for the authorization to work that they would receive as members, migrant workers would commit to the core value of labor citizenship: solidarity with other workers in the United States, expressed as a commitment to refuse to work under conditions that violate the law or labor agreements.

The premise behind this proposal is that in the face of enormous inequality between countries, immigration controls will not stop the movement of workers from the South to the North. But recognizing that migrants will continue to arrive in the United States regardless of our policy does not require abdicating wages and working conditions to employers who would set them as low as the market permits. Advocates have long stated that the government must actively enforce basic workplace standards in immigrant-heavy workplaces to set a floor for all workers. Such a step is necessary but insufficient. The state does not have the political will, the staffing, or the mechanisms to enforce those laws consistently, and even if it did, the minimums are set too low to assure

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15. See *infra* Part IV.C (discussing the problems posed by even the best-designed guest worker programs).

16. Despite the transnational focus of my proposal, the central concern of this Article remains addressing conditions of work within the United States.

17. See *infra* Part V.

workers a decent standard of living. To engage the state more fully in enforcement, and to go beyond inadequate existing levels of protection, workers themselves must organize. Transnational labor citizenship would shift the enforcement of a floor on working conditions from the arena of immigration policy in employer hands, where it currently lies, to the arena of labor solidarity in worker hands, where it belongs. In this way, I argue, we can create structures that respond at once to the desires of migrants for jobs and to the aspirations of labor citizenship to preserve decent working conditions in this country.

A brief map of the road ahead is in order. I begin in Part II by elaborating the concept of labor citizenship, drawing on the nation-state citizenship framework and emphasizing the key pragmatic and normative roles of borders in union organizing. In Part III, I trace the interactions between labor citizenship and its nation-state counterpart, arguing that in the context of large-scale immigration, the bounded nature of labor citizenship is frequently its undoing, creating a recurring conflict between solidarity and defense. In Part IV, I lay out the dilemma of guest work as the last frontier in this progression. I draw on the history of both the *bracero* and more recent temporary work visa programs in the United States to argue that even a “good guest work program” would not address the challenges of establishing labor citizenship in a transnational world because guest work proposals inevitably preserve barriers between “guests” and residents that undermine efforts to raise or even maintain wages and working conditions. In Part V, I lay out my proposal for transnational labor citizenship, and in Part VI, I explore practical and theoretical hurdles and suggest how they might be overcome.

## II. LABOR CITIZENSHIP

Unions in the United States have often approached membership in ways that echo aspects of nation-state citizenship. In this Part, I develop the concept of “labor citizenship” as a way to explain the role of boundaries within unions and to elucidate the relationship between labor’s borders and those of the nation-state.

### A. THE CONCEPT OF LABOR CITIZENSHIP

Labor citizenship describes the structure of membership in workers’ organizations, the expectations such groups have of their members, and strategies they use to leverage better working conditions. From the perspective of workers, labor citizenship refers to the *status* of membership

in a workers' organization, and to the *act* of participation in the decisionmaking processes of that organization, with the *goal* of improving wages, working conditions, and the dignity of work. As these three things come together, they may forge a fourth component, *identity*, as participants come to identify with their organization and with fellow "labor citizens," and stand in solidarity with them. From the perspective of the organization, the effort to build labor citizenship is at once an effort to create a strong democratic internal culture, and to exercise power in the workplace, the community, and the political arena in order to achieve recognition of and compensation for workers' economic contributions to society.

Unlike similar-sounding theories of economic or industrial citizenship, which call on the state to provide decent work and to protect working conditions through law and policy, labor citizenship as I envision it is located in an organization or collective effort, and the benefits it provides are the direct product of the actions of workers themselves.<sup>18</sup> Its development may be facilitated by state policies that support economic or industrial citizenship and held back by laws that seek to restrict the scope

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18. The idea of economic citizenship has its roots in T.H. Marshall's classic work, *Citizenship and Social Class*. Marshall described full citizenship as an amalgam of political, civil, and social rights. Although he did not make economic rights one of his three pillars, the availability of decent work and the assurance of a minimum income underpin his concepts of civil and social rights. See T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS AND OTHER ESSAYS* (1950); Alice Kessler-Harris, *In Pursuit of Economic Citizenship*, 10 SOC. POL. 157, 159–62 (2003). Scholars such as William Forbath, Kenneth Karst, Alice Kessler-Harris, Vicki Schultz, and Judith Shklar have developed the idea of economic citizenship more fully, including the right to decent work and, in the case of Kessler-Harris, to compensation for unpaid care work, as an essential component of a just citizenship regime. See JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* (1991); William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1 (1999); Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 CORNELL L. REV. 523 (1997); Kessler-Harris, *supra*, at 157–61; Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1886–88 (2000).

In a somewhat different sense, the Canadian labor scholar Harry W. Arthurs wrote in 1967 about the concept of "industrial citizenship," meaning the collective rights and duties legislatively granted to employees. Harry W. Arthurs, *Developing Industrial Citizenship: A Challenge for Canada's Second Century*, 45 CANADIAN BAR REV. 786–89 (1967). Canadian labor scholarship has engaged with this rubric ever since. The introduction to a recent journal volume revisiting the theory lays out the trajectory of this scholarship. See Michel Coutu & Gregor Murray, *Towards Citizenship at Work? An Introduction*, 60 REL. INDUSTRIELLES/INDUS. REL. 617–19 (2005).

A third use of "citizenship" in conjunction with work is found in Katherine Stone's recent book, *From Widgets to Digits*, where she uses the phrase "citizen unions" to describe organizing by labor unions that is focused on a geographic region (rather than being centered on a particular workplace). KATHERINE V.W. STONE, *FROM WIDGETS TO DIGITS: EMPLOYMENT REGULATION FOR THE CHANGING WORKPLACE* 227–37 (2004). Stone deploys the word "citizen" in this context to evoke standing to participate based on work and territorial presence but does not link it to a theorized concept of citizenship either in the nation-state or the workplace. See *id.*

of workers' rights, but at its core labor citizenship is the product of worker agency, exercised collaboratively, with or without state permission.<sup>19</sup>

#### B. THE ROOTS OF THE METAPHOR: NATION-STATE CITIZENSHIP

In an aspirational sense, I use the concept of labor citizenship to refer to participation by workers in collective efforts to achieve recognition of and compensation for their economic contributions to society. Although this vision can be achieved through many organizational forms—spontaneous campaigns, worker centers, and employee coalitions among them—the most familiar structure through which labor citizenship has been enacted in the United States is the labor union.<sup>20</sup>

Especially in the context of a union, the use of the term “citizenship” to describe this phenomenon is an obvious choice. The parallels between labor citizenship in a union and nation-state citizenship are striking. You gain the status of labor citizenship if you become a part of a union, just as you gain national citizenship by being admitted to membership in a country. In the union setting, that status entitles members to a package of rights exclusively available to insiders<sup>21</sup> and binds them to a set of responsibilities that outsiders do not bear, as nation-state citizenship does. Like national citizenship, labor citizenship is embodied in the act of democratic participation within the organization and collective action outside it, both to advance the group's campaigns and to protect its gains. Reflecting these parallels, the form of labor citizenship that has developed in unions in the United States is often explicitly analogized to the nation-state: “industrial democracy” created in the image of political democracy.<sup>22</sup>

Citizenship is an enormously appealing concept. Like its cousin, “democracy,” “citizenship” is almost always deployed with a positive

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19. Theories of economic and industrial citizenship, by contrast, are state-centric. Economic citizenship is presented by its proponents as a universal right that flows from status citizenship, to be guaranteed by the state and taken up by citizens in their individual capacity. *See, e.g.*, Karst, *supra* note 18, at 553–59. Although Arthurs's theory of industrial citizenship casts collective action in a more important role, his notion of industrial citizenship is at base quite similar to Marshall's, a package of legislated rights that establish “the right to economic security.” Arthurs, *supra* note 18, at 812. Its exercise is only available to designated industrial citizens (that is, legal employees). *Id.* at 787.

20. For a discussion of alternative forms of labor citizenship, see Parts V and VI, *infra*.

21. I refer to the benefits guaranteed by a collective bargaining agreement to members of the bargaining unit it covers. A high level of unionization also delivers benefits to nonunion workers. In *infra* note 50 and accompanying text, I discuss the positive effects of unionization on nonunion workers, including union advocacy for legislation to advance the rights of all workers and the spillover wage effects of unionization in an industry for nonunion workers in the same industry.

22. *See infra* Part II.B.2.

cant.<sup>23</sup> It connotes *belonging, participation, inclusion*. It speaks of shared endeavor and shared benefit, with echoes of *goodness, fairness, and equality*. It is hard to imagine someone advancing a theory of citizenship in which the term is a negative. Because of its emancipatory potential, the call for “full citizenship” has been renewed by generations of social movements and is undergoing a renaissance yet again today.<sup>24</sup>

But citizenship is also problematic. In Part VI, I explore the way the citizenship concept so often turns exclusionary, a phenomenon as manifest on the nation-state level as it is within the labor union. There, I ask how choosing citizenship as a metaphor may have distorted my transnational labor citizenship proposal. For the moment, it will suffice to note a challenge that is easier to overcome: the term’s chronic imprecision. Because citizenship brings its normative blessing to whatever status, act, or benefit it labels,<sup>25</sup> it has become a sort of rhetorical trump card, or, in Boaventura de Sousa Santos’s terminology, a “topos,” a “widely accepted point[] of view with very open, unfinished or flexible content easily adaptable to the different contexts of argumentation.”<sup>26</sup> The temptation to use the word is strong, and few have resisted the call. Today “citizenship” is used on the nation-state level to describe the legal status of permanent membership in a country, the act of voting, and the right to receive benefits from the welfare state; it is also applied to a broad range of transnational economic and political relationships and to participation in and identification with a wide variety of institutions and cultural communities.

The term covers such extensive ground that to label something “citizenship” is to raise the question of “what kind?”<sup>27</sup> In the face of divergent meanings, it is necessary to be precise in creating a citizenship metaphor, and I will aim for such precision in my discussion of labor citizenship. Particularly helpful in that regard is the taxonomy that Linda

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23. Nancy Fraser & Linda Gordon, *Civil Citizenship Against Social Citizenship? On the Ideology of Contract-versus-charity*, in *THE CONDITION OF CITIZENSHIP* 90, 90 (Bart van Steenberg ed., 1994) (“We find no pejorative uses.”). See also Linda Bosniak, *Critical Reflections on “Citizenship” as a Progressive Aspiration*, in *LABOUR LAW IN AN ERA OF GLOBALIZATION: TRANSFORMATIVE PRACTICES & POSSIBILITIES* 339, 340 (Joanne Conaghan et al. eds., 2002) (“There is . . . one thing that almost everyone *does* seem to agree on, and that is that citizenship is something very significant and desirable.”).

24. For case studies of emerging social movements using “citizenship” as a framework, see *INCLUSIVE CITIZENSHIP: MEANINGS AND EXPRESSIONS* (Naila Kabeer ed., 2005).

25. Fraser & Gordon, *supra* note 23, at 90 (“[T]he word appears often as a prefix to another term, always adding dignity to the original, as in ‘citizen-soldier’, ‘citizen-worker’, ‘citizen-mother.’”).

26. BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION* 40–41 (1995).

27. See SHKLAR, *supra* note 18, at 1; Bosniak, *supra* note 6, at 450.

Bosniak offers, dividing understandings of the term into four categories: citizenship as legal status, citizenship as political activity, citizenship as rights, and citizenship as collective identity.<sup>28</sup>

On the national level, citizenship as legal status refers to formal membership in the nation-state, the determination of whether a person is a “citizen” of a particular country by virtue of birthplace, parentage, or naturalization. Political citizenship, meanwhile, encompasses the myriad ways in which people participate in the governance of the communities in which they live. In the classic, civic republican sense, traced most often to Aristotle’s *Politics*, a “citizen” is a person who is a full member of and legitimate political participant in a state,<sup>29</sup> but citizenship-as-political-participation has long been enacted in other realms within the nation-state and across its borders. Citizenship as rights, sometimes called social citizenship, is rooted in T.H. Marshall’s classic work, *Citizenship and Social Class*.<sup>30</sup> It denotes the package of entitlements that flow to citizens by virtue of membership. Finally, citizenship as identity evokes the feeling of being a part of, and allied with, a larger group: the identification and solidarity that go with belonging.<sup>31</sup> I will trace parallels to each of these aspects of citizenship in my discussion of labor unions.

To be clear, I am not arguing that labor citizenship and nation-state citizenship are perfectly aligned. Unions operate within the framework of the nation-state rather than as autonomous actors outside it, and they have taken a wide range of approaches to membership, only some of which are as focused on boundaries as countries are.<sup>32</sup> Most notably, a union has an

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28. Bosniak, *supra* note 6, at 455. Earlier scholars offered their own taxonomies. For example, Judith Shklar suggests four categories: citizenship as standing, citizenship as nationality, citizenship as active participation, and citizenship as “ideal republican citizenship.” SHKLAR, *supra* note 18, at 3.

29. See ARISTOTLE, *THE POLITICS* (Stephen Everson ed., Cambridge Univ. Press 1988) (350 BCE). See also LINDA BOSNIAK, *THE CITIZEN AND THE ALIEN: DILEMMAS OF CONTEMPORARY MEMBERSHIP* (2006) [hereinafter BOSNIAK, *THE CITIZEN AND THE ALIEN*]; J.G.A. Pocock, *The Ideal of Citizenship Since Classical Times*, in *THE CITIZENSHIP DEBATES: A READER* 31, 31–33 (Gershon Shafir ed., 1998).

30. MARSHALL, *supra* note 18, at 110–11.

31. For a discussion of citizenship and identity, see Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 *UCLA L. REV.* 405, 449–77 (2005).

32. Furthermore, too great a reliance on the analogy risks casting unorganized workers as labor’s “enemies.” Nation-states defend their borders against invasion by individuals, organizations, or states that pose an ideological or resource-based threat. The analogy suggests that when unions take a hostile stance toward immigrants, they are likewise defending against their adversaries. Labor competition is a problem that unions must grapple with, but casting migrant and other workers as labor’s nemesis ignores the role of capital in opposing worker organization generally and in choosing the workforce. In industrial unionism, it is management, not the union, that makes the de facto decision about who will be

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immediate interest in improving the working conditions at nonunion enterprises within the labor market in which it operates in order to avoid giving nonunion employers an advantage over unionized businesses. This mandate to address the needs of nonmembers as a matter of institutional survival has no easy parallel in the nation-state citizenship context.<sup>33</sup> My goal here is therefore not to construct a tight analogy but to highlight a few of the noteworthy areas where labor citizenship *has* paralleled nation-state citizenship, both in its structure and in its rhetoric. In particular, I address the ways that status citizenship, the benefits of citizenship, political participation, and identity/solidarity have manifested themselves inside unions. In Part III, I go on to explore the ways that labor's concern about competition over jobs has led it to rely on nation-state citizenship rules to curtail the supply of workers in order to reinforce labor citizenship's capacity to achieve its goals.

### 1. Status, Benefits, and Border Defense in Labor Citizenship

There are many membership models among unions, and they vary widely in the importance they assign to the border between members and outsiders, depending on their industry, geographic location, and organizing philosophy. Among the various approaches, the classic craft unions—and in particular building trades or construction unions—have offered the clearest parallels with national citizenship.<sup>34</sup>

The traditional craft union approach, the hallmark of the American Federation of Labor (“AFL”), characterized most labor organizing in this country for the first third of the twentieth century and is still in effect in the building trades and the entertainment industry among others. Building trades unions, for example, arose in decentralized labor markets where

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a union member by hiring one employee rather than another. My thanks to Sameer Ashar and Sarah Fox for elaborating on these implications of the analogy.

33. It is also clearly in wealthy countries' interests to address poverty and health issues in poor countries. However, while unions *must* support the rights of nonunion workers to ensure labor's continued existence, countries from the global North continue to see aid to developing countries more as a matter of charity than an imperative related to the survival of the donor states.

34. Like all generalizations, this has its exceptions. Historically, there have been craft unions that developed more open organizing approaches, foreshadowing the inclusive strategies of industrial unionism. *See, e.g.,* Dorothy Sue Cobble, *Lost Ways of Organizing: Reviving the AFL's Direct Affiliate Strategy*, 36 *INDUS. REL.* 278, 279–80 (1997). Furthermore, in the past few decades, craft unions such as the building trades have found that their exclusivity has been their downfall in the face of an influx of nonunion construction firms, often staffed by new immigrants. The resulting loss of market share and decline in union strength in the construction industry has led many in the building trades to rethink the classic craft union model and to develop programs to draw in immigrants and others historically excluded from their ranks. *See, e.g.,* Bruce Nissen, *The Role of Labor Education in Transforming a Union Toward Organizing Immigrants: A Case Study*, 27 *LAB. STUD. J.* 109, 109–13 (2002).

workers held particular skills in demand by employers, yet jobs were brief, hiring was competitive, and tenure with any one employer was likely to be short.<sup>35</sup> To improve working conditions, they sought to take wages out of competition, ensuring that labor costs were uniform so that contractors could not underbid each other by paying lower wages. One way they did this was by attempting to control the supply of workers in their trade. Formally, construction unions limit the numbers of people who can enter the skilled worker pool through qualification rules and apprenticeship periods.<sup>36</sup> Until recently, equally entrenched in a number of building trade unions have been informal practices of exclusion through nepotism, corruption, and race and gender discrimination.<sup>37</sup> Craft unions then negotiate rules about wages, benefits and working conditions that all employers in the industry must respect if they wish to have access to these highly skilled workers.

With regard to status citizenship—citizenship as admission to membership—such unions have created bright-line rules distinguishing between members and nonmembers. Those on the inside, the “labor citizens,” have rights and privileges which are denied to everyone else, and have obligations to each other with which outsiders are not expected to comply.<sup>38</sup> As with nation-state citizenship, the line-drawing that accompanies the construction union version of labor citizenship is not merely a heuristic device for separating the ins from the outs, but a mechanism that makes these increased benefits possible.<sup>39</sup>

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35. For a description of how these characteristics of the labor market in construction led to the emergence of the distinctive structure of building trades unions, see ROBERT MAX JACKSON, *THE FORMATION OF CRAFT LABOR MARKETS* 123–80, 209–12 (1984); MICHAEL J. PIORE & CHARLES F. SABEL, *THE SECOND INDUSTRIAL DIVIDE* 115–17 (1984).

36. See MARK ERLICH, *WITH OUR HANDS: THE STORY OF CARPENTERS IN MASSACHUSETTS* 18–19 (1986); MICHAEL KAZIN, *BARONS OF LABOR: THE SAN FRANCISCO BUILDING TRADES AND UNION POWER IN THE PROGRESSIVE ERA* 98 (1987); GRACE PALLADINO, *SKILLED HANDS, STRONG SPIRITS: A CENTURY OF BUILDING TRADES HISTORY* 141–44 (2005).

37. See ERLICH, *supra* note 36, at 208–18; KAZIN, *supra* note 36, at 145–76; PALLADINO, *supra* note 36, at 157–66. For a discussion of how exclusionary strategies have backfired for building trades unions in a context of high immigration, with the result that many of those unions now actively seek to recruit immigrants as members, see note 34, *supra*, and note 42, *infra*.

38. In states governed by so-called “Right to Work” legislation, where the benefits of a union contract must be extended to all workers in the bargaining unit whether they pay dues or not, “insiders” for the purposes of contract benefits include everyone in the bargaining unit.

39. For a discussion of the importance of labor’s boundaries to successful collective action (and of unions’ need to effectively police borders against defection as well as intrusion), see David Abraham, *Individual Autonomy and Collective Empowerment in Labor Law: Union Membership Resignations and Strikebreaking in the New Economy*, 63 N.Y.U. L. REV. 1268 (1988).

When borders are this important, a great deal of energy goes into their defense. As with the nation-state, building trades' labor citizenship boundary-drawing strategies fail without the policing of those who would undermine them by taking work at lower rates.<sup>40</sup> Thus, like countries, construction unions set rules about who can be a member, how members are expected to conduct themselves, and what consequences will befall those who deviate from that code.<sup>41</sup>

This model of labor citizenship is threatened when an employer has easy access to alternative sources of workers with similar skills and can fill its labor needs outside the union pool.<sup>42</sup> As mass production rose to prominence in the 1920s, with its reliance on vast numbers of "unskilled" workers, the typical AFL union's approach faced severe challenges.<sup>43</sup> In response, the industrial model was forged by unions in steel, auto plants, and mines, which eventually came together to form Congress of Industrial Organizations ("CIO").

Industrial unionism rejected the exclusivity of the craft approach. Rather than focusing on highly skilled workers whose abilities were in

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40. As Mark Erlich notes in his study of Massachusetts construction unions, "[e]ven a handful of men outside the union community represented a threat . . ." ERLICH, *supra* note 36, at 50.

41. Craft union constitutions and bylaws often establish intricate systems governing admission to membership, member discipline, and expulsion. Entire suborganizations within unions are dedicated to weighing the evidence against members who have transgressed and deciding whether they will be permitted to retain their membership. The United Brotherhood of Carpenters, for example, has a system of councils and trial committees to hear claims against members who violate union rules. United Brotherhood of Carpenters Constitution §§ 51–52, available at <http://www.ranknfile.net/constitution'01.htm> (follow "Offenses and Penalties" hyperlink; then follow "Charges and Trials" hyperlink) (last visited Mar. 11, 2007). For examples of such union rules in action, see ERLICH, *supra* note 36, at 73; KAZIN, *supra* note 36, at 95–97.

42. With the influx of immigrants into the industry over the past few decades, building trades unions' control over construction jobs has been severely eroded. The unions' first reaction was to seek to expel the immigrants. Of late, however, the construction unions who organize the less elite members of the construction workforce—including the bricklayers, laborers, and carpenters—have begun to invite them within the circle. Nissen, *supra* note 34 (providing a case study of the role of labor education in efforts by the South Florida Regional Council of Carpenters to organize new immigrant workers); Miriam Jordan, *Rebuilding Plan: Carpenters Union Courts Immigrants to Increase Clout—Undocumented Workers See Risk of Firings, Fewer Jobs*, WALL ST. J., Dec. 15, 2005, at A1 (discussing union efforts to court immigrants); Nate Schweber, *Worked Over? Union Organizers Say Immigrants Get Cheated*, HERALD NEWS (Passaic County, N.J.), Sept. 6, 2004, at A1 (recounting outreach efforts by the Laborers' International Union of North America to reach out to immigrants on construction sites in New Jersey); Nicole Andrea Silverman, *Deserving of Decent Work: The Complications of Organizing Irregular Workers Without Legal Rights* (Oxford Centre on Migration, Policy and Society, Working Paper No. 21, 2005) (discussing a case study of efforts by the New England Regional Council of Carpenters to organize Latino immigrant workers).

43. To be fair, the AFL included unions with a far wider range of organizing strategies than is commonly acknowledged, including a number of locals with an industry-wide approach. Cobble, *supra* note 34.

demand, it sought to organize entire industries, bringing skilled and unskilled workers together. Without skill as a source of leverage, an industrial union could only take wages out of competition by organizing as many employers as possible in a given industry. Once it established a presence in a particular sector of a labor market, therefore, the industrial union's goal could be characterized as maximum *inclusiveness*. Where the goal of bringing all employers within the labor market under contract proved elusive, the union sought to raise wages in the industry by other means and to keep nonunion shops from profiting at unionized employers' expense.<sup>44</sup> Driven by this imperative and by solidarity with nonunion workers, industrial unions have perennially been leaders in advancing and supporting legislation on behalf of all workers.<sup>45</sup>

Another key difference between the industrial and the craft models is that, unlike a craft union, the industrial union does not choose its members. Its contracts apply to whomever the employer hires, a decision over which the union has no authority. After the initial campaign, in which union representation is determined by the desires of a majority of the employees in a bargaining unit, new hires are brought within the circle of union protection by virtue of being selected by the employer for a job in the organized unit.<sup>46</sup> In this sense, industrial unions can only influence the

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44. For a discussion of the emergence and characteristics of the industrial union model, see DAVID BRODY, *WORKERS IN INDUSTRIAL AMERICA* 82–119 (1980); NELSON LICHTENSTEIN, *STATE OF THE UNION: A CENTURY OF AMERICAN LABOR* 20–53 (2002).

45. Beyond legislative efforts, a newer effort to reach out to nonunion workers is reflected in the upsurge in affiliate membership programs among unions. In recent years, U.S. unions have experimented with a range of ways to draw in people who are not yet in a position to become members. In 1994, the ILGWU/UNITE! created several immigrant worker centers, through which immigrants could become “associate members,” gaining access to services and support. Immanuel Ness, *Organizing Immigrant Communities: UNITE's Workers Center Strategy*, in *ORGANIZING TO WIN: NEW RESEARCH ON UNION STRATEGIES* 87, 91, 93 (Kate Bronfenbrenner et al. eds., 1998). Many unions now have some form of affiliate membership. See, e.g., United Steelworkers, Associate Member Program, [http://www.usw.org/uswa/program/content/overview\\_sub.php?modules2\\_ID=186&modules\\_ID=285](http://www.usw.org/uswa/program/content/overview_sub.php?modules2_ID=186&modules_ID=285) (last visited Mar. 11, 2007). In 2003, the AFL-CIO created Working America, an association with membership open to anyone concerned with the group's core issues of good work, health care, and other benefits. See Working America, [www.workingamerica.org](http://www.workingamerica.org) (last visited Mar. 11, 2007).

46. There are exceptions to the rule that workers are admitted to craft unions based on skill but join industrial unions once they are hired by an employer. Some industrial unions run hiring halls, such as those operated by the Culinary Union Local 226 (an affiliate of the Hotel Employees and Restaurant Employees International Union (“HERE”)) for the hotels, casinos, and banquet halls of Las Vegas. Harold Meyerson, *Las Vegas as a Workers' Paradise*, *AM. PROSPECT*, Jan. 2004, at 38. In a hiring hall model, a worker first joins the union (often after completing a training program) and then becomes eligible for employment through the union's job center. See *PIORE & SABEL*, *supra* note 35, at 116.

composition of their membership by declining to organize entire workplaces, rather than by deciding among employees.<sup>47</sup>

Because of these distinctions, the industrial union view of the role of borders in labor citizenship is at variance with that of craft unions. Once workers are present within a given labor market, the industrial union wants to bring them into its ambit, not to exclude them. Yet, industrial unions, too, would prefer less competition for jobs to more. The industrial union's leverage—that is, its ability to negotiate higher wages for members—comes, as with craft unions, from its capacity to threaten convincingly to shut down production. Industrial unions' ability to follow through on such a threat is undermined by the presence of large numbers of nonunion workers.<sup>48</sup> This raises the question of how boundaries might be drawn that would keep some workers out of the labor market. As I set out in Part III, the desire to reduce the supply of workers has often motivated industrial as well as craft unions to pursue restrictive immigration policies.

Boundaries continue to play other roles within industrial unionism as well. Despite industrial unions' incentive to improve wages and working conditions for all workers, the fact remains that those covered by a union contract are granted privileges denied to those outside the circle. Only union members have access to the rights and benefits in the collective bargaining agreements that the union negotiates. These contracts ordinarily provide benefits that go considerably beyond the legal minimum,<sup>49</sup> including higher wages, health insurance and pension plans, job security, and a wealth of other goods, such as job training, guaranteed raises, and paid vacation and holidays.<sup>50</sup> Furthermore, there have been times in the history of industrial unionism when leaders focused almost exclusively on existing membership. During the height of "business unionism," from the late 1940s through the 1970s and even into the 1980s, most craft and industrial unions within the AFL-CIO were inward-looking, paying little

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47. For a description of these and other characteristics of industrial unions, see BRODY, *supra* note 44, at 82–119; CHARLES C. HECKSCHER, *THE NEW UNIONISM* 23–24 (1988); LICHTENSTEIN, *supra* note 44.

48. Under the permanent replacement doctrine of labor law, an employer can respond to a union that strikes for higher wages by permanently replacing its members with nonunion workers. *NLRB v. MacKay Radio & Tel. Co.*, 304 U.S. 333, 343 (1938).

49. Or, I should say, *most* union contracts secure *most* of these things. In the context of low-wage immigrant workers, I have seen union contracts that add almost nothing to the floor set by law.

50. Nonetheless, nonunion workers may benefit indirectly from high union density in their industry, as their employers raise wages in order to remain competitive in the labor market while avoiding unionization. See David Card, Thomas Lemieux & W. Craig Riddell, *Unions and the Wage Structure*, in *INTERNATIONAL HANDBOOK OF TRADE UNIONS* 246, 247 (John T. Addison & Claus Schnabel eds., 2003).

attention to new organizing or to the needs of the unorganized.<sup>51</sup> During those decades, the line separating those who belonged to unions from outsiders was particularly important.

The foregoing analysis emphasizes the exclusionary aspects of the barrier that traditional labor citizenship constructs between those inside its realm and those outside it. But what makes labor citizenship so complex is that, at its best, its ethos is a powerfully inclusionary one—and that the boundaries of labor citizenship also play important roles in fostering unions' capacity to develop a strong spirit of solidarity and democracy among their members. The union version of labor citizenship thus echoes some of the “hard on the outside and soft on the inside” features of nation-state citizenship in the United States.<sup>52</sup>

In this regard, the justifications for labor citizenship's boundaries are very similar to those offered by communitarian theorists with regard to the nation-state.<sup>53</sup> Michael Walzer, for example, has defended bounded citizenship as necessary to foster the growth of genuine democratic community as well as to ensure the flow of substantive goods to those who are citizens. In his foundational book *Spheres of Justice*, Walzer writes “[w]hen we think about distributive justice, . . . [w]e assume an established group and a fixed population.”<sup>54</sup> Elsewhere, he notes that the “idea of distributive justice presupposes a bounded world, a community within which distributions take place, a group of people committed to dividing, exchanging, and sharing, first of all among themselves.”<sup>55</sup> Along similar

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51. See generally PAUL BUHLE, *TAKING CARE OF BUSINESS: SAMUEL GOMPERS, GEORGE MEANY, LANE KIRKLAND, AND THE TRAGEDY OF AMERICAN LABOR* (1999).

52. BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 29, at 4 (emphasis omitted).

53. For a discussion of the essential role that enforceable union borders play in fostering the pursuit of collective goods (including the collective good of democracy within the group), see Abraham, *supra* note 39, at 1288, 1292–93.

54. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 31 (1983) [hereinafter WALZER, *SPHERES*].

55. Michael Walzer, *The Distribution of Membership*, in *BOUNDARIES: NATIONAL AUTONOMY AND ITS LIMITS* 1, 1 (Peter G. Brown & Henry Shue eds., 1981). The communitarian argument is open to critique on the grounds that it derives its legitimacy from the inaccurate assumptions that all those who are present within the community are equal participants in its democracy, and that all those who are affected by the decisions made through these deliberations are likewise represented in them. WALZER, *SPHERES*, *supra* note 54, at 31, 62. Neither holds true in the United States today, if indeed they are descriptive of any society. Millions of immigrants are physically present within our borders and governed by our laws but are ineligible for citizenship because they are undocumented or, if legally present, because they have not yet met the requirements to apply. To be fair to Walzer, he recognizes this situation as a real possibility, and decries it, calling for the incorporation into full membership of all who live and work in a community. WALZER, *SPHERES*, *supra* note 54, at 62–63. See also BOSNIAK, *THE CITIZEN AND THE ALIEN*, *supra* note 29, at 37–76 (discussing Walzer's position on immigrants and crediting him with a more complex analysis than his usual characterization as a proponent of firm

lines, political scientists such as Gary Freeman have argued as a descriptive matter that wealthy countries' emphasis on boundaries and border control is a direct outgrowth of their strong social citizenship policies.<sup>56</sup> "The welfare state," Freeman notes, "seeks to take care of its own, and its ability to do so is premised on its ability to construct a kind of safe house in which to shelter its members from the outside world."<sup>57</sup>

## 2. Democracy and Political Participation in Labor Citizenship

On the level of the workplace, unions have been celebrated as the guarantors of what has been termed "industrial democracy," a workplace-based system of majority representation. The analogy between industrial democracy and political democracy on the national level was explicit in the crafting of the National Labor Relations Act ("NLRA") scheme and is frequently drawn on by the National Labor Relations Board ("NLRB") and courts, particularly in the context of union representation elections.<sup>58</sup> As the *Congressional Record* stated at the time of the passage of the Wagner Act in 1935, "[D]emocracy in industry must be based upon the same principles as democracy in government. Majority rule, with all its imperfections, is the best protection of workers' rights, just as it is the surest guaranty of political liberty that mankind has yet discovered."<sup>59</sup>

Unions also emphasize democracy as an *internal* governing principle and as a justification for the demands they place on their citizens.<sup>60</sup> At its

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boundaries allows). This granted, Walzer does not seem to have conceived of undocumented workers present in numbers so high that their incorporation challenges his core idea of bordered sovereignty. It is unclear what he would say about the situation of the United States at present.

Millions of others possess formal citizenship status but are denied many of its benefits by virtue of race, ethnicity, or gender. Furthermore, literally billions of people outside of the community are deeply affected by the decisions made within it. Communitarianism's appeal as a progressive theory is significantly undermined by these observations about its application in real nation-states.

56. Gary Freeman, *Migration and the Political Economy of the Welfare State*, ANNALS AM. ACAD. OF POL. & SOC. SCI., May 1, 1986, at 51, 54.

57. *Id.* See also Lucie White, *The Power Beyond Borders*, 70 MISS. L.J. 865, 866, 873–74 (2001).

58. The analogy between the two forms of democracy is not always apparent. For critiques from a pro-union perspective, see Craig Becker, *Democracy in the Workplace: Union Representation and Federal Labor Law*, 77 MINN. L. REV. 495, 542, 547, 569–70 (1993); James J. Brudney, *Neutrality Agreements and Card Check Recognition: Prospects for Changing Paradigms*, 90 IOWA L. REV. 819, 867–74 (2005). For a conservative critique of the analogy, see Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357, 1405–06 (1983) ("It is not part of a tradition of voluntarism or democracy to grant workers the power to conscript the employer and dissenting workers into the service of their cause.").

59. 79 CONG. REC. 7571 (1935).

60. For elaborations of this argument, see Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1381, 1422–27 (1993); Becker, *supra* note 58. See also Reinhold Fahlbeck, *Collective Agreements: A Crossroad Between*

best, union democracy offers members a far more intimate, immediate, and hands-on experience of self-governance than is possible at the national, state, or even local government levels.<sup>61</sup> The building blocks of democracy in the union are the small communities of the bargaining unit and the enterprise. Although union bylaws vary, the governance of labor citizenship is generally carried out through a system of worksite representatives or “shop stewards” (often, although not exclusively, elected by workers from among the rank-and-file) who organize on the shop-floor level and press workers’ grievances with management.<sup>62</sup> Depending on the culture and constitution of the particular union, any number of decisions may be put to a vote at the worksite or the level of the local union, from daily disputes about break times to major issues like contract ratification and strike decisions. Union locals send delegates to the national union’s conventions and are thereby represented in debates about the union’s overall direction and leadership. The power of union democracy grows from the directness of these representation schemes and from the immediate impact of the decisions made through them on the work lives of members.

Much as communitarians highlight the borders limiting national citizenship as essential to the development of a genuine community within a country, the boundaried nature of labor citizenship plays an important role in facilitating the development of genuine community within a union.

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*Public Law and Private Law*, 8 COMP. LAB. L.J. 268, 275 (1987); Reuel E. Schiller, *From Group Rights to Individual Liberties: Post-war Labor Law, Liberalism, and the Waning of Union Strength*, 20 BERKELEY J. EMP. & LAB. L. 1, 6–7, 19–20 (1999); Stewart J. Schwab, *Union Raids, Union Democracy, and the Market for Union Control*, 1992 U. ILL. L. REV. 367, 371 (“Whether pessimistic or optimistic about the likelihood of union democracy, analysts typically turn to democratic political theory for an analogy and a yardstick.”).

61. Many unions have long and vibrant democratic traditions. To be frank, other unions are run in a way that make a mockery of the term “democracy.” In a number of such unions, the rank-and-file are actively engaged in struggles to bring their union closer to realizing these goals. Internal democracy movements are a part of many unions, including the well-known Teamsters for a Democratic Union. The Association for Union Democracy is a clearinghouse for such movements. The Association for Union Democracy, <http://www.uniondemocracy.org/> (last visited Feb. 2, 2007).

Democratic rights are guaranteed to union members through federal law under the 1959 Landrum-Griffin Act, passed in the wake of growing congressional concern about union corruption. Labor-Management Reporting and Disclosures (Landrum-Griffin) Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (1959) (codified in scattered sections of 29 U.S.C.). The Act establishes free speech and assembly rights within the union, requires regular elections by secret ballot, and sets rules for union reporting and the management of union funds. *Id.* Landrum-Griffin offers disenfranchised workers important tools to challenge antidemocratic practices within their unions and further reinforces the parallels between a union and a nation. *Id.*

62. See, e.g., United Auto Workers, UAW Constitution, <http://www.uaw.org/constitution/ethics.cfm> (last visited Mar. 11, 2007) (discussing internal democracy within the union).

As I note earlier, borders are central to the view of the good society inherent in the communitarian enterprise. Within a bounded community, the theory goes, democracy can take root, and rules to ensure fairness and reciprocal obligation can be developed. Indeed, Michael Walzer argues, “The community itself is a good—conceivably the most important good—that gets distributed.”<sup>63</sup> Walzer is referring to political community, but the analogy to the union is apt because democracy is a particularly strong value of labor citizenship and one that is facilitated by union boundaries.<sup>64</sup>

### 3. Identity and Solidarity in Labor Citizenship

Finally, solidarity is an essential norm of labor citizenship. What patriotism is to a country, solidarity is to a union.<sup>65</sup> Like national citizenship, labor citizenship is founded on the expectation that members will meet a high standard of identification with and action on behalf of fellow members. Within the boundaries of labor citizenship—among the workers in a workplace or an industry where a union is active, and across unionized workplaces and industries—solidarity among workers is essential to labor’s success. To organize, unions must unite workers rather than divide them. In the simplest sense, an industrial union can only come to represent the employees in a workplace if a majority of them stand together in favor of the union.<sup>66</sup> Beyond the initial choice about representation, workers’ power resides in their capacity to act collectively and to respond to an injury to one as an injury to all. Employers have long sought to undermine that power by setting workers against each other on the basis of race, language, ethnicity, country of origin, or immigration status.<sup>67</sup> Unions can only prevail if they persuade workers to overcome their differences and stand united, protesting each other’s grievances and respecting each other’s picket lines. To be a labor citizen in this sense

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63. WALZER, SPHERES, *supra* note 54, at 29.

64. I return to this question in Part VI, where I explore whether my prescription for a more open form of labor citizenship dilutes unions’ democratic capacity.

65. For a discussion of solidarity in the national context, see Janine Brodie, *Citizenship and Solidarity: Reflections on the Canadian Way*, 6 CITIZENSHIP STUD. 377 (2002).

66. This reiterates the commonly understood version of the centrality of majority unionism to the U.S. industrial relations scheme. For the contrary argument that minority unionism has a rich tradition in the United States and that it merits consideration again as the labor movement moves forward, see CHARLES J. MORRIS, *THE BLUE EAGLE AT WORK: RECLAIMING DEMOCRATIC RIGHTS IN THE AMERICAN WORKPLACE* (2005).

67. For just two examples, one from the most famous labor novel of the turn of the last century and the other from a contemporary newspaper article, both set in the meatpacking industry, see UPTON SINCLAIR, *THE JUNGLE* (1906); Charlie LeDuff, *At a Slaughterhouse Some Things Never Die: Who Kills, Who Cuts, Who Bosses Can Depend on Race*, N.Y. TIMES, June 16, 2000, at A1.

means to understand the struggle of all workers as the same struggle. To the extent that immigrants are present in a workplace that a union seeks to organize, they must be included in this circle or an effort to establish labor citizenship will fail.

### III. LABOR CITIZENSHIP AND NATIONAL CITIZENSHIP IN A CONTEXT OF TRANSNATIONAL MIGRATION

In a context of high immigration and intense competition for work, a contradiction within labor citizenship comes to the fore. On the one hand, labor's motto is solidarity; division among workers is its downfall. Unions must reinforce the bonds among workers, or employers will succeed in fracturing organizing efforts along the enduring lines of race, ethnicity, language, and immigration status. On the other hand, job competition from "outsiders" is the primary threat to labor citizenship. Unions fear being undermined by workers willing to take wages and benefits lower than those they have negotiated. Although unions have designated "outsiders" according to various criteria over the past century and a half, including race and gender, the line has frequently come to rest at the national border.<sup>68</sup> To defend labor citizenship, unions have sought to keep would-be immigrant competitors out of the country, or, where that has failed, to bar them from the workplace. The restrictionist policies they have pursued have alienated immigrants and created divisions among workers—the antithesis of solidarity.<sup>69</sup>

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68. Beyond the scope of this Article, but equally powerful and equally representative of the solidarity/defense conflict, has been labor's relationship with African-American workers. For explorations of this long and complex history from a variety of perspectives, see, for example, MICHAEL K. HONEY, *SOUTHERN LABOR AND BLACK CIVIL RIGHTS: ORGANIZING MEMPHIS WORKERS* (1993); RUTH NEEDLEMAN, *BLACK FREEDOM FIGHTERS IN STEEL: THE STRUGGLE FOR DEMOCRATIC UNIONISM* (2003); BRUCE NELSON, *DIVIDED WE STAND: AMERICAN WORKERS AND THE STRUGGLE FOR BLACK EQUALITY* (2001); Colin J. Davis, *Shape or Fight?: New York's Black Longshoremen, 1945–1961*, 62 *INT'L LAB. & WORKING-CLASS HIST.* 143 (2002); Alex Lichtenstein, *The CIO in Black and White*, 82 *RADICAL HIST. REV.* 203 (2002) (reviewing NELSON, *supra*); BAYARD RUSTIN, *The Blacks and the Unions*, *HARPER'S MAG.*, May 1971, reprinted in *DOWN THE LINE: THE COLLECTED WRITINGS OF BAYARD RUSTIN* 335 (1971); *supra* note 37 (listing sources that discuss labor's relationship with African-American workers).

69. For accounts of this tension in a variety of contexts, see KAZIN, *supra* note 36, at 145–47 (describing appeals to members' racial fears and hatred by union leaders in San Francisco in the Progressive Era); ANTHONY T. LANE, *SOLIDARITY OR SURVIVAL? AMERICAN LABOR AND EUROPEAN IMMIGRANTS, 1830–1924* (1987) (describing obstacles for immigrants within the emerging U.S. labor movement as a whole); Bruce Nissen & Guillermo Grenier, *Local Union Relations with Immigrants: The Case of South Florida*, 26 *LAB. STUD. J.* 76 (2001) (discussing union relationships with immigrants in contemporary Miami).

As this illustrates, labor citizenship as crafted by U.S. unions is not merely a metaphor that draws on parallels with nation-state citizenship but a concept in dynamic interaction with citizenship at the state level. Before proceeding to explore the pendulum swings of this relationship, it is worth pausing to note that the topic of the relationship of citizenship-as-nationality to citizenship in the workplace has received surprisingly little scholarly attention. As Bosniak has pointed out, historians, political theorists, and law professors deploying the term “citizenship” to describe aspects of work have long played on the word’s evocation of democratic participation and equal rights while ignoring its relationship to immigration status.<sup>70</sup> Marshall’s work, described above, and that of other scholars such as William Forbath, Kenneth Karst, and Judith Kessler-Harris, who have built on Marshall’s notion of economic citizenship, have made critical contributions to our understanding of the role of work in the context of other aspects of the citizenship framework. As Bosniak observes, however, this work-as-citizenship discourse operates as if in an insulated sphere from the nationality-as-citizenship discourse, which permits such scholars “to avoid addressing the fact that the national community *within which* universal citizenship is championed is a community that is constituted by boundaries that keep nonmembers out,” and to avoid asking the critical questions about the extent to which “achievement of economic justice—or economic citizenship—within the national society [is] contingent upon such restriction.”<sup>71</sup>

In fact, however, as the next two sections illustrate, the two forms of citizenship are inextricably interrelated. With regard to citizenship as political participation, over the course of U.S. history active labor citizenship has consistently produced and enriched political participation in the community, state, and national arenas. With regard to citizenship as status, labor citizenship has long relied on the nation-state’s limits on immigration as a sort of front-line defense for its own efforts to reduce competition. In that setting, the interactions between labor and nation-state citizenship have brought the recurring tensions between labor citizenship’s twin pillars of solidarity and defense to the fore.

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70. BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 29, at 114; Linda Bosniak, *Citizenship and Work*, 27 N.C. J. INT’L L. & COM. REG. 497, 503 (2002).

71. BOSNIAK, THE CITIZEN AND THE ALIEN, *supra* note 29, at 114.

## A. LABOR CITIZENSHIP: CRADLE FOR NATIONAL CITIZENSHIP

Across the breadth of U.S. history, unions and labor citizenship have produced strong participants in the political sphere as well as the workplace. As Bruce Watson describes the Lawrence, Massachusetts, millworkers strike of 1912,

People from all over the globe, having packed their belongings and come to America, found themselves on the nation's bottom rung. They bore their burden well for a while, and then rose up. Once merely workers, they became citizens—in name or only in spirit—demanding a living wage and a little respect.<sup>72</sup>

The same could be said of generation after generation of newcomers who have entered labor struggles and there been exposed to, and come to participate in, citizenship in both the economic and the political spheres.

Some unions literally “make citizens,” in the sense of assisting immigrant members to naturalize. The International Ladies’ Garment Workers’ Union (“ILGWU”), true to its immigrant roots, was one of the most active in this regard. In the early 1900s, it forged a close alliance with Jane Addams and Hull House, the pioneering Chicago immigrant settlement house, which saw supporting the growth of “strong citizens” among its Italian, Russian, and Polish immigrant members as its primary goal.<sup>73</sup> In 1986, when Congress created an immigrant amnesty program, the ILGWU founded its Immigration Project to help as many of its members as possible move from undocumented status toward citizenship.<sup>74</sup> Other unions also began offering classes and legal support to members who wanted to take advantage of the amnesty provision.<sup>75</sup> In 1995, Teamsters Local 890 launched a particularly ambitious Citizenship Project among

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72. BRUCE WATSON, *BREAD AND ROSES: MILLS, MIGRANTS, AND THE STRUGGLE FOR THE AMERICAN DREAM* 3 (2005). See also Clayton Sinyai, *Unions and Immigrants: No Longer Enemies*, COMMONWEAL, Aug. 11, 2006, at 9 (quoting Samuel Gompers, AFL President from 1886–1924 (except in 1895), describing the outcome of a 1902 coal mine strike involving many immigrants, as saying: “from then on the miners became not merely human machines to produce coal but men and citizens, taking their place . . . abreast of all the people not only of their communities but of the republic”).

73. For a discussion of the relationship among the ILGWU, Jane Addams, and the Hull House, see JANICE FINE, *WORKER CENTERS: ORGANIZING COMMUNITIES AT THE EDGE OF THE DREAM* 35–36 (2006).

74. UNITE HERE!, *Our History*, <http://www.unitehere.org/about/historyunite.php> (last visited Mar. 11, 2007). The ILGWU (by then UNITE!) Immigration Project was discontinued in 2005.

75. *Labor’s Outreach Efforts Fill a Need—Illegal Aliens and Amnesty Under Immigration Reform and Control Act of 1986*, AFL–CIO AMERICAN FEDERATIONIST, Jan. 17, 1987, available at [http://www.findarticles.com/p/articles/mi\\_m1009/is\\_v94/ai\\_4655455](http://www.findarticles.com/p/articles/mi_m1009/is_v94/ai_4655455).

Mexican workers in Salinas, California.<sup>76</sup> All of these projects help immigrant workers achieve citizenship “in name,” or legal status.

Labor citizenship, though, has historically sought to move workers beyond legal immigration status onto the path of active participation.<sup>77</sup> One aspect of the formal exercise of citizenship is, of course, voting. Here the link between labor citizenship and the exercise of political citizenship is not limited to immigrant workers.<sup>78</sup> Some unions go to great lengths to instill a sense of commitment to voting in all of their members. The United Auto Workers (“UAW”) Constitution, in general distinguished by its length, lists only three brief duties for UAW members.<sup>79</sup> The first two relate to upholding union solidarity under all circumstances.<sup>80</sup> The third is “the duty of each member to participate in all local, state, provincial and federal elections through registration and balloting.”<sup>81</sup> Unions that promote voting succeed in moving their members to do so. Empirical studies have confirmed a significantly higher rate of voter participation among active union members compared to the unorganized population.<sup>82</sup>

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76. Paul Johnston, who founded and directs the project, has also documented its work over time. Paul Johnston, *Organising Citizenship at Local 890's Citizenship Project: Unleashing Innovation Through an Affiliate Organisation*, 14 DEV. PRAC. 85 (2004). Much of Johnston's writing is available on the Internet at PublicActions, <http://www.newcitizen.org/PublicActions.htm> (last visited Feb. 2, 2007). See also Fitzgerald, *supra* note 7, at 235–37 (describing efforts of a local union in South City, California, to promote citizenship among its members).

77. See, e.g., Evelyn Savidge Sterne, *Beyond the Boss: Immigration and American Political Culture from 1880 to 1940*, in E PLURIBUS UNUM? CONTEMPORARY AND HISTORICAL PERSPECTIVES ON IMMIGRANT POLITICAL INCORPORATION 33, 43–50 (Gary Gerstle & John Mollenkopf eds., 2001) (arguing for the importance of unions among other civic and religious associations to the political incorporation of immigrants). Paul Johnston, *Rethinking Cross-border Employment in Overlapping Societies: A Citizenship Movement Agenda*, in FORUM FOR TRANSNATIONAL EMPLOYMENT 62, 65 (Amber López ed., 2001) (stating that “a great body of historical research on the emergence of citizenship has shown that labor movements among workers who are excluded from basic citizenship rights have been and remain today among the most important forces in history for the expansion of citizenship in all these domains”).

78. “Evidence shows that participation in organizations in general and unions in particular increase [sic] political efficacy, sophistication, and interest.” Benjamin Radcliff, *Organized Labor and Electoral Participation in American National Elections*, 22 J. LAB. RES. 405, 406 (2001) (internal citations omitted).

79. UAW Constitution, *supra* note 62, art. 41, § 3.

80. *Id.*

81. *Id.* See also SEIU, 2000 Constitution and Bylaws art. XV, § 15, [http://www.seiu7.org/appResources/scdocs/SEIU\\_Constitution\\_in\\_english.pdf](http://www.seiu7.org/appResources/scdocs/SEIU_Constitution_in_english.pdf) (last visited Mar. 11, 2007) (“The Executive Board of each Local Union shall appoint a Committee on Political Education to assist such Executive Board in carrying out a program for sound political education and political action and encouraging its members and their families to register and vote.”).

82. Radcliff, *supra* note 78, at 409–11 (concluding that “[u]nions play a major role in determining the extent of citizen participation”); Roland Zullo, *Labor Council Outreach and Union Member Voter Turnout: A Microanalysis from the 2000 Election*, 43 INDUS. REL. 324, 327 (2004)

Beyond voting, unions also provide their members with opportunities for other forms of political participation.<sup>83</sup> In the case of immigrants, this experience may come long before formal citizenship status does. In the past decade, for example, numerous unions and worker centers have worked with noncitizen members to create political change through electoral and legislative campaigns in which noncitizens were as or more active than their citizen counterparts.<sup>84</sup> In all of these ways, labor citizenship becomes a conduit to the attainment of citizenship in the national sense, both on the level of immigration status and in terms of full political participation.

B. LABOR CITIZENSHIP AND NATIONAL CITIZENSHIP: THE CONFLICT BETWEEN SOLIDARITY AND DEFENSE

One logical relationship between nation-state citizenship and labor citizenship might be a straightforward one: immigration status dictates who can take a job and therefore who can join a union. In this view, because undocumented immigrants are forbidden to work, the question of whether they can become union members is one step beyond moot. This equation would be feasible in a country with secure borders, where the aspirations set out in immigration law were reflected in the actual population. But we are no longer such a nation, if we ever were one.<sup>85</sup> By 2005, more

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(emphasizing the relationship between active union membership and political participation, and arguing that membership in inactive labor organizations is insufficient to generate an increase in political participation).

83. For a discussion of the labor movement's long history of engaging workers in political action, see CLAYTON SINYAI, *SCHOOLS OF DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN LABOR MOVEMENT* (2006).

84. GORDON, *SUBURBAN SWEATSHOPS*, *supra* note 3, at 241–49 (discussing political participation of immigrants in a campaign to change New York State wage payment laws); Paul Johnston, *Transnational Citizenries: Reflections from the Field in California*, 7 *CITIZENSHIP STUD.* 199, 204–07 (2003); Monica W. Varsanyi, *The Paradox of Contemporary Immigrant Political Participation: Organized Labor, Undocumented Migrants, and Electoral Participation in Los Angeles*, 37 *ANTIPODE* 775, 783–85 (2005). The New York Civic Participation Project, an organization founded by three New York City local unions, a community organization and the National Employment Law Project, involves working-class immigrants in local efforts to make change through the political process. New York Civic Participation Project, <http://www.nycpp.org> (last visited Mar. 11, 2007). The founding partners were SEIU Local 32 BJ, AFSCME/DC 37, UNITE–Here Local 100, Make the Road by Walking, and the National Employment Law Project. *But see* Fox, *supra* note 6, at 176 (concluding that “acting like a citizen is not the same as being a citizen”).

85. Contrary to the popular perception, undocumented immigration is not a new phenomenon. As long as the United States has placed any requirements or restrictions on those who could immigrate (that is, beginning roughly in the last quarter of the nineteenth century), there have been would-be migrants who sought to evade inspection by government officials and enter the country illegally. Many of these were people of European and Chinese origin, who made their way to the Mexican or Canadian borders and slipped in undetected. For a fascinating and meticulously researched history of the “illegal alien” in the United States, see NGAI, *supra* note 12.

immigrants entered the United States illegally than came in through legal channels.<sup>86</sup> They joined an undocumented population now numbering nearly 12 million.<sup>87</sup> Their growing presence is evident in the workplace. According to the best recent estimates, undocumented immigrants make up nearly five percent of the U.S. labor force.<sup>88</sup> In some sectors their presence is much stronger. A fifth of all cooks, a quarter of all construction workers, and a third to a half of the agricultural workers in this country are undocumented.<sup>89</sup>

The relationship between labor citizenship and nation-state citizenship is thus considerably more complicated than the logical equation suggests. As the presence of undocumented immigrants in the workplace has grown steadily despite decades of both harsh and lenient immigration policies, unions have faced an increasingly difficult series of choices that have thrown the tension between labor citizenship's exclusive and inclusive strands into sharp relief.

In a situation of effective border control, where national immigration policy is deployed at a country's boundary to exclude would-be migrants before they get to the workplace, unions feel little tension between the solidarity and defense imperatives of labor citizenship in relation to immigrants. The logic of both poles seems to be consistent: keep the outsiders out so the insiders can stand together with less fear of being undermined. This sense of compatibility is greatly facilitated because, for most unions, the two functions are taking place far away from each other. When unions do not encounter immigrants already in the workplace or labor market (because they have been excluded at the country's border), solidarity and defense have no conflict. Spatial separation of the functions creates the sense that the goals of preserving nation-state citizenship and building labor citizenship are separate but aligned. That this "ideal" has rarely been achieved—and that even when it has, many other workers, such as African-Americans and women, have been physically present yet

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86. PASSEL & SURO, *supra* note 1, at iii.

87. JEFFREY S. PASSEL, *THE SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S. 1* (2006).

88. *Id.* at 9.

89. U.S. DEP'T OF LABOR, *FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001–2002: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 7* (2005), available at [http://www.doleta.gov/agworker/report9/naws\\_rpt9.pdf](http://www.doleta.gov/agworker/report9/naws_rpt9.pdf) [hereinafter DOL NAWS SURVEY]; Eduardo Porter, *Here Illegally, Working Hard and Paying Taxes*, N.Y. TIMES, June 19, 2006, at A1.

excluded from labor citizenship,<sup>90</sup> reigniting the defense dynamic—has not kept labor from striving for it repeatedly.

Even when that strategy was successful, however, labor's defensive urge did not completely dictate its policy toward immigrants. Simultaneously, in the interests of solidarity, a number of unions sought to organize those immigrants already in the workplace.<sup>91</sup> This accommodation between defense and inclusiveness ceased to function well beginning in the 1970s, as the borders of the United States became increasingly porous. In such a setting, the desire to defend the borders of labor citizenship led unions to advocate for moving border control into the workplace. But once employers had been deputized as immigration agents through employer sanctions, as described below, labor's capacity to establish solidarity was imperiled. Unions then sought to reconstitute the possibility of solidarity by opening their doors to new immigrants. And yet the wider the welcome, the more urgent the anxiety became in some segments of the labor movement about increasing competition from immigrants yet to come.

### 1. In Search of a Compromise Between Solidarity and Defense

Unions seek to minimize competition for jobs. Labor citizenship is easier to establish and leverage into better working conditions where legal immigration status is hard to obtain, so long as the borders are secure. Limit immigration to limit competition: it is this equation that drove labor's pursuit of restrictions on immigrant admissions to the United States for over a century.

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90. It is worth reiterating here that only craft unions make a choice individually about which workers to exclude from membership. As I note above, industrial unions represent whomever the unionized employer hires. Therefore, an industrial union could only "decide" to exclude black workers, women, or some other group from membership by avoiding organizing in the industries where those workers labor. Once the employer hires such workers into unionized positions, they are immediately brought within the union's ambit. How attentively the union addresses those workers' needs is a different question. Technically, a union is bound by the "duty of fair representation" to represent the interests of all workers in the unit in a way that is not "arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967). *See also Steele v. Louisville & Nashville R.R.*, 323 U.S. 192, 204 (1944) (imposing the duty under the Railway Labor Act). Duty of fair representation claims are, however, notoriously hard to win, and as discrimination became more subtle, would-be plaintiffs increasingly found themselves in the position where "[t]he Union's response to its members' complaints was enough to discharge its duty of fair representation, yet not enough to satisfy their demands." Reuel E. Schiller, *The Emporium Capwell Case: Race, Labor Law, and the Crisis of Post-war Liberalism*, 25 *BERKELEY J. EMP. & LAB. L.* 129, 144 (2004).

91. *See, e.g.,* HECTOR L. DELGADO, *NEW IMMIGRANTS, OLD UNIONS: ORGANIZING UNDOCUMENTED WORKERS IN LOS ANGELES* (1993) (describing an organizing effort among undocumented workers in a waterbed factory in the early 1980s).

a. Defending Labor Citizenship Through Immigration Control at the Border

From the 1870s, when serious talk of national immigration control first began, roughly until the 1970s, the mainstream labor movement answered the question of what the ideal immigration policy might be from the point of view of sustaining labor citizenship with little equivocation. The less immigration, the better.

The labor movement's efforts to restrict immigration from the 1870s through the 1920s have been amply detailed elsewhere.<sup>92</sup> In brief, the Knights of Labor and later the AFL endorsed a series of restrictive immigration measures during the golden era of immigration in the decades before and after the turn of the twentieth century, and saw a number of them passed into law. In no small part through labor's efforts, the once open U.S. immigration scheme came to include a prohibition of contract labor;<sup>93</sup> bans on the immigration of specific ethnic groups, such as the Chinese;<sup>94</sup> literacy requirements, widely understood as a stab at Southern and Eastern European immigrants and as a proxy for weeding out unskilled laborers;<sup>95</sup> and, eventually, restrictive numerical quotas for all immigrants.<sup>96</sup>

There were always dissenters. Militant unions such as the Industrial Workers of the World ("IWW" or the "Wobblies") saw both prospective immigration and the organizing of immigrants already present as emblematic of its drive to unite the working class world-wide.<sup>97</sup>

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92. Readers interested in this history should see VERNON M. BRIGGS, JR., *IMMIGRATION AND AMERICAN UNIONISM* (2001); KITTY CALAVITA, *U.S. IMMIGRATION LAW AND THE CONTROL OF LABOR: 1820–1924* (1984); LANE, *supra* note 69; ALEXANDER SAXTON, *THE INDISPENSABLE ENEMY: LABOR AND THE ANTI-CHINESE MOVEMENT IN CALIFORNIA* (1971).

93. The Alien Contract Law of 1885, which both the Knights of Labor and the AFL favored, prohibited employers from contracting to bring foreign workers into the country. Alien Contract Labor Law, ch. 164, 23 Stat. 332 (1885) (codified as amended at 8 U.S.C. § 1552 (1952)).

94. The 1882 Chinese Exclusion Act, strongly supported by the Knights, barred new Chinese immigrants from entering the United States and prevented those already inside the country from becoming citizens. SAXTON, *supra* note 92, at 177–80.

95. The AFL endorsed a literacy test as a precondition for immigration in 1897. CALAVITA, *supra* note 92, at 111; LANE, *supra* note 69, at 95–113. It was finally enacted by Congress in 1917. In 1891, the Knights defunct, the AFL passed an internal resolution calling for a halt to *all* immigration. LANE, *supra* note 69, at 75–92.

96. Numerical quotas on immigration entered into effect for the first time in the nation's history in 1921, in the wake of World War I. NGAL, *supra* note 12, at 20.

97. The IWW wholeheartedly rejected the nativist position of the AFL, which it mocked as the "American Separation of Labor." CALAVITA, *supra* note 92, at 101–02. For a discussion of the IWW, see generally PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES, VOL. IV: THE INDUSTRIAL WORKERS OF THE WORLD, 1905–1917* (2d ed. 1973).

Particularly interesting for the purposes of this Article is the approach of unions such as the Knights of Labor, which opposed prospective immigration but looked favorably on immigrants already present, because it illustrates the recurring bargain unions have struck to balance the imperative to organize everyone within the worksite while limiting those who competed for those jobs.<sup>98</sup> Despite a number of unions' considerable engagement with the existing population of immigrants, however, and

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98. LANE, *supra* note 69, at 57–72. Some AFL locals also organized among European immigrants already in the country, and their staff and rank-and-file members had begun to recognize immigrants' potential as union supporters as early as the late 1800s. In the words of one delegate to the 1897 AFL convention, the AFL was guilty of ignoring the fact that “the best trade unionists were the foreigners.” PHILIP S. FONER, *HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES, VOL. II: FROM THE FOUNDING OF THE AFL TO THE EMERGENCE OF AMERICAN IMPERIALISM* 363 (2d ed. 1975).

It is not uncommon for groups to take a restrictionist position vis-à-vis future immigration while advocating on behalf of newcomers already on the ground. Such organizations fit within the “Nationalist Egalitarian” quadrant of political scientist Daniel Tichenor’s useful model of immigration politics in the United States. DANIEL J. TICHENOR, *DIVIDING LINES: THE POLITICS OF IMMIGRATION CONTROL IN AMERICA* 36–37 (2002). Groups that oppose new immigration often make the distinction between “anti-immigration” positions (advocating increased limits on the flow of newcomers) and “anti-immigrant” ones (opposing immigrants themselves, the implication being that the opposition derives from racism and other forms of animus). Tom Barry, *Immigration Debate: Politics, Ideologies of Anti-immigration Forces*, AMS. UPDATER (Int’l Rel. Ctr., Americas Program), June 17, 2005, available at <http://www.americaspolicy.org/reports/2005/0506ideologies.html> (“The [immigration] debate [in the United States] divides sharply into two sides. On one side stand those who believe that immigration flows should be dramatically restricted. Commonly described as being anti-immigrant, these groups object to the negative label, saying that they oppose uncontrolled immigration, not immigrants themselves.”). Some have further argued that efforts to restrict immigration are in the best interests of immigrant groups already within the country. Mark Krikorian, *A Stern Face and a Warm Welcome: What to Do About Immigration Policy and Immigrant Policy—Two Different Things*, NAT’L REV., Oct. 27, 2003 (“Thus the answer: a meta-policy that combines low immigration and no-nonsense enforcement with an enthusiastic embrace of lawfully admitted newcomers. In other words, a pro-immigrant policy of low immigration—fewer immigrants but a warmer welcome.”).

Historically, those unions that excluded particular groups of workers argued that their decisions were motivated not by racism or anti-immigrant sentiment but by the need to limit supply. *See, e.g.*, Herman D. Bloch, *Craft Unions and the Negro in Historical Perspective*, 43 J. NEGRO HIST. 10, 10 (1958) (“[W]hite workers discriminated against Negro employment . . . . They justified their position by emphasizing the scarcity of work. Race prejudice, they declared, was not the issue; in other words, industrialization and not trade unionism produced discrimination.”).

The distinction has proven as difficult to sustain in the immigration context as it was with race. This is particularly so where unions with “anti-immigration” policies express them through actions targeting immigrant workers. *See, e.g.*, Jordan, *supra* note 42 (quoting James Hadel, vice president of the United Union of Roofers, Waterproofers and Allied Workers, recalling that fifteen years ago, the union was “‘looking at the Hispanic workers as our enemy,’” and noting that at the time the union was “videotaping Hispanic immigrants on construction sites in Kansas City, with the aim of getting them deported”). Unions that actively seek to organize current immigrants, but support restrictionist policies for those yet to come, risk having their position read as xenophobic or racist, however firmly they maintain it is rooted in concerns about supply. Also, as I recount below, the anti-immigration policies labor pursued eventually put even the most pro-immigrant unions in a position where they were unable to establish solidarity with immigrants already in the workplaces they sought to organize.

despite dissent on the national level from radical unions, the public face of the mainstream labor movement was unequivocally opposed to new immigration during this period.

Following the restrictions on immigration put into place in 1921 and 1924, immigration dropped, and the numbers of newcomers fell sharply again during the Depression.<sup>99</sup> With this, the AFL's concern about immigration receded.<sup>100</sup> The CIO emerged during this period and thus was not immediately forced to face the question of what position to take on future immigration. Consistent with the spirit of inclusiveness embodied in its model of industrial unionism, the CIO affirmatively sought to build solidarity among immigrants already present, African-Americans, and the white working class.<sup>101</sup> Immigration reappeared briefly on labor's radar in the 1950s, in the context of the Cold War, but the Cold War immigration debate was more of a blip on labor's screen than an enduring concern.<sup>102</sup> From the perspective of the labor movement, the lull was a period of success for its strategy of defending its workplace gains from competition by drawing on nation-state immigration control.<sup>103</sup> With the exception of agriculture, to which I turn now, immigration was not a major issue for the labor movement from the 1930s through the mid-1960s.

While most unions in the labor movement in mid-century operated in northern cities, and thus experienced border defense as spatially separate from the workplace, agricultural worker organizing efforts in border states, whose members were largely Mexican-Americans, had a different perspective. As former farm worker and United Farm Workers ("UFW") organizer Roberto de la Cruz recalls,

The problem is that in the rural areas, especially in California and Arizona and Texas, all of which border Mexico, it's real easy to bring

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99. See BRIGGS, *supra* note 92, at 96.

100. *Id.* at 81–123.

101. LIZABETH COHEN, MAKING A NEW DEAL: INDUSTRIAL WORKERS IN CHICAGO, 1919–1939, at 333, 337–39 (1990). “The chasms that CIO unions devoted themselves most intensively to closing separated workers of different races and ethnicities.” *Id.* at 333.

102. Although George Meany, president of the newly merged AFL-CIO, spoke in the mid-1950s in favor of a “reasonable” level of immigration as a way to “combat world communism,” the Federation’s ideological commitments were overshadowed by its fear of increased competition. Any more than 25,000 visas to working migrants, an AFL-CIO representative testified to Congress at the time, would raise the risk of “a tidal wave of immigration” that would pose a threat to U.S. workers and working conditions. NGAI, *supra* note 12, at 243, 250, 252.

103. The lull in immigration from 1924–1965 was an important time for the integration of white immigrants into American society (or, as some would argue, for ethnic immigrants to “become white”). For the argument that labor’s success was closely linked to the lower levels of immigration, see BRIGGS, *supra* note 92, at 81–82.

people in from Mexico to break the strike. We'd convince the strikebreakers not to [work] . . . and as soon as we had, they'd bring thousands more, and we would have to convince them too. But once that group would stop working, the growers and the immigration would just bring in a whole other group of immigrants.<sup>104</sup>

As a result of this proximity, while most of the AFL-CIO's attacks on the undocumented took place in the higher echelons of federal policymaking, farm labor unions' battles with undocumented migrants more often resembled hand-to-hand combat. In the late 1940s and early 1950s, for example, historian Mae Ngai has described the efforts of the National Agricultural Workers Union of the AFL to fight undocumented immigration, including picket-lines on the border and "citizen's arrests" of alleged illegal aliens.<sup>105</sup> Unions supported "Operation Wetback," a series of raids in 1954 that resulted in the deportation of over 1 million migrants.<sup>106</sup> More than a decade later, the UFW—otherwise known for its social movement orientation and emphasis on pride in Mexican identity—continued this tradition. In the late 1960s and early 1970s, the UFW used every means at its disposal to get undocumented migrants out of the fields. It reported workers to the Immigration and Naturalization Service ("INS") and demanded that the agency arrest and deport them.<sup>107</sup> When repeated and detailed communications with the border patrol on the whereabouts of immigrants, pickets of the border patrol office,<sup>108</sup> and demands that the INS raid labor camps as well as the fields did not generate the results the UFW sought, the union set up a "private border patrol" near the San Luis

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104. Interview by Anamaria de la Cruz with Roberto de la Cruz, n.p. (n.d.), available at [http://www.farmworkermovement.org/essays/essays/109%20De%20La%20Cruz\\_Roberto.pdf](http://www.farmworkermovement.org/essays/essays/109%20De%20La%20Cruz_Roberto.pdf) (last visited Mar. 11, 2007).

105. NGAI, *supra* note 12, at 161.

106. Gonzalo Santos, *Modern Human Migration and the History of "Immigration Problems" in California*, in CALIFORNIA'S SOCIAL PROBLEMS 154, 154–85 (Charles F. Hohm ed., 1997); CALAVITA, *supra* note 12, at app. A. See also NGAI, *supra* note 12, at 60 (noting the Texas CIO's Latin American Committee's support of the INS's actions during Operation Wetback, and also its opposition to some of the methods used—such as bloodhounds—and to future plans to militarize the border).

107. United Farm Workers of America: Illegal Alien Farm Labor Activity in California and Arizona (unpublished report, found in the Jacques E. Levy Research Collection on Cesar Chavez, Yale Collection of Western Americana, Beinecke Rare Book and Manuscript Library, Box 21, Folder 444; Box 29, Folder 568). The UFW's mimeographed report recounts its efforts to spur the INS to action in great detail. ("A total of 300 illegal aliens living at 3089 S. Del Rey, Sanger, California . . . . This information was turned over to the Fresno County Border Patrol Office. . . . Four follow-up phone calls were made to the patrol during the next three months. Out of 300 illegals, the border patrol arrested four . . .").

108. See Interview by Anamaria de la Cruz with Jessie de la Cruz, in Fresno, Cal. (Nov. 29–30, 2003), available at [http://www.farmworkermovement.org/essays/essays/010%20De%20La%20Cruz\\_Jessie.pdf](http://www.farmworkermovement.org/essays/essays/010%20De%20La%20Cruz_Jessie.pdf).

border checkpoint.<sup>109</sup> The idea, at least originally, was to persuade potential strikebreakers of their folly. Failing that, the union called in INS border agents to return them to Mexico.<sup>110</sup>

b. Moving the Border to the Workplace: Defense and Solidarity in Tension

Since the 1960s, the United States has been in a period of increasing immigration, both legal and undocumented. After the passage of the Immigration Act of 1965 triggered a massive wave of legal immigration from Latin America, the Caribbean, and Asia, unions found themselves back in the middle of the fray. The number of legal immigrants admitted without regard to the country's employment needs rose sharply. Even more precipitous was the surge in undocumented immigration beginning in the 1960s and 1970s.<sup>111</sup> The best available estimates indicate that the number of undocumented immigrants in the United States had already reached 3.3

109. SUSAN FERRISS & RICARDO SANDOVAL, *THE FIGHT IN THE FIELDS: CESAR CHAVEZ AND THE FARMWORKERS MOVEMENT* 244 (1997); Jeff Coplon, *Cesar Chavez's Fall from Grace, Part II*, *VILLAGE VOICE*, Aug. 21, 1984, at 18, 20.

110. Even within the union, there was ambivalence about this policy. See Memoir of Alfredo Acosta Figueroa 1965–1979, at 29–30, available at [http://www.farmworkermovement.org/essays/essays/021%20Figueroa\\_Alfredo.pdf](http://www.farmworkermovement.org/essays/essays/021%20Figueroa_Alfredo.pdf) (last visited Mar. 11, 2007) (discussing his “differences with the policies and direction that the UFW was taking” in asking its field offices to report undocumented immigrants to the INS); Posting of Deborah Vollmer to the Documentation Project, [http://www.farmworkermovement.org/disc/May\[1\]\[2\].pdf](http://www.farmworkermovement.org/disc/May[1][2].pdf) (May 9, 2004) (describing her deceased husband, former UFW organizer Philip Vera Cruz's “differences with Cesar [Chavez] on the issue of how undocumented farm workers should be treated”); Posting of Tom Dalzell to the Documentation Project, [http://www.farmworkermovement.org/disc/May\[1\]\[2\].pdf](http://www.farmworkermovement.org/disc/May[1][2].pdf) (May 22, 2004) (“I remember vigorous opposition within the Union to the anti-illegals campaign of 1973–1974 . . .”).

Outside the union, and particularly in the urban Chicano movement, the UFW attacks on the undocumented were widely denounced. MARIO T. GARCÍA, *MEMORIES OF CHICANO HISTORY: THE LIFE AND NARRATIVE OF BERT CORONA* 249 (1994). See also Ralph Abascal, Former California Rural Legal Assistance (“CRLA”) Lead Attorney, Class Discussion, Stanford Law School, Professor Michael Wald's Class (transcript on file with author) [hereinafter Abascal Transcript]. But the UFW was driven by a very practical concern that undocumented immigrants would undermine its capacity to strike for higher wages. Chavez's response to objections was characteristically direct: “if somebody's busting our picket line, the hell with them.” Interview with Jerry Cohen, Former General Counsel, UFW, in Carmel, Cal. (July 22, 1999). This is labor citizenship in pure defense mode.

UFW organizer Richard Ybarra makes the important point that undocumented immigrants who supported the UFW were welcomed as members. The core issue was strikebreaking rather than immigration status. Posting of Richard Ybarra to the Documentation Project, [http://www.farmworker-movement.org/disc/June\[1\]\[2\].pdf](http://www.farmworker-movement.org/disc/June[1][2].pdf) (June 27, 2004).

111. BRIGGS, *supra* note 92, at 141–43; DOUGLAS S. MASSEY, JORGE DURAND & NOLAN J. MALONE, *BEYOND SMOKE & MIRRORS: MEXICAN IMMIGRATION IN AN ERA OF ECONOMIC INTEGRATION* 41–47 (2002); NGAI, *supra* note 12, at 265–66. See also PHILIP MARTIN, *PROMISE UNFULFILLED: UNIONS, IMMIGRATION, AND THE FARM WORKERS* 180–96 (2003) (discussing the upsurge in Mexican undocumented migration in the 1980s).

million by 1980, and rose from there to 5 million in 1996, 8 million in 2000, and an estimated 11.5 to 12 million today.<sup>112</sup>

With attempts to stop immigration at the border in disarray and undocumented immigrants increasingly being hired to fill low-wage jobs, unions faced a difficult dilemma. The core tension of labor citizenship that I set forth in Part II—the need for solidarity with immigrants once they are present in the workplace pulling against the need to limit competition from them—came to the fore. Beginning in the 1970s, labor’s reaction to immigration had a schizophrenic quality as it responded to both of these impulses simultaneously and found it could succeed in achieving neither of them. On the ground, many local unions found themselves facing workplaces full of new immigrants, many of them undocumented. Some of them actively engaged in the struggle to organize those workers and, in the process, transformed into much more pro-immigrant organizations.<sup>113</sup> At the same time, however, as a defensive measure, almost every international union (the parents of these locals), and the AFL-CIO as a whole, continued to advocate for policies that would remove undocumented immigrants from the labor market. The policies that resulted made the locals’ efforts to build solidarity with immigrants much more difficult.

#### i. Employer Sanctions

During this time, labor argued that if the country could not stop low-wage immigrant competition at its borders, it would have to find ways to do so at the doors of the workplace. The UFW led the charge, winning a 1971 California law creating the first employer sanctions program imposing penalties on employers for hiring undocumented workers.<sup>114</sup>

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112. PASSEL, *supra* note 87, at i.

113. For case studies of unions in transition, see Nissen & Grenier, *supra* note 69 (describing the changing attitudes of four Miami union locals toward immigrants); David Kieffer & Immanuel Ness, *Organizing Immigrant Workers in New York City: The LIUNA Asbestos Removal Workers Campaign*, 24 LAB. STUD. J. 12 (1999) (describing the transformation of a Laborers Union local in New York City with regard to its approach to immigrant workers).

114. Kitty Calavita, *California’s “Employer Sanctions” Legislation: Now You See It, Now You Don’t*, 12 POL. & SOC’Y 205 (1983). The idea of sanctions had been discussed in labor circles for over fifteen years prior to its first success. In the late 1960’s, the UFW asked CRLA to provide legal support for its efforts to address the problem of undocumented immigration. Abascal Transcript, *supra* note 110, at 4–6. Part of that legal strategy, which CRLA spearheaded, was a campaign for an employer sanctions bill in California. *Id.* The law was passed in 1971, but never enforced. Calavita, *supra*, at 205–06. The current UFW is deeply ambivalent about this aspect of its history and has at times sought to minimize or even deny it. For example, in 2004, the UFW president, Arturo Rodriguez, stated: “Since the early 1970s, the UFW was one of the first unions opposing sanctions on employers and embracing a process to ‘legalize’ undocumented farm workers.” Arturo S. Rodriguez, Online Guest Editorial, *Congress Should Pass the AgJobs Bill—Now*, OREGONIAN, May 3, 2004, [http://www.joehilldispatch.org/laborwire/archives/2004\\_05.php](http://www.joehilldispatch.org/laborwire/archives/2004_05.php). Nonetheless, the UFW lobbied for national employer

Beginning in the 1970s, the AFL-CIO called for Congress to draft similar legislation.<sup>115</sup> In 1986, with the passage of the Immigration Reform and Control Act, unions saw their lobbying efforts transformed into a new federal employer sanctions program, which imposed fines and eventual criminal penalties on employers who failed to comply with the law's documentation requirements.<sup>116</sup>

From the AFL-CIO's perspective, employer sanctions were an attempt to make labor citizenship easier to establish and maintain by limiting competition from undocumented workers at the moment the employer hired its workforce. If employers were penalized for hiring the undocumented, the reasoning went, they would turn to legal workers instead. But once the locus of labor's battle to reduce competition from immigrants shifted from the border to the workplace, the interaction between the two sorts of citizenship proved much more detrimental than unions had predicted.

Sanctions complicated the legal landscape of the workplace.<sup>117</sup> After the passage of employer sanctions, undocumented immigrants were forbidden from working in the United States. Hiring people not authorized to work could subject an employer to fines and, eventually, criminal prosecution.<sup>118</sup> The immigrants themselves faced not only deportation and additional civil and criminal penalties if their initial entry was illegal, but

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sanctions legislation in the early 1980s. See, e.g., *Chronology: Cesar Chavez and the UFW*, BAKERSFIELD CALIFORNIAN, May 8, 2004, at A8 (stating that in "1981—UFW testifies in favor of employer sanctions to discourage illegal immigration").

The idea of employer sanctions as a local (rather than state or federal) policy has emerged recently as a part of the resurgent anti-immigrant sentiment in municipalities across the country. In 2006 in Suffolk County, New York, for example, County Executive Steve Levy proposed a law that would require all companies doing business with the county to certify that all of their employees were legally authorized to work. James T. Madore, *Pols Ponder Immigrant Law*, NEWSDAY (N.Y.), Aug. 24, 2006, at A48.

115. The first federal employer sanctions bill was sponsored in 1973 by U.S. Congressman Peter Rodino. Peter Brownell, *The Declining Enforcement of Employer Sanctions*, MIGRATION INFO. SOURCE, Sept. 2005, available at <http://www.migrationinformation.org/Feature/display.cfm?id=332>.

116. *The Immigration Reform and Control Act of 1985: Hearing on S. 1200 Before the Senate Subcomm. on Immigration and Refugee Policy*, 99th Cong. 422–36 (1985) (statement of Thomas R. Donahue, Secretary-Treasurer, AFL-CIO). Employer sanctions are codified in the Immigration and Nationality Act, 8 U.S.C. § 1324(a) (2000).

117. See Linda Bosniak, *Exclusion and Membership: The Dual Identity of the Undocumented Worker Under United States Law*, 1988 WIS. L. REV. 955 (discussing sanctions' history and their impact); Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 U. MICH. J.L. REFORM 737 (2003) (same); Lori A. Nessel, *Undocumented Immigrants in the Workplace: The Fallacy of Labor Protection and the Need for Reform*, 36 HARV. C.R.-C.L. L. REV. 345 (2001) (same); Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. PA. J. LAB. & EMP. L. 497 (2004) (same).

118. 8 U.S.C. § 1324(a). This is true whether they crossed the border surreptitiously or entered legally on visas that then expired.

also potential prosecution for presenting false documents to obtain work.<sup>119</sup> But these new rules were laid on top of a preexisting web of agency regulations and court holdings explicitly including undocumented workers under the coverage of most workplace protective laws. In an attempt to protect legal U.S. workers from the job competition that results when employers are tempted to hire undocumented workers in order to avoid the expense of complying with basic workplace statutes, Congress, the courts, and other authorities had generally covered the undocumented under the federal minimum wage set by the Fair Labor Standards Act (“FLSA”), the worker safety protections established by the Occupational Safety and Health Act, and, in most circuits, antidiscrimination laws as well.<sup>120</sup> It had also unequivocally been held that undocumented workers were “employees” within the definition of the NLRA.<sup>121</sup> In passing sanctions, Congress recognized the importance of this coverage, and to a great extent it survives to this day.<sup>122</sup> Thus, it is fair to say that after sanctions passed,

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119. *Id.* §1324(c).

120. The Fourth Circuit is the exception regarding Title VII. *See Egbuna v. Time Life Libraries, Inc.*, 153 F.3d 184 (4th Cir. 1998). Workers’ compensation for on-the-job injuries suffered by undocumented immigrants is limited in a few states and under dispute in others, although most states still guarantee coverage to the undocumented. For a recent case upholding the right, see the California Court of Appeal’s decision in *Farmers Bros. Coffee v. Workers’ Compensation Appeals Board*, 35 Cal. Rptr. 3d 23 (Cal. App. 2005). For a case limiting some elements of the right, see the Pennsylvania Supreme Court’s holding in *Reinforced Earth Co. v. Workers’ Compensation Appeal Board*, 810 A. 2d 99 (Pa. 2002). For an overview of the state of the law in this regard, see John Annarino, Doug Hayden & Pete Mihaly, *Illegal Aliens and Workers Compensation*, NEWSL. (American Association of State Compensation Insurance Funds, New York, N.Y.), Mar. 2006, available at [http://www.aascif.org/public/jan\\_feb\\_mar06/alien.htm](http://www.aascif.org/public/jan_feb_mar06/alien.htm). Despite widespread coverage on the books, the undocumented are often unable to gain compensation for on-the-job injuries. Liz Chandler, *Illegal Immigrants Frequently Denied Compensation*, MCCLATCHY NEWSPAPERS (D.C. Bureau), Sept. 15, 2006, available at <http://www.realcities.com/mld/krwashington/15527454.htm>.

Undocumented workers are ineligible for unemployment insurance, as their lack of legal status renders them unable to meet the requirement that recipients be “ready, willing and able” to accept another job. *See, e.g.*, N.Y. LAB. LAW § 591(2) (Consol. 2006) (“[N]o benefits shall be payable to any claimant . . . who is not ready, willing and able to work . . .”). *See Zapata v. Levine*, 375 N.Y.S.2d 424 (App. Div. 1975) (reasoning that immigrants without valid work permission are unable to meet the “available for employment” requirement because they are “legally barred from working”).

121. *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 891 (1984).

122. IRCA’s legislative history states:

It is not the intention of the Committee that the employer sanctions provisions of the bill be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees for exercising their rights . . . . As the Supreme Court observed in *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883 (1984) application of the NLRA “helps to assure that the wages and employment conditions of lawful residents are not adversely affected by the competition of illegal alien employees who are not subject to standard terms of employment.”

H.R. REP. NO. 99-628(I), at 58 (1986).

undocumented immigrants were technically barred from the workplace by immigration law (a bar frequently honored in the breach), but technically protected once they were hired by workplace law (a protection frequently honored in the breach).

The conflicts and gaps in the relationships between laws governing nation-state citizenship and laws governing labor citizenship create both opportunities and obstacles for unions. On the one hand, the fact that undocumented workers are protected by most workplace laws offers unions a legal hook to use in organizing. Litigation about the wages paid to undocumented workers, for example, has been used to pressure recalcitrant employers not only into compliance with the law but also to agree not to interfere with those workers' efforts to unionize.<sup>123</sup> Labor citizenship thus grows in the cracks between the two legal schemes.

On the other hand, the clash between the imperatives of solidarity and defense played out to unions' detriment with sanctions. Betraying labor's expectations, sanctions proved minimally effective and possibly counterproductive with regard to controlling the presence of undocumented workers on the job.<sup>124</sup> Even more destructive of labor citizenship,

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The biggest exception came in a devastating 2002 Supreme Court ruling about the National Labor Relations Act ("NLRA"), *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002). In *Hoffman Plastic*, the Court held that an employer who had unknowingly hired an undocumented worker, and then violated the NLRA by firing that worker in retaliation for his union support, would not have to reinstate the worker or provide back pay, the standard remedies under the Act, despite the clear violation of the Act's prohibition on such firings. *Id.* (The Court had earlier affirmed that undocumented immigrants were "employees" protected by the NLRA.) The Court relied heavily on Congress's passage of employer sanctions to support its conclusion that immigration law should trump labor law in the workplace. *Id.* at 147–51. Although limited in its holding to the NLRA, *Hoffman Plastic* created a great deal of concern among immigrants and their advocates about its possible extension to other areas. See, e.g., Rebecca Smith & Amy Sugimori, *Undocumented Workers: Preserving Rights and Remedies After Hoffman Plastic Compounds v. NLRB*, IMMIGRANT WORKER PROJECT (Nat'l Emp. Law Project, New York, N.Y.), Apr. 2003, available at <http://www.nelp.org/document.cfm?documentID=305>.

123. One example of such an effort was the campaign to organize Manhattan greengrocers. See Matthew T. Bodie, *The Potential for State Labor Law: The New York Greengrocer Code of Conduct*, 21 HOFSTRA LAB. & EMP. L.J. 183 (2003); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-regulation*, 105 COLUM. L. REV. 319, 350–52, 386–89 (2005); Immanuel Ness, *Community Labor Alliances: A New Paradigm in the Campaign to Organize Greengrocery Workers in New York City*, in FROM ACT UP TO THE WTO: URBAN PROTEST AND COMMUNITY BUILDING IN THE ERA OF GLOBALIZATION (Benjamin Shepard & Ronald Hayduk eds., 2002).

124. Eduardo Porter, *The Search for Illegal Immigrants Stops at the Workplace*, N.Y. TIMES, Mar. 5, 2006, at A1; U.S. GEN. ACCOUNTING OFFICE, ILLEGAL ALIENS: SIGNIFICANT OBSTACLES TO REDUCING UNAUTHORIZED ALIEN EMPLOYMENT EXIST (1999) ("[S]ignificant numbers of unauthorized aliens still obtain employment because the process can be circumvented or easily thwarted by fraud."); KEITH CRANE ET AL., THE EFFECT OF EMPLOYER SANCTIONS ON THE FLOW OF UNDOCUMENTED IMMIGRANTS TO THE UNITED STATES 73 (1990) ("Our labor market survey indicates that any decline in undocumented immigration has been small.").

employers used sanctions as an excuse to fire undocumented workers who tried to organize.<sup>125</sup>

Thus, sanctions rendered undocumented immigrants more vulnerable, less likely to report violations of minimum wage and other workplace standards, cheaper, and increasingly resistant to organizing efforts. In other words, they *increased* the appeal of undocumented workers to unscrupulous employers and gave employers a way to derail organizing campaigns in immigrant-heavy workplaces.<sup>126</sup> Under this regime, undocumented status became an increasingly significant impediment to a union's capacity to establish labor citizenship in a workplace by organizing, the very opposite of the result that labor had intended. In the words of David Koff, communications director for the union-sponsored Immigrant Workers Freedom Ride, "[y]ou can't have a subclass of vulnerable workers who can be deported without holding down the capacity of all workers to improve their lives."<sup>127</sup> Labor's defense of labor

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Within less than two decades, the government had essentially abandoned enforcement of the program. In 2004, the Immigration Control and Enforcement Bureau issued Notices of Intent to Fine under these provisions to a total of three employers, down from 417 in 1999. U.S. GOV'T ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: WEAKNESSES HINDER EMPLOYMENT VERIFICATION AND WORKSITE ENFORCEMENT EFFORTS 7 (2006). As the immigration debate heated up in 2006, increased sanctions enforcement and the intensification of document verification were centerpieces of both the House and the Senate reform bills.

Sanctions' greatest impact was to encourage a flourishing market in false documents, to lower wages of all workers in immigrant-heavy industries, and to further informalize immigrant work, thus increasing the wage gap between the undocumented and those legally present. This downward trend in wages was exacerbated by employers' shift to subcontractors in high-turnover industries dependant on undocumented workers, seeking to insulate themselves from liability. MASSEY ET AL., *supra* note 111, at 119–21. For another critical analysis of sanctions' impact, see Kitty Calavita, *The Contradictions of Immigration Lawmaking: The Immigration Reform & Control Act of 1986*, 11 LAW & POL'Y 17 (1989).

125. Employers used employer sanctions and/or the ruling in *Hoffman Plastics* as an excuse to squelch labor organizing or efforts to enforce workplace rights. See, e.g., MEX. AM. LEGAL DEFENSE & EDUC. FUND, USED AND ABUSED: THE TREATMENT OF UNDOCUMENTED VICTIMS OF LABOR LAW VIOLATIONS SINCE HOFFMAN PLASTIC COMPOUNDS V. NLRB (2003), available at [www.maldef.org/publications/pdf/Hoffman\\_11403.pdf](http://www.maldef.org/publications/pdf/Hoffman_11403.pdf) [hereinafter USED AND ABUSED]; Bob Shiles, *Roger Carter Suspends More than 20 Undocumented Workers*, FREE PRESS (Kingston, N.C.), July 19, 2006; Petition, Mexico National Administration Office ("NAO") of Mexico, Submission No. 9804 (1998) (filed by the Yale Workers Rights Clinic) (alleging that INS enforcement impedes the enforcement of U.S. workplace laws with regard to immigrants).

126. Matters deteriorated further after *Hoffman Plastic*. Post-*Hoffman Plastic*, a union seeking to organize in a workplace with undocumented employees faced the reality that even if the union prevailed before the NLRB, the only penalty for an employer's retaliatory dismissal of an undocumented worker would be the posting of a "cease and desist" notice, an all but meaningless remedy. *Hoffman Plastic*, 535 U.S. at 152. For critiques of *Hoffman*, see USED AND ABUSED, *supra* note 125, and Maria Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2004).

127. Ricky Baldwin, *A New Kind of Freedom Ride*, Z MAG., Jan. 2004, at 17, available at <http://zmagsite.zmag.org/Jan2004/baldwinpr0104.html> (quoting David Koff). See also Nina Shapiro,

citizenship through exclusionary immigration policy had undermined the possibility of establishing labor citizenship through solidarity.

ii. The Adverse Effect Wage Rate

Another illustration of the perverse effects of unions' efforts to use immigration policy to defend labor's boundaries appears in the context of guest work, an arena that I explore more fully in Part IV. Seeking to prevent employers from importing agricultural guest workers to undercut domestic wages, unions pressed the government to create the Adverse Effect Wage Rate ("AEWR"), a pay level based on the average regional wage, at which growers must demonstrate an inability to attract U.S. workers before they are permitted to contract guest workers.<sup>128</sup> The AEWR is often significantly above the federal minimum wage.<sup>129</sup>

The AEWR appears at first glance to assist both guest workers (who are the direct beneficiaries of its guarantee of a high minimum wage rate) and U.S. workers (who are presumably less likely to be passed over for jobs once the AEWR is enforced). But like employer sanctions, the AEWR

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*Let Freedom Ride*, SEATTLE WEEKLY, Sept. 17, 2003, at 14 (identifying David Koff as the communications director of the Immigrant Workers Freedom Ride).

128. Immigration & Nationality Act, 8 U.S.C. § 1188(a)(1)(A), (B) (2000). The AEWR is defined as follows in the regulations:

*Adverse effect wage rate (AEWR)* means the wage rate which the Director has determined must be offered and paid, as a minimum, to every H-2A worker and every U.S. worker for a particular occupation and/or area in which an employer employs or seeks to employ an H-2A worker so that the wages of similarly employed U.S. workers will not be adversely affected.

20 C.F.R. § 655.100(b) (2002). The AEWR is determined on a state-by-state basis, using "the annual weighted average hourly wage rate for field and livestock workers (combined) for the region as published annually by the U.S. Department of Agriculture." *Id.* § 655.107(a). Employers must pay whatever is higher: the AEWR, the applicable prevailing wage, or the federal minimum wage. *Id.* § 655.107(b).

129. Although initially excluded from the Fair Labor Standards Act's minimum wage provisions, most agricultural employees were brought under those protections through a 1966 amendment. 29 U.S.C. § 213(a)(6) (2000). Farm workers are still not covered by FLSA's overtime provisions. 29 U.S.C. § 213(b)(12). Federal minimum wage is currently \$5.15 per hour. 29 U.S.C. § 206(a)(1) (2000). In 2005, the AEWR for Arizona was \$7.63, in California \$8.56, in Florida \$8.07, and in Texas \$7.89. Labor Certification Process for the Temporary Employment of Aliens in Agriculture and Logging in the U.S., 70 Fed. Reg. 10,152 (Mar. 2, 2005). One logical question is why growers use H-2A guest workers at all, given their considerably higher cost. The answer resides in such workers' legally enforced subservience and controllability. *See infra* note 169 and accompanying text. In a crop such as tobacco, many small tasks must be accomplished over the course of the season. The work requires long periods of idleness interspersed with intensive labor, is carried out under awesomely hot conditions, causes nausea and dizziness, and is both unpredictable and time-sensitive. Employers who hire guest workers can rest assured that they will be present for the entire season and available when needed. Undocumented workers and other non-guest workers, employers complain, are unwilling to put up with these conditions, demand higher wages at peak times, and are not always easy to come by when the crop needs tending. Interview with Brendan Greene, Cástulo Benavides & two H-2A workers traveling to North Carolina, in Monterrey, Mex. (May 22, 2006).

has affected labor citizenship in perversely negative ways. In its operation, the AEWR has made undocumented workers—for whom there is no AEWR and to whom growers often pay less than minimum wage—much more attractive to growers.<sup>130</sup> In addition, the AEWR has imposed an upper limit on what labor citizenship can win for union members. Should a group of farm workers ever organize a union and demand even a few cents more than the AEWR, they would immediately become “unavailable” for work according to the law. The grower would then be authorized to replace them with workers imported from abroad.<sup>131</sup> In this sense, the AEWR acts as an artificial cap on what agricultural workers in the United States can demand for their labor, even as it undermines the possibility that workers who are legally present will receive jobs. It makes the U.S. government and growers partners in enforcing that cap. And—by definition, because the AEWR is based on the *average* regional wage—it sets the cap lower than what a number of the workers in the fields are already making.<sup>132</sup> The AEWR protections, created in the name of protecting labor citizenship, instead have made it harder to establish.

c. Bringing the Undocumented Within the Circle of Solidarity

Both farm worker unions and the AFL-CIO as a whole eventually changed their strategies vis-à-vis undocumented workers toward inclusion rather than exclusion. These shifts shed further light on the interrelationship of the law governing labor citizenship and the law governing nation-state

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130. According to the U.S. Department of Labor’s own National Agricultural Worker Survey, 51% of the workers in the fields in 2001–2002 were undocumented, compared to 7% in 1989. DOL NAWS SURVEY, *supra* note 89, at 7; U.S. DEP’T OF LABOR, THE NATIONAL AGRICULTURAL WORKERS SURVEY: A PROFILE OF U.S. FARM WORKERS tbl. 4.1 (1997), available at <http://www.doleta.gov/agworker/report/main.cfm>. The number is likely to *underestimate* the undocumented workforce because it relies on interviews with the workers themselves by representatives of the U.S. government. Of the remainder, the vast majority were citizens and legal permanent residents, rather than H-2As. DOL NAWS SURVEY, *supra* note 89, at 7. H-2As appear to account for approximately 2–3% of the agricultural workforce. See American Immigration Lawyers’ Association, AgJobs—We Need Reform to Achieve a Stable and Legal Agricultural Work Force, <http://www.aila.org/Content/default.aspx?docid=9897> (last visited Mar. 11, 2007). Still, the presence of H-2A workers in the United States nearly tripled in the 1990s. Michael Holley, *Disadvantaged by Design: How the Law Inhibits Agricultural Guest Workers from Enforcing Their Rights*, 18 HOFSTRA LAB. & EMP. L.J. 575, 591 (2001).

131. OXFAM AMERICA, LIKE MACHINES IN THE FIELDS: WORKERS WITHOUT RIGHTS IN AMERICAN AGRICULTURE 43 (2004), available at [http://www.oxfamamerica.org/pdfs/labor\\_report\\_04.pdf](http://www.oxfamamerica.org/pdfs/labor_report_04.pdf); Bruce Goldstein, Guestworker Policy: H-2A Program Adverse Effect Wage Rates Are Too Low (May 2006), available at [http://www.fwjustice.org/Immigration\\_Labor/H2abDocs/AEWRTooLow.doc](http://www.fwjustice.org/Immigration_Labor/H2abDocs/AEWRTooLow.doc).

132. 20 C.F.R. § 655.107(a). See also OXFAM AMERICA, *supra* note 131, at 43. Growers have been documented using a number of approaches to reject domestic applicants willing to work for the AEWR, including performance tests, refusing housing, and outright refusal to consider their applications. Holley, *supra* note 130, at 591–92.

citizenship. Partial victories for solidarity over defense, both of these moves nonetheless illustrate the continued tensions faced by efforts to build labor citizenship in a context of ongoing immigration.

i. The UFW

It is not only immigration law that constructs certain workers as the unorganizable outsider; it is also the workings of other laws and the changing strategies of unions themselves. The UFW's change in approach to undocumented workers following the passage of a California law governing the organization of farm labor in 1975 illustrates how a shift in labor law can provoke a change in approach to labor citizenship that moves a group of workers from the targets of defense to the subjects of solidarity, outside to in, without any corresponding shift in immigration policy.

Until 1975, the UFW, like all farm worker unions, was not covered by labor law.<sup>133</sup> Freed from the NLRA requirement that a majority of the workers in a bargaining unit choose union representation, the union could achieve recognition from growers through social movement pressure without ever holding an election.<sup>134</sup> The costs to the UFW of attacking undocumented workers were thus particularly low because it did not need their votes to prevail.

While exclusion from the NLRA had its advantages, it also left the UFW devastatingly open to attack by growers and rival unions. To remedy this, the union sought and passed the California Agricultural Labor Relations Act ("ALRA") in 1975.<sup>135</sup> This law created California's first legal framework and administrative body to govern farm labor organizing. Although the ALRA said nothing about immigration status, it made majority election the only route to union recognition. Nothing in the law excluded undocumented workers from this process. Suddenly, the vote of each undocumented worker mattered as much as the vote of a legally present worker. For the purpose of constructing labor citizenship under the new ALRA rules, an undocumented farm worker had become every bit as much a potential labor citizen as a U.S. citizen.

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133. "The term 'employee' . . . shall not include any individual employed as an agricultural laborer . . ." National Labor Relations Act, 29 U.S.C. § 152(3) (2000).

134. For an analysis of the UFW's use of law in conjunction with organizing strategies both before and after the passage of the ALRA, see Jennifer Gordon, *Law, Lawyers and Labor: The United Farm Worker's Legal Strategy in the 1960s and 1970s and the Role of Law in Union Organizing Today*, 8 U. PA. J. LAB. & EMP. L. 1 (2005).

135. CAL. LAB. CODE §§ 1140–1166 (West 2005).

Literally overnight, the UFW's position on undocumented immigrants transformed. The undocumented had become the union's constituency, and the UFW began to take up their cause both privately and publicly.<sup>136</sup> It abruptly stopped goading the INS for its failure to remove "illegals" from the fields. At a critical moment in the fate of the California employer sanctions measure, which was itself the result of the union's own advocacy, the union withdrew its backing for the law.<sup>137</sup> And it ended its policy of reporting individual undocumented workers to the government for deportation. Over the years that followed, the UFW emerged as an advocate for the undocumented in the United States, supporting efforts to advance the rights of undocumented workers and lobbying vigorously for special legislation to legalize migrant farm laborers.<sup>138</sup> Much earlier than the mainstream labor movement, the UFW developed a vision of undocumented immigrants as potential labor citizens. But like the AFL-CIO when it caught up a quarter-century later, the UFW found itself continuing to grapple with the question of future flow.

ii. The AFL-CIO

The election in 1995 of a new slate of AFL-CIO leaders with a markedly pro-immigrant stance and a renewed commitment to organizing, combined with growing union experience with organizing campaigns involving undocumented immigrants, fostered a sense that the AFL-CIO's official policy on immigrants was due for reconsideration.<sup>139</sup> This urgency

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136. It is interesting to note that the effects of this shift replicated on the labor citizenship level T.H. Marshall's influential theory that economic and social rights follow political rights in the context of nation-state citizenship (because once people can vote, politicians will begin to take them into account in designing social programs and economic policy). MARSHALL, *supra* note 18.

137. The UFW withdrew its support for employer sanctions just as CRLA was preparing to argue for the law's validity against a preemption challenge before the Supreme Court in December, 1975. Abascal Transcript, *supra* note 110, at 8–9. *See also* Calavita, *supra* note 114, at 221. CRLA continued, and prevailed. The case *DeCanas v. Bica*, 424 U.S. 351, 356, 365 (1976), upheld sanctions in principle, remanding to the California state courts to determine whether the law would conflict with any federal laws in its application. Neither CRLA nor the state pursued the case, and the law was never enforced. Calavita, *supra* note 114, at 219; Abascal Transcript, *supra* note 110, at 19–20.

138. For examples of the UFW's efforts to advance legislation benefiting immigrants, see United Farm Workers, [www.ufw.org](http://www.ufw.org) (last visited Mar. 11, 2007).

139. JULIE R. WATTS, IMMIGRATION POLICY AND THE CHALLENGE OF GLOBALIZATION: UNIONS AND EMPLOYERS IN UNLIKELY ALLIANCE 154–58 (2002). This impulse bore fruit in 1999 and 2000, when the AFL-CIO debated and eventually endorsed a proposal calling for legalization of the undocumented and a repeal of employer sanctions. *Id.*

As HERE President John Wilhelm said during the floor debate at the AFL-CIO convention in 1999:

HERE in the 1980s supported employer sanctions . . . .

. . . .  
And we see in our workplaces that the harsh reality is that employer sanctions are used as a weapon by employers against workers, as if employers needed another weapon against workers . . . .

was intensified by the realization that the future of many of its member unions lay with immigrant workers. As global competition decimated labor's traditional industrial strongholds and employers moved production offshore to countries with lower labor costs, unions here came to see that if they were to survive they would have to organize work and workers that were locally rooted. Focusing on janitors, hotel maids, laundry workers, and health care aides brought unions organizing in those sectors face to face with the new and often undocumented labor migrants who hold these jobs. It quickly became obvious that if unions were to gain a stronghold in service work, they would have to gain a foothold among immigrant workers.<sup>140</sup>

After intensive internal debate, the AFL-CIO emerged from its 2000 executive committee meeting with a radical new statement on immigrants and immigration policy. It endorsed a new amnesty and stated its unequivocal opposition to employer sanctions. Today, the majority of unions within the mainstream labor movement at least espouse an attitude of solidarity and inclusiveness toward undocumented immigrants already present.<sup>141</sup> Many locals go well beyond this, actively embracing the undocumented as members and leaders.<sup>142</sup>

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... When those who ... built this labor movement as we know it today in the great depression, in the great strikes in rubber and steel and hotels and so many other industries ... they didn't say "Let me see your papers" to the workers in those industries. They said "Which side are you on?" And immigrant workers today have the right to ask of us the same question.

John Wilhelm, President, HERE, Address Before the AFL-CIO Convention (Oct. 12, 1999), available at <http://saxakali.com/immigration/af11.htm>. The proposal was debated at the October 1999 AFL-CIO membership convention, formally approved and issued as a statement at the February 2000 meeting of the AFL-CIO Executive Committee, and officially ratified at the December 2001 membership convention. *Id.*

140. Muzaffar Chishti, *Guest Workers in the House of Labor*, 13 NEW LAB. F. 67, 68 (2004) ("For unions in the low-wage sector, organizing workers today is synonymous with organizing immigrant workers.").

141. The U.S. labor movement is not the only one to have undergone such a shift. For an exploration of the changing response of European unions to immigrants, see WATTS, *supra* note 139.

142. See, e.g., LEON FINK, *THE MAYA OF MORGANTON: WORK AND COMMUNITY IN THE NUEVO NEW SOUTH* (2003) (describing a poultry plant organizing campaign in North Carolina supported by Laborers' International Union of North America ("LIUNA")); *ORGANIZING IMMIGRANTS: THE CHALLENGE FOR UNIONS IN CONTEMPORARY CALIFORNIA* (Ruth Milkman ed., 2000) (describing union organizing campaigns by California-based locals of HERE, SEIU, the United Food and Commercial Workers ("UFCW"), and the International Association of Machinists and Aerospace Workers actively incorporating undocumented immigrants); IMMANUEL NESS, *IMMIGRANTS, UNIONS, AND THE NEW U.S. LABOR MARKET* 58-95 (2005) (describing the involvement by UNITE and UFCW locals in a campaign to organize largely undocumented deli workers in New York City); David Johnson, *Model Organizing Campaign Doubles Union Membership in Nine Months*, LAB. NOTES, May 2002, at 16, available at [http://www.cpcs.umb.edu/labor\\_notes/files/27816.pdf](http://www.cpcs.umb.edu/labor_notes/files/27816.pdf) (describing a campaign by the Laborers Eastern Region Organizing Fund, a department of the Laborers Union, among immigrant asbestos workers in New Jersey).

## 2. The Problem of Future Flow

Labor's policy toward immigration remains unresolved with regard to the "future flow" of migrants. Here the contradiction in labor citizenship comes once more to the fore.

As both the UFW and the AFL-CIO have discovered, a change in labor's position in relation to the undocumented is only half the battle. Immigration law must change as well, or the unique vulnerability of the undocumented to exploitation will continue. The coming of the ALRA did not erase the problem of competition from undocumented workers in the fields.<sup>143</sup> The new AFL-CIO policy did not reduce employers' capacity to fire undocumented workers with impunity, because their status in relation to the state had not changed. Undocumented workers remained desperate to earn money and vulnerable to abuse, and therefore unlikely to walk off the job in protest or to honor a picket line. Unions still faced the challenge of convincing such workers that they should take the risks associated with becoming labor citizens, risks that grew from federal immigration law and that unions could do little to address through on-the-ground organizing strategy.

Even if the continuing vulnerability of undocumented workers could be addressed, labor's resolution of its competing principles in favor of solidarity with undocumented workers is an inherently unstable solution to the tensions in labor citizenship. In casting their lot with the undocumented, unions have not eliminated line-drawing. They have just moved the line further out, so that workers currently present within the country—whatever their immigration status—are seen as potential labor citizens, while migrants yet to come remain the targets of labor's defensive impulses. In 2006, for example, the AFL-CIO called for "an immigration system that protects all workers *within our borders*—both native-born and foreign,"<sup>144</sup> while recognizing the inevitability of continued immigration so long as global inequality persists. Nonetheless, its proposed policy would bar any expansion of the temporary labor migration program and would only

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143. MARTIN, *supra* note 111, at 181–82, 192–93. Indeed, undocumented immigration began to rise dramatically in the 1980s. Philip Martin has argued that this influx of undocumented workers was a critical factor in the UFW's decline during that period. *Id.* Others have pointed to different precipitating factors for the union's decline. For a recent piece of investigative journalism on the topic, see Miriam Pawel, *UFW: A Broken Contract: Decisions of Long Ago Shape the Union Today*, L.A. TIMES, Jan. 10, 2006, at A1.

144. AFL-CIO, Responsible Reform of Immigration Laws Must Protect Working Conditions for All Workers in the U.S. (Mar. 1, 2006), available at <http://www.aflcio.org/aboutus/thisistheafclio/ecouncil/ec02272006e.cfm> (emphasis added).

permit the entry of workers on permanent employment visas in response to “actual, demonstrated labor shortages.”<sup>145</sup>

This stretching of the boundaries of labor citizenship to be contiguous with physical presence (rather than legal status) inside the United States would make sense—so long as undocumented immigrants currently within the country could be legalized or fully protected under labor and employment laws, and so long as further undocumented immigration was greatly curtailed.<sup>146</sup>

Unions in the United States today are pursuing steps in the first direction. To overcome the impediments to organizing the undocumented, the Change to Win Coalition and the AFL-CIO have enthusiastically endorsed a legalization program for undocumented immigrants currently present. In the interim, they also seek to remove the impediments to organizing that currently accompany undocumented status. Most of the labor movement is united in pursuing reform of policies that hamper undocumented immigrants’ ability to enforce their rights in the workplace. Among other provisions in this vein, they call for an iron wall between the Department of Homeland Security’s immigration agency and the Department of Labor, and various changes in enforcement practices to facilitate the detection and punishment of employers who violate basic workplace laws.<sup>147</sup>

These are all sensible and much-needed proposals. Undocumented workers are cheaper than others in part because they are less able to enforce their workplace rights; were these initiatives to be implemented, they would increase the rights that undocumented workers could claim and thus

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145. *Id.* Ana Avedaño, Director of the AFL-CIO Immigrant Worker Program, argues that this policy may not be any more restrictionist than the current one, as the number of visas would rise at times of demonstrated labor shortages, which could potentially increase visa availability beyond current levels. Telephone Interview with Ana Avedaño, Director, AFL-CIO Immigrant Worker Program (Oct. 17, 2006).

146. Of course, legalization still incorporates large numbers of new workers into the labor market. In a perfect world, as I have noted, unions would want to curtail labor supply rather than augmenting it. Their support for legalization is founded on the recognition that, if the presence of new immigrants in a labor market cannot be avoided, it is better to legalize them than to have them present but vulnerable to greater exploitation because of their lack of legal status.

147. AFL-CIO, *supra* note 144. Letter from Anna Burger, Chair, Change to Win, to Arlen Specter and Patrick Leahy, U.S. Senators (Mar. 1, 2006), *available at* <http://www.changetowin.org/fileadmin/pdf/Immigration%20Letter%20-%20PDF.pdf>. During the 2006 immigration debate, Senator Kennedy attempted unsuccessfully to amend S. 2611, the immigration reform bill that would eventually pass the Senate, by adding a number of these enforcement provisions. 152 CONG. REC. S4950-51, S4954 (daily ed. May 23, 2006) (statement by Sen. Kennedy) (discussing Amendment No. 4106, Amendment to Enhance Labor Law Protections for American Workers and Guestworkers, to S. 2611).

reduce the incentive for employers to hire them over others.<sup>148</sup> But even if the proposals all passed, they would be unlikely to completely level the playing field. Not all of the wage penalty associated with undocumented status is due to diminished rights on the job; other factors include the increased likelihood that undocumented workers will labor under wage-lowering subcontracting arrangements in the wake of employer sanctions and the uncertainty about duration of stay that discourages undocumented immigrants from investing in job training.<sup>149</sup>

Nor are these workers attractive to employers solely because of their low wages. Indeed, as the history of guest worker programs has shown, the actual cost of an employee may run second to an employer's desire for subservient workers.<sup>150</sup> In employers' oft-voiced view, the ideal worker "doesn't complain" and "is willing to work hard."<sup>151</sup> Employers judge subservience through a complex mix of racial stereotypes, immigration status, and length of time in the United States.<sup>152</sup> Although race is a critical factor in this mix, like wage levels, it is insufficient as a predictor of employer preference. Vulnerability to deportation and recent arrival as a proxy for ignorance of rights appear to trump both skin color and wage levels. Employers may hire new African and black Caribbean immigrants but spurn African-Americans, look for Poles with expired visas while

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148. On the wage penalty that results from undocumented status under an employer sanctions regime, see Julie A. Phillips & Douglas S. Massey, *The New Labor Market: Immigrants and Wages After IRCA*, 36 DEMOGRAPHY 233 (1999). Phillips and Massey calculate the wage penalty to be 22%, meaning undocumented immigrants earn 22% less than legally present workers in similar jobs. *Id.* at 11.

149. MASSEY ET AL., *supra* note 111, at 122–23, 128–30.

150. Historian Cindy Hahamovitch has observed that in the early 1940s, at the inception of the *bracero* program:

Caribbean and Mexican workers were not more attractive because they were cheaper than domestic workers. Growers who hired them had to pay a minimum wage, provide housing, pay their way home, guarantee three-quarters of their wages if work was unavailable, and pay the government a non-refundable fee per worker. . . . The attraction lay in the fact that, unlike domestic workers, the importees could be promptly and unceremoniously 'repatriated' and replaced.

Cindy Hahamovitch, *The Politics of Labor Scarcity: Expediency and the Birth of the Agricultural "Guestworkers" Program*, BACKGROUND (Ctr. for Immigr. Stud., Wash., D.C.), Dec. 1999, at 5.

151. See, e.g., Lee Mueller, *Coal Firm Wants to Hire Hispanics*, LEXINGTON HERALD-LEADER, Feb. 7, 2006, at A1 ("The company's objective is to attract workers to the area who 'have the necessary work ethic.'"); Jeffrey Leiter, Leslie Hossfeld & Donald Tomaskovic-Devey, *North Carolina Employers Look at Latino Workers* (Apr. 2001) (unpublished paper, on file with author) (quoting a manager: "[M]ost of the supervisors will say, I've got to have all Hispanic workers. [Why do you think that's the case?] The work ethic . . . They're going to work overtime if we need people overtime.").

152. See ROGER WALDINGER & MICHAEL I. LICHTER, *HOW THE OTHER HALF WORKS: IMMIGRATION AND THE SOCIAL ORGANIZATION OF LABOR* 141–80 (2003); Leticia M. Saucedo, *The Employer Preference for the Subservient Worker and the Making of the Brown Collar Workplace*, 67 OHIO ST. L.J. 961, 977–79 (2006).

turning their backs on white citizens, and seek out undocumented Mexicans but ignore Chicanos.<sup>153</sup>

As to the second point, is it realistic to believe that undocumented immigration can be curtailed? Even if the immigration status issues could be addressed through a complete amnesty for undocumented immigrants already present, all evidence indicates that hundreds of thousands of migrants will continue to enter the country illegally each year unless they are provided with legal avenues through which to do so. Full militarization of the border, oft-threatened, has an economic and political price tag beyond imagination.<sup>154</sup> And even were it to be achieved, it would not begin to address the problem of undocumented migration. Overstays of non-immigrant visas—which are issued by the U.S. government at the rate of over 30 million a year (the vast majority to tourists)<sup>155</sup>—currently account for an estimated forty-one percent of the undocumented population,<sup>156</sup> a number that would surely grow dramatically were border-crossing to become a less viable option.

One way or another, people who want to migrate will find a way, in numbers generated not by our formal legal permission but because of decades upon decades of economic and social pressures in both countries. To imagine that we can roll back the century or more of migration history between the United States and Mexico (and other countries as well), eradicate the entrenched migrant networks that bind the two countries to

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153. See, e.g., WALDINGER & LICHTER, *supra* note 152, at 165 (“Managers looked askance at assimilation. . . . The second generation was seen as not so willing to cooperate with authority . . . [n]or were they willing to work as hard . . .”). As employers decide which among new immigrants to hire, however, race discrimination once again comes to the fore. See, e.g., Joleen Kirschenman & Kathryn M. Neckerman, “*We’d Love to Hire Them, But . . .*”: *The Meaning of Race for Employers*, in THE URBAN UNDERCLASS 203, 210–11 (Christopher Jencks & Paul E. Peterson eds., 1991) (discussing employer preferences for Eastern European white workers for skilled jobs and Hispanic workers for unskilled jobs); Jennifer Steinhauer, *Domestic Workers Face Blatant Discrimination, Investigation Reveals*, N.Y. TIMES, June 1, 2005, at B3 (detailing a settlement between N.Y. Attorney General Eliot Spitzer and domestic work placement agencies after an investigation uncovered widespread racial coding of available jobs).

154. Furthermore, as data from the Mexican Migration Project has shown, tightening of U.S. borders has converted what would otherwise be cyclical migration, sensitive to the ups and downs of the labor market, into permanent immigration, with migrants remaining to compete for jobs even in times of high unemployment. Efforts to curtail illegal entry through border control thus have the perverse result of increasing the long-term undocumented population of the country. MASSEY ET AL., *supra* note 111, at 128–33.

155. DEP’T OF HOMELAND SEC., 2005 YEARBOOK OF IMMIGRATION STATISTICS (2006), available at [www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS\\_2005\\_Yearbook.pdf](http://www.dhs.gov/xlibrary/assets/statistics/yearbook/2005/OIS_2005_Yearbook.pdf).

156. U.S. CITIZENSHIP & IMMIGR. SERVS., ILLEGAL ALIEN RESIDENT POPULATION (1996), available at <http://www.dhs.gov/xlibrary/assets/statistics/illegal.pdf>.

each other, and undo the complex web of economic interdependence that characterizes our thoroughly integrated labor markets, is pure fantasy.

Although this claim is usually cast in terms of the desperation of would-be migrants (“they will come at any cost”), it is only honest to acknowledge that the U.S. dependence on migrant labor is the other side to that coin. The fantasy is flawed not only because it ignores the tremendous pressure on Mexicans to migrate for income, but also because it disregards the role of U.S. corporations in creating a situation where jobs that once attracted U.S. residents are no longer of a quality that will do so, and thus remain open as a draw to migrants. By deskilling and deunionizing large swaths of work, and stripping jobs of benefits through subcontracting and other forms of contingent employment, corporations have turned many jobs that once attracted U.S. citizens with their high wages and full benefits, into low-wage, no-benefit work.<sup>157</sup> They are then able to argue that the United States needs to import migrants because U.S. workers “will not do these jobs.”<sup>158</sup>

For some in the labor movement, the image most readily associated with migrants yet to come is still that of an unstoppable tide. Donald Kaniewski, political director for the Laborers’ International Union of North America, speaks for many union leaders when he states in a recent newspaper article, “I don’t think there’s a tolerance for an unlimited, unregulated flow of foreign workers.”<sup>159</sup> Kaniewski points to competition as the issue, arguing: “There is a reality that immigrants, particularly those out of status, put downward pressure on wages.”<sup>160</sup> Seen through the cold lens of supply and demand, the newcomers represent an ongoing threat to labor citizenship.

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157. Nowhere is this more evident than in the food processing/meatpacking industry. From the 1960s through the early 1980s, meatpacking was a largely unionized industry that paid wages 15–19% higher than the average in manufacturing in the United States. Today, after a concerted effort by giant meatpacking companies such as Iowa Beef Processors, those jobs have been automated, deskilled, sped up, and deunionized. Now paying 24% less than the average U.S. manufacturing wage, these jobs are increasingly filled by nonunion immigrant labor. LANCE COMPA, BLOOD, SWEAT, AND FEAR: WORKERS RIGHTS IN U.S. MEAT AND POULTRY PLANTS 11–14 (2004); Marc Cooper, *The Heartland’s Raw Deal: How Meatpacking Is Creating a New Immigrant Underclass*, NATION, Feb. 3, 1997, at 11.

158. The Essential Worker Immigration Coalition (“EWIC”), to which the American Meat Institute belongs (together with the Chamber of Commerce and most other large industrial lobbies), calls for increased temporary migration programs to fill jobs “that most Americans take for granted but won’t do themselves.” EWIC, 5 Myths Regarding Immigrants and Comprehensive Immigration Reform in the U.S., <http://www.clca.us/immigration/moreinfoDocs/1.pdf> (last visited Mar. 11, 2007).

159. Rachel L. Swarns, *Union Leader Supporting Guest Worker Proposal*, N.Y. TIMES, Feb. 24, 2006, at A14 (quoting Donald Kaniewski, Political Director for the Laborers’ International Union of North America, speaking in opposition to the McCain-Kennedy guest work proposal).

160. *Id.*

#### IV. IS A GUEST WORKER PROGRAM A SOLUTION TO THE PROBLEM OF FUTURE FLOW?

What, then, is to be done? The defensive strand of labor citizenship still cries out for some effective means of border control. Yet for unions to advocate excluding future migrants through harsh border policies or restrictions on new visas is distasteful to their immigrant members, inconsistent with the solidaristic emphasis of current labor movement policy, and likely to fail in any case. This is labor's quandary. The question unions currently confront is whether a new guest worker program is a way out of this conflict, or would mire them more deeply in it.

##### A. GUEST WORKERS IN THE UNITED STATES

The United States currently has a guest worker program, although most people associate the term in this country exclusively with the *bracero* program, relegated in collective memory to an unsavory corner of our past. In 1942, faced with shortages of field workers as a result of World War II, the United States signed the Mexican Farm Labor Program Agreement with the government of Mexico, creating what would become known as the *bracero*, or "manual laborer," visa. This was not the country's first guest worker experiment—that honor belongs to a category of temporary agricultural workers created to address shortages during World War I<sup>161</sup>—but it was its most massive, bringing a total of 4.6 million workers to the United States during more than twenty years.

Contrary to popular perception, the end of the *bracero* program in 1964 did not bring guest work to a close in the United States. The "H" category of the Immigration and Nationality Act provided for the admission of other temporary workers beginning in 1952, during the *bracero* era. When the *bracero* program was abolished, use of those visas expanded. Currently, the United States imports approximately 175,000 guest workers a year in three categories: (1) H-1B, for skilled professional workers, most often used in the technology field; (2) H-2A, for agricultural workers; and (3) H-2B, for other seasonal workers.<sup>162</sup> Outside of these

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161. Alice J. Baker, *Agricultural Guestworker Programs in the United States*, 10 *TEX. HISP. J.L. & POL'Y* 79, 82 (2004); Cindy Hahamovitch, *Creating Perfect Immigrants: Guestworkers of the World in Historical Perspective*, 44 *LAB. HIST.* 69, 70, 79–80 (2003).

162. Immigration & Nationality Act of 1952, 8 U.S.C. § 1101(a)(15)(H) (2000). Although admitted in numbers close to 200,000 per year in the early 2000s, H-1Bs are currently capped at 64,300 per year, with an additional 20,000 available for holders of masters degrees or their equivalent. Press Release, U.S. Citizenship & Immigr. Servs., USCIS Reaches H-1B Cap (June 1, 2006). H-2Bs are capped at 66,000 per year. 8 U.S.C. § 1184 (g)(1)(B) (2000). Both of these categories are oversubscribed

areas, there is currently no general guest worker category, nor has there ever been one.

In the summer of 2001, the idea of a new legalization program was gaining political currency, as President George W. Bush entered what was to be a series of meetings with his Mexican counterpart, Vicente Fox, to discuss amnesty as well as other matters of shared concern. On September 11, the gathering momentum came to a skidding halt. When President Bush again raised the issue of immigration reform two years later, his focus was on temporary, rather than permanent visas.<sup>163</sup> In the ensuing years, with the President's vocal support, the idea of a general guest work program has gained support across the political spectrum.<sup>164</sup>

From the perspective of service businesses rooted in the United States, it is not hard to understand why guest work is an appealing concept, with its guarantee of an unending supply of workers at low cost.<sup>165</sup> More surprising is the recent hint of a sea change in the immigrant advocacy community on the issue of guest work. Manuel Pastor and Susan Alva surveyed a range of immigrants' rights advocates in 2002 and found a surprising willingness (at least in private interviews, if not in public positions) to consider support for a "decent guest worker program."<sup>166</sup> As one activist noted, "If cross-border life is irreversible, then maybe we need cross-border institutions."<sup>167</sup> In theory, such advocates say, a temporary worker program could become a source of recognition and support for the reality of transnational migrant lives.<sup>168</sup>

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and thus are fully used each year. H-2A visas are not capped; approximately 30,000 are issued per year. U.S. Dep't of State, Table XVI(B): Nonimmigrant Visas Issued by Classification (Including Crewlist Visas and Border Crossing Cards) Fiscal Years 2001-2005, <http://travel.state.gov/pdf/FY05tableXVIb.pdf> (last visited Mar. 11, 2007). Although H-2B visas are limited to "nonagricultural work of a temporary or seasonal nature," 8 C.F.R. 214.2(h)(1)(ii)(D) (2001), they are granted in a wide range of industries, from hotel and restaurant, to construction, to factory work. See U.S. Chamber of Commerce, Seasonal Workers (H-2B Workers), <http://www.uschamber.com/issues/index/immigration/spousal.htm> (last visited Mar. 11, 2007).

163. Chishti, *supra* note 140, at 70-71.

164. See *infra* notes 165-68 and accompanying text.

165. See, e.g., EWIC, [www.ewic.org](http://www.ewic.org) (last visited Feb. 3, 2007) (outlining positions taken by the EWIC, which counts among its members some of the country's largest corporations and business associations); Petition at 12, NAO of Mexico, Submission No. 2003-1 (2003) (filed by the *Central Independiente de Obreros Agricolas y Campesinos* and the Farmworker Justice Fund) (alleging the failure by the United States to implement and effectively enforce the labor laws applicable to agricultural workers under the H-2A program in North Carolina) [hereinafter NAO H-2A Petition].

166. Manuel Pastor & Susan Alva, *Guest Workers and the New Transnationalism: Possibilities and Realities in an Age of Repression*, 31 SOC. JUST. 92, 100-04 (2004).

167. *Id.* at 100 (quoting an unidentified activist).

168. For one example of a coalition of immigrant-led community organizations that actively supports a guest worker proposal, see the November 2004 statement of the National Alliance of Latin

Unions until recently had been united in rejecting guest work. But the instability introduced in labor citizenship by the fear of ongoing large-scale immigration—combined with the belief that it may be impossible to stem the flow, but feasible to regulate it—led some within the labor movement to reconsider this position.

#### B. GUEST WORK AND LABOR CITIZENSHIP

Historically, unions have staunchly opposed guest worker programs on the ground that they posed an insuperable threat to establishing labor citizenship. The dangers were abundantly clear during the *bracero* program. Growers preferred *braceros* over resident workers because they had control over them and could work them harder, and because they provided insulation from labor unrest.<sup>169</sup> Despite myriad protections on paper, the mistreatment of *braceros* was legion: pay at times barely sufficient to cover daily costs, diminished further by illicit “deductions” that were never repaid, shoddy housing, poisonous food, and dangerous transportation.<sup>170</sup>

Unions did not consider bringing guest workers inside labor citizenship a viable option. The sole recorded attempt to reach out to *braceros* as allies and potential union members, spearheaded in 1950 by

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American and Caribbean Communities (“NALACC”), a nonprofit association of more than seventy-five community-based organizations led by immigrants from Latin America and the Caribbean. One of the four central points of this group’s immigration reform proposal affirmatively calls for “temporary worker programs for foreign workers that guarantee worker rights, including the right to collective bargaining.” Press Release, NALACC, Latin American and Caribbean Immigrants Present Immigration Reform Agenda at Meeting in Los Angeles (Nov. 9, 2004), available at <http://www.enlacesamerica.org/articles0303/NALACC-postconfinenglish11-09-041.doc>. The National Council of La Raza has also recently endorsed a new temporary worker visa program. Janet Murguía, Op-Ed., *A Change of Heart on Guest Workers*, WASH. POST, Feb. 11, 2007, at B7.

I do not want to overstate the support among advocacy groups for a new guest worker program. It is fair to say that far more immigrant rights advocates oppose than support such an expansion. See, for example, the signatures of over 140 organizations on the National Statement to Support Human and Civil Rights for All Immigrants and to Oppose Compromise Immigration Reform Proposals (Apr. 2006), available at <http://www.nnirr.org/projects/immigrationreform/statement.htm#endorsers>, developed by the National Network for Immigrant and Refugee Rights, which takes an unequivocal stance against the expansion of guest work programs.

169. LINDA C. MAJKA & THEO J. MAJKA, *FARM WORKERS, AGRIBUSINESS, AND THE STATE* 142 (1982) (“Even where there were a sufficient number of domestic workers willing to accept the low wages advertised, *braceros* were often illegally hired instead: they were less likely to strike or disrupt harvest operations.”). *Braceros* were also systematically used to break strikes. GALARZA, *MERCHANTS OF LABOR*, *supra* note 12, at 216–18; GALARZA, *SPIDERS IN THE HOUSE*, *supra* note 12, at 23–28; Hahamovitch, *supra* note 150, at 5.

170. See GALARZA, *MERCHANTS OF LABOR*, *supra* note 12, at 183–98; NGAI, *supra* note 12, at 143–44.

union organizer and author Ernesto Galarza, was a failure.<sup>171</sup> For the fifty years that followed, although there have been various temporary worker programs continuously in effect, there has been little evidence of efforts to draw those workers into U.S. unions. The *bracero* program finally ended in 1964, done in by the accumulated weight of exposés of its abuses and a public push by the newly established UFW, which found *braceros* a nearly insurmountable impediment to organizing in the fields.<sup>172</sup> Not coincidentally, the UFW launched its first strike within a year of the end of the *bracero* program and signed its first grape contracts within two years, winning a forty percent increase in grape-pickers' wages.<sup>173</sup>

As H visas extended the realm of guest work past the end of the *bracero* era, Congress made a variety of guarantees in terms of H-2A workers' wages, housing, travel expenses, and access to free legal representation.<sup>174</sup> Just as in the *bracero* era, however, growers have been able to evade many of these obligations.<sup>175</sup> Similar dynamics are at work

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171. While working in California for the National Farm Labor Union ("NFLU"), an affiliate of the AFL, Galarza invited *braceros* to join the NFLU and make common cause with the Mexican-Americans next to whom they labored. GALARZA, MERCHANTS OF LABOR, *supra* note 12, at 222–23. For descriptions of this effort, see NGAI, *supra* note 12, at 161–63 and STEPHEN J. PITTI, THE DEVIL IN SILICON VALLEY: NORTHERN CALIFORNIA, RACE, AND MEXICAN AMERICANS 142–45 (2003).

172. For a television broadcast that put the issue of *braceros* squarely in the public eye, see Edward R. Murrow's 1960 documentary, *Harvest of Shame* (CBS television broadcast Nov. 26, 1960); Philip Martin, *There Is Nothing More Permanent than Temporary Foreign Workers*, BACKGROUNDER (Ctr. for Immigr. Stud., Wash., D.C.), Apr. 2001, at 1, 3.

173. Martin, *supra* note 172, at 3.

174. For an overview of H-2A protections, see Holley, *supra* note 130, at 592–93, 613–14. In other areas, however, H-2As have considerably less protection. For example, they are not entitled to coverage under the federal Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). *Id.* at 605. In addition, agricultural work as a whole—the sector in which most guest workers labor—is exempted from coverage, or at best granted limited protection, by almost every federal protective workplace law. For an overview of these exclusions, see OXFAM AMERICA, *supra* note 131, at 38–41. The AWPA provides special protections for domestic farm workers, but it addresses few of these gaps, although it offers crucial guarantees of grower liability for many contractor abuses and mandates that farm worker housing and transportation meet federal standards. AWPA, Pub. L. No. 97-470, 96 Stat. 2583 (codified as amended in scattered sections of 29 U.S.C.); 29 C.F.R. § 500 (2002); OXFAM AMERICA, *supra* note 131, at 40.

There is considerable tension inherent in a system that offers rights to one set of workers with the sole purpose of protecting a second group of workers against competition from the first group. See Fran Ansley, Mexican Guest Workers in Carolina del Norte: Social Movement Lawyering on Transnational Ground 15 (unpublished paper, on file with author). The same tensions are evident in the argument that the reason to enforce basic workplace rights for undocumented workers is to make those workers less attractive to employers relative to legally present workers.

175. See generally LANCE COMPA, UNFAIR ADVANTAGE: WORKERS FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS 146–60 (2004); OXFAM AMERICA, *supra* note 131, at 47–50; Holley, *supra* note 130, at 594–616; NAO H-2A Petition, *supra* note 165.

with regard to unionization. Although the H-2A regulations do not forbid unionization, they operate in a way that discourages it.<sup>176</sup> Growers openly warn H-2A workers away from unions, and they enforce contractual bans against visitors to the fields or labor camps that keep workers from talking to union organizers.<sup>177</sup> The warnings are rarely necessary. Under current H-2 visa programs, a migrant's right to remain lasts only as long as her relationship with the employer who brought her to the United States.<sup>178</sup> This is the fundamental obstacle to making any paper rights real, or to guest worker unionization. Recognizing that antagonizing her employer is likely to result in a quick ticket home and a guaranteed slot on future blacklists, an H-2A worker is unlikely to want to take the risk of supporting a union organizing campaign.

With these experiences in mind, unions such as the UFW and the Farm Labor Organizing Committee ("FLOC") had long been leading voices in opposition to temporary work programs. They pointed out that the "labor shortages" that were used to justify the need for importing more workers were a fiction.<sup>179</sup> Furthermore, they insisted that politicians' promises of a guest worker program with rights and protections that would keep foreign workers from competing unfairly with domestic ones were impossible to keep in the face of vast power imbalances and weak enforcement.<sup>180</sup> In 1999, UFW president Arturo Rodriguez unequivocally

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176. COMPA, *supra* note 175, at 146–60 (describing how the agricultural guest worker program impedes unionization in practice); Holley, *supra* note 130, at 575–623 (same). *But see Hearing on H.R. 4548, the "Agricultural Opportunities Act," Before the Subcomm. on Immigration and Claims of the H. Comm. on the Judiciary*, 106th Cong. (2000) (statement of Dr. James S. Holt, Senior Economist on behalf of the National Council of Agricultural Employers). Dr. Holt said:

First it should be noted that use of the H-2A program as a strike-breaking tool is expressly prohibited. H-2A workers may not be employed in any job opportunity that is vacant because the former occupant of the job is on strike or involved in a labor dispute. Secondly, there is no impediment to an H-2A worker becoming a union member. . . . If an employer seeking labor certification has a collective bargaining agreement and a union shop, the H-2A aliens, like all other employees, can be required to pay union dues and may become union members.

*Id.*

177. COMPA, *supra* note 175, at 147, 153–55; NAO H-2A Petition, *supra* note 165.

178. Holley, *supra* note 130, at 595.

179. See, e.g., Marc Grossman, Op-Ed., *Why Import More Farm Workers When We Already Have Too Many?*, SACRAMENTO BEE, Jan. 13, 2003, at B5 ("An agricultural guest-worker program can only be justified if there are really labor shortages. All the objective data say as a rule shortages don't exist."); Gonzales & Rodriguez, *Inhumanity in the Fields*, DENVER POST, July 18, 1999, at K3 ("As Mike Ferner of FLOC stated, 'If the industry paid the workers properly, there would be no labor shortages.'"). In a fascinating article, historian Cindy Hahamovitch details the creation of guest worker programs by the U.S. government during WWII in the face of a surplus, not a shortage, of workers, as a mechanism to placate growers who demanded a more predictable and controllable workforce when U.S. workers threatened labor unrest. Hahamovitch, *supra* note 150.

180. Grossman, *supra* note 179; Arturo Rodriguez, Statement (Nov. 1999), <http://www.ufw.org/ssgw1199.html>.

stated: “Fifty-seven years with guest worker programs tell us that in the end, terms and conditions will be set by the growers—despite all the wonderful guarantees and protections advertised in any bill. That is why the UFW views any bracero or guest worker programs as indentured servitude.”<sup>181</sup>

In 2003, however, farm labor unions did an about-face, announcing their support for the AgJobs bill, which coupled the legalization for undocumented workers that the UFW had long sought with grower-friendly changes to the current temporary worker program.<sup>182</sup> This willingness to consider an expansion of guest work was initially less a matter of choice than of realpolitik, born of the need to give in on guest work in order to secure the right for undocumented workers to legalize. But, at least in the case of FLOC, it appears to have since developed beyond a political decision to an affirmative position. While rejecting President Bush’s temporary visa proposal, FLOC has endorsed a “Freedom Visa, with freedom to travel and work with full rights and dignity for all workers.”<sup>183</sup> At a 2006 conference, FLOC President Baldemar Velasquez called for “some kind of guest worker program to handle the future flow of these workers into the United States,”<sup>184</sup> citing the need for free movement of labor to complement the free movement of capital in a globalized world.

Part of the mainstream labor movement is undergoing a similar shift, while the remainder continues to oppose guest workers categorically. Several of the Change to Win unions—including leader SEIU—have endorsed the concept of a large new guest worker program.<sup>185</sup> SEIU

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181. Rodriguez, *supra* note 180 (calling the Graham-Smith guest worker plan a “cruel hoax” on farm workers).

182. United Farm Workers, UFW Announces Historic Compromise (Sept. 23, 2003), [www.ufw.org/H2Aanalysis.htm](http://www.ufw.org/H2Aanalysis.htm). Among other grower-friendly features, AgJobs would have frozen the AEW for three years, then phased it out entirely, and streamlined the process of obtaining guest workers, a change for which growers had long lobbied. See Agricultural Job Opportunity, Benefits and Security Act of 2003, S. 1645, 108th Cong. tit. II (2003). See generally 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). AgJobs also would have maintained the existing link between a worker’s legal status and a particular employer, meaning that the visa is revoked if the worker seeks to change employers, a rule that advocates have long decried as a breeding ground for exploitation.

183. Press Release, Farm Labor Organizing Committee (“FLOC”), Bush’s Proposal Encouraging but Falls Short: FLOC Proposes “Freedom Visa” (May 17, 2006), available at <http://www.ggjalliance.org/news.php?id=32>.

184. Author’s notes on Baldemar Velasquez, Keynote Speech at the Conference on Organizing Migrant and Immigrant Workers at the University of Michigan (Jan. 20, 2006) (on file with author).

185. Rachel L. Swarns, *Chamber and 2 Unions Forge Alliance on Immigration Bill*, N.Y. TIMES, Jan. 19, 2006, at A17; Jennifer Ludden, *All Things Considered: Strange Bedfellows Join Forces for Immigration Bill* (Nat’l Public Radio broadcast Jan. 19, 2006).

President Andy Stern argues that a guest work program will help address the problems of undocumented immigration and the underground economy.<sup>186</sup> No leader embodies the changing temper of the times more than John Wilhelm, former president of the Hotel Employees Restaurant Employees International Union (“HERE”), the former head of the AFL-CIO immigration committee, and current president of the Hospitality Division of Change to Win union UNITE HERE. In 2001, Wilhelm described himself and his union as “unalterably opposed” to a guest work program.<sup>187</sup> He bluntly stated: “‘To think the law will protect people whose right to stay in the country ends with their job is not living in the real world.’”<sup>188</sup> Four years later, however, UNITE HERE endorsed and Wilhelm himself praised a bill that would create the largest guest worker program this country has seen since the *bracero* era, annually admitting numbers of guest workers that rival *bracero* admissions at their peak. Wilhelm called the bill “a rational solution for the millions of undocumented workers in the United States” and “good for all American workers.”<sup>189</sup>

Meanwhile, the AFL-CIO remains staunch in its opposition to an augmented guest work program.<sup>190</sup> Its 2006 Executive Council Statement

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186. Scott Shepard, *Labor Takes Softer Line on Illegal Immigration*, ATLANTA J.-CONST., Mar. 1, 2006, at 3A (noting that Stern views guest worker legislation as “a way to bring illegal immigrants out of the underground economy”); Ludden, *supra* note 185.

187. See David Bacon, *New Players—New Game? Guest Workers or Amnesty*, PAC. NEWS SERV., Aug. 7, 2001. See also Leon Lazaroff, *Be Our Guest: Legalization Debate Sparks “Immigrants Freedom Ride,”* TEX. OBSERVER, Aug. 17, 2001.

188. David Bacon, *Be Our Guest*, NATION, Sept 2, 2004, available at <http://dbacon.igc.org/Imigrants/2004guests.html> (quoting John W. Wilhelm).

189. See John W. Wilhelm, President/Hospitality, UNITE HERE International Union, Statement (May 25, 2005), <http://www.unitehere.org/frontpagedetail.asp?ID=67>. Wilhelm’s comments refer to the piece of legislation around which the labor debate about guest work crystallized in 2005. In May of 2005, Senators McCain and Kennedy introduced the Secure America and Orderly Immigration Act, which combines intensified immigration enforcement measures with a legalization program and creates a new guest worker program for all industries, offering 400,000 visas per year. S. 1033, 109th Cong. (2005). For purposes of comparison, 445,197 *braceros* were admitted in 1956, that program’s peak year. See CALAVITA, *supra* note 12, at 218 (citing Congressional Research Service figures).

The AFL-CIO publicly recognized McCain-Kennedy as “an important legislative accomplishment” at the time it was introduced, but did not endorse it. Letter from John J. Sweeney to AFL-CIO National and International Union Presidents (June 1, 2005) (on file with author). See Editorial, *On the Border: The Best Solution So Far to One of America’s Thorniest Problems*, ECONOMIST, May 21, 2005, (praising the McCain-Kennedy bill and noting that the AFL-CIO has withheld endorsement of it). It has since lobbied against the bill in Congress. Telephone Interview, Ana Avedaño, *supra* note 145. See also Ludden, *supra* note 185 (quoting Ana Avedaño calling for permanent legalization rather than guest work programs, and arguing that using guest workers to fill a job will “change the fundamental nature of that job,” increasing outsourcing and decreasing wages and benefits).

190. AFL-CIO, *supra* note 144.

on Immigration unequivocally rejected any immigration reform that expanded guest work. “We are not a nation of guests; we are a nation of citizens,” the statement reads. “To embrace . . . the creation of a permanent two-tier workforce . . . would be repugnant to our traditions and our ideals and disastrous for the living standards of working families.”<sup>191</sup>

### C. IS A “GOOD GUEST WORKER PROGRAM” POSSIBLE?

#### 1. Components of a Good Guest Worker Program

Those who argue in favor of union support for temporary visas say that it is possible to craft a temporary program that would be good for migrants and good for unions as well. There is consensus among advocates about the provisions and protections such a guest work program would have to include to be considered humane. The visa would need to be portable, rather than tied to a particular employer, because the potential for exploitation increases dramatically once an employer controls a worker’s immigration status. The program would have to provide guest workers with full rights in the workplace, including the right to unionize, and it would need to contain multiple enforcement mechanisms for those rights, including access to federally funded legal service attorneys. It would have to allow guest workers to be accompanied by their families. Finally—and most controversially—most insist that it would have to create a path to permanent residence, permitting guest workers who wished to become permanent residents to apply for a green card after a time in temporary status.<sup>192</sup> So long as these conditions are met, pro-guest worker unions say, it is far better to have a legal population of workers than one hidden in the shadows.

#### 2. Obstacles to Achieving the Goals of a Good Guest Worker Program

If incorporated into a new guest worker program (which is extremely politically unlikely) and fully enforced (more unlikely still), such provisions would make guest workers quite similar to full-fledged legal immigrants. Even in this ideal form, however, the remaining differences between guest workers and legal permanent residents are telling. So too is

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191. *Id.*

192. Pastor & Alva, *supra* note 166, at 101–03; Coalition for Comprehensive Immigration Reform, Principles for Comprehensive Immigration Reform, [http://www.cirnow.org/content/en/about\\_principles.htm](http://www.cirnow.org/content/en/about_principles.htm) (last visited Mar. 11, 2007).

the likely impact of those differences on efforts to establish labor citizenship in the workplaces where “guests” labor.

a. Guest Work Undermines Working Conditions in the United States

The unions that oppose guest work argue that there is no way to adequately address the danger that such workers will be used to undercut U.S. workers’ wages and thus to undermine labor citizenship. While the best proposals for a new guest worker program build in features designed to protect the migrant workers’ rights, those features will prove both inadequate and beside the point if history is any guide. Temporary workers know that they will be in the United States for a limited period of time, and they are seeking to maximize the money they can earn. This is not a mindset conducive to the defense of basic rights, much less to union organizing.<sup>193</sup> The sense of contingent status the program creates, unions argue, makes guest workers unlikely to take the risks needed to become labor citizens. Therefore, their impact on the labor market will inevitably be negative.

The response from the pro-guest work unions is that opponents are not thinking creatively enough about the configuration of a new program. Just because current past visas have proven exploitative, they argue, does not mean a better way cannot be found.<sup>194</sup> But the opponents are not reassured. Even a perfect program, they fear, would massively increase competition from “outsiders” at the bottom of the labor market.<sup>195</sup> Indeed, the more guest workers are able to act like free agents, the swifter their path to permanent residence, and the more they look, from a traditional labor citizenship standpoint, like an invasion of unorganized low-wage workers coming to compete with those already here.

b. Guest Work Encourages Undocumented Immigration

Although guest work programs are often offered as the solution to undocumented immigration—a way, in the crude terms in which it is

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193. For a fuller discussion of this issue, see Part IV.C.2.a, *supra*. For an analysis of the negative impact of immigrants’ “sojourner” mentality on their likelihood to support union organizing, see Roger Waldinger & Claudia Der-Martirosian, *Immigrant Workers and American Labor: Challenge . . . or Disaster?*, in *ORGANIZING IMMIGRANTS*, *supra* note 142, at 49. See also GORDON, *SUBURBAN SWEATSHOPS*, *supra* note 3, at 36–37.

194. See, e.g., Chishti, *supra* note 140, at 73–74 (“[E]ndorsing a temporary worker program, in principle, today does not mean accepting elements that have made such programs so notorious in the past.”).

195. See, e.g., Martin, *supra* note 172, at 5 (“There is no way to eliminate the distortion and dependence that accompanies guest workers.”).

sometimes put, to “dry up the pool”<sup>196</sup>—many argue that guest work is unlikely to achieve that goal. As a historical matter, guest work programs in the United States and Europe have led to increased migration, including undocumented migration.<sup>197</sup> And, even the most liberal guest worker proposals currently on the table have features that virtually guarantee that many in the temporary worker population will eventually become undocumented, thus replenishing the “pool” that the legislation is intended to drain.<sup>198</sup>

c. Guest Work Creates a Formal Tier of Second-class Citizens

The most fundamental normative argument against any form of guest work is that, by its very nature, such a program creates explicit second-class citizenship.<sup>199</sup> Temporary worker programs seek to ensure that people admitted through the program will be here only so long as they are filling specific labor needs.<sup>200</sup> By their name and structure, progressive opponents urge, they induce in participants a sense that they are marked as lesser, the perennial “other,” never to be considered full and genuine members in the

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196. See David Bacon, *U.S. Corporations Win the Immigration Debate*, Z MAG., Nov. 2004, available at <http://zmagsite.zmag.org/Nov2004/baconpr1104.html>.

197. Tanya Basok, *He Came, He Saw, He . . . Stayed. Guest Worker Programmes and the Issue of Non-return*, 38 INT'L MIGRATION 215, 217–28 (2000); Freeman, *supra* note 56, at 60 (“The problem with the guest-worker system from the point of view of the host state is that it tends to break down.”); Friedrich Heckmann, *Temporary Labor Migration or Immigration? “Guest Workers” in the Federal Republic of Germany*, in GUESTS COME TO STAY: THE EFFECTS OF EUROPEAN LABOR MIGRATION ON SENDING AND RECEIVING COUNTRIES 69 (Rosemarie Rogers ed., 1985); Martin, *supra* note 172. See also Maurice Schiff, *When Migrants Overstay Their Legal Welcome: A Proposed Solution to the Guest-worker Program*, World Bank Discussion Paper No. 1401, 2004 INST. FOR THE STUD. OF LAB., at 1–2.

198. The McCain-Kennedy bill, for example, would require temporary visa holders to leave the country after forty-five days of unemployment; if they do not, they are rendered ineligible to gain permanent status. S. 1033, 109th Cong. (2005). Where is the Brazilian or Nigerian worker going to get the money for the flight home after forty-five days without work? The worker will, instead, remain here in violation of the law.

199. Leslie Berestein, *AFL-CIO Has Guest-worker Strategy; Legalization Backed for Immigrants Here*, N.Y. TIMES, Mar. 1, 2006, at C1 (“To embrace the expansion of temporary guest-worker programs is to embrace the creation of an undemocratic, two-tier society.”(quoting Linda Chavez, AFL-CIO Executive Vice President)). Journalist David Bacon has emphasized similar points in a series of articles on the topic. See, e.g., Bacon, *supra* note 188 (arguing that guest worker programs render migrants vulnerable to abuse, rob them of the ability to enforce their rights, and consign them to a permanent underclass in U.S. society). See also David Bacon, *Immigrants*, <http://dbacon.igc.org/Imigrants/imigrants.htm> (last visited Feb. 3, 2007) (providing links to similar articles).

200. See *Bush on Immigration*, *supra* note 13 (“I propose a new temporary worker program that will match willing foreign workers with willing American employers when no Americans can be found to fill the jobs. . . . This program expects temporary workers to return permanently to their home countries.”).

communities where they live or in the country where they sweat out their days.<sup>201</sup>

Some would argue that we should be less concerned about guest workers' second-class status where the law permits those workers eventually to adjust to permanent residence.<sup>202</sup> But this, opponents respond, does not address troubling inequities at both the individual and the societal level.<sup>203</sup> From the perspective of guest workers, such a regime still requires them to be on their best behavior and remain in compliance with a burdensome set of regulations for years before they will be permitted to begin walking the path to full membership. From a societal perspective, it is not an answer to concerns about second-class citizenship that any one migrant's time in that status may be brief. The class itself is permanent, even if its composition changes over the years. Indeed, the very fact that migrants are only in the class temporarily may be used as a justification for lower wages and worse treatment. For the United States to create a formal category of residents who must earn the right to so much as apply for a green card through years of hard manual labor, opponents say, is unprecedented in U.S. history and inimical to this country's professed tradition of equality and citizenship without tiers.<sup>204</sup>

## V. TRANSNATIONAL LABOR CITIZENSHIP

In the short term, ongoing labor migration to the United States is a given. Where countries of greatly unequal wealth share a border, and where manual work abounds in the richer country, people will move in search of opportunity. Although we seek to sort those people into legal categories, such as "family-sponsored immigrant," "temporary worker," and "undocumented migrant," and attach limits and consequences to the markers, in the end, labels shift but never wholly shape the reality of those who bear them. Limit one category through which manual workers can enter and another bulges. The urge to migrate and the demand for migrants

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201. See Bacon, *supra* note 188; Berestein, *supra* note 199.

202. See, e.g., Chishti, *supra* note 140, at 74 ("Temporary worker status thus becomes a path toward permanent residence. . . . [T]hey are not truly temporary workers, but actually permanent residents-in-waiting.").

203. For a persuasive argument against any form of guest worker program, including those with a path to permanent residence, on the grounds that such programs impede immigrant integration in the long term, see Cristina M. Rodriguez, *Guest Worker Programs and the Challenge to Immigrant Incorporation*, U. CHI. LEGAL F. (forthcoming Oct. 2007).

204. For a discussion of European temporary work programs as a form of "institutionalized inequality," see generally KITTY CALAVITA, *IMMIGRANTS AT THE MARGINS: LAW, RACE, AND EXCLUSION IN SOUTHERN EUROPE* (2005).

is greater than the law (or, at the least, greater than the law we have as yet been willing to pass, and we have passed some draconian laws).

In the long term, a genuine solution to the “immigration problem” would focus not on refining and enforcing classes of entry, but on addressing the underlying factors that bring so many to decide to leave.<sup>205</sup> This will only happen through sustainable development in sending countries so that their residents can support themselves and their families on work available within the country.<sup>206</sup> Critical to achieving this is ending the debt restructuring practices of institutions such as the World Bank and the International Monetary Fund. The structural adjustments imposed by these lenders have pushed developing countries to invest less in education, health care, and housing; devalue their currencies; refocus their economies on production for export and on the consumption of goods produced elsewhere; and take other measures that have undermined the living conditions and future prospects of their residents.<sup>207</sup> It is helpful to remember, however, that addressing push factors is only half of the equation. As Alejandro Portes and Rubén Rumbaut remind us in the introduction to their classic *Immigrant America: A Portrait*, “Manual labor migration is . . . not a one-way flow away from poverty and want, but rather a two-way process fueled by the changing needs and interests of those who come and those who profit from their labor.”<sup>208</sup> No long-term

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205. A fuller solution—if complete societal transformation can be called a “solution”—is to equalize developed and less-developed countries so that North to South migration is as attractive and viable as the current unidirectional South to North flow. This would require not just development in Southern countries but a weaning of more developed economies off of their astronomical consumption of natural and other resources.

206. A study released by the Pew Hispanic Center in December of 2005 ignited a debate on this point. The study found that “[t]he vast majority of undocumented migrants from Mexico were gainfully employed before they left for the United States.” From this information, its author concluded, “failure to find work at home does not seem to be the primary reason that the estimated 6.3 million undocumented migrants from Mexico have come to the U.S.” RAKESH KOCHHAR, PEW HISPANIC CTR., SURVEY OF MEXICAN MIGRANTS, PART III: THE ECONOMIC TRANSITION TO AMERICA, at i (2005). This finding was widely reported in the media. See, e.g., Nina Bernstein, *Most Mexican Immigrants in New Study Gave Up Jobs to Take Their Chances in U.S.*, N.Y. TIMES, Dec. 7, 2005, at A30. But what the study did not ask was, employed doing what? Informal, part-time, and low-paying jobs in Mexico are “employment,” but they do not generate an income that is stable or adequate enough to support a family. See also ALEJANDRO PORTES & RUBÉN RUMBAUT, IMMIGRANT AMERICA: A PORTRAIT 11 (2d ed. 1996) (“[T]he findings indicate that it is not the lack of jobs, but of *well-paid jobs*, which fuels migration to the United States.”) (quoting WAYNE CORNELIUS, ILLEGAL MEXICAN MIGRATION TO THE UNITED STATES 4 (1977)).

207. JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 53–67, 78–80 (2003); Carmen G. Gonzalez, *Trade Liberalization, Food Security, and the Environment: The Neoliberal Threat to Sustainable Rural Development*, 14 TRANSNAT’L L. & CONTEMP. PROBS. 419, 457–58 (2004).

208. PORTES & RUMBAUT, *supra* note 206, at 18.

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solution can be effective unless it also addresses work and the conditions of work in the United States.

For the foreseeable future, there will continue to be an oversupply of workers seeking so-called low-skilled jobs in the United States. How, then, should we approach the task of preserving and creating decent work here? In a transnational labor market, the answer lies in a form of labor citizenship that correspondingly crosses borders. By this I mean considerably more than the usual references to and experiments with international solidarity between unions. I propose the creation of a new immigration status, “transnational labor citizenship,” which would entitle the holder to come and go freely between the sending country and the United States, and to work in the United States without restriction.<sup>209</sup> The transnational labor citizenship regime would be the product of a binational public/private collaboration. For conceptual ease, I will limit the discussion to Mexico, but the model could take root in any migrant-sending country. It would be brought into being and governed by a combination of negotiations between the United States and Mexico, unilateral regulation by both governments, and the engagement of a network of nongovernmental workers organizations operating across borders, membership in one of which would be a precondition for obtaining a visa. The network would have a strong presence both in sending and receiving countries, with a mission of raising the floor on wages and working conditions for all workers in the United States, with particular attention to its members, the newest to arrive and thus the most easily exploitable.

A quick review of the legal and functional structure of the current guest worker program for low-wage, low-skilled workers sets up the contrast with transnational labor citizenship. The current regime is a unilateral and largely privatized one. Unlike other countries’ guest work programs, such as the Mexico-Canada Seasonal Agricultural Workers Program, the U.S. program was designed without formal input from sending-country governments and does not require or envision any role for such governments in administering or monitoring the flow of guest

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209. Transnational labor citizenship fills the gaping hole left by NAFTA’s failure to couple free movement of capital across North American borders with free movement of labor. It also would vastly increase the network of organizations with the capacity to utilize the complaint mechanism established through NAFTA’s labor side agreement. Finally, it would add a component of democratic deliberation to the regional integration that NAFTA envisions. For a brief sketch of a proposal for deliberation and collaboration across Mexico-U.S. borders, see David Bonior, *Towards a North American Parliamentary Union*, DEMOCRATIC LEFT, Winter 2003–04, at 5, 13, 15. The European Union’s coupling of free migration between member states with open trade regimes and a range of transnational deliberative mechanisms is an obvious model for what I propose.

workers.<sup>210</sup> Under the current program, a U.S. employer that wishes to employ guest workers under the H-2A and H-2B programs must first show to the satisfaction of the Department of Labor that it has been unable to recruit U.S. workers at the set wage rate, which varies across the programs.<sup>211</sup> It is then certified by the Department of Labor and the Department of Homeland Security's bureau of Citizenship and Immigration Services to import a certain number of workers.<sup>212</sup> Most employers recruit migrants through private contracting firms operating in sending countries, which themselves often subcontract the responsibility for choosing workers to labor recruiters operating in cities and small villages.<sup>213</sup> Contractors hold tremendous power, and the contracting system is riddled with abuses, ranging from high fees through corruption, usury, and outright fraud.<sup>214</sup>

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210. The Mexico-Canada Seasonal Agricultural Workers program was initiated in 1974, after bilateral negotiations between the two countries. Memorandum of Understanding Between the Government of Mexico and the Government of Canada Relative to the Admission into Canada of Mexican Migratory Farm Workers (June 17, 1974) (on file with author). This agreement envisions both a larger role for the Mexican government and a wider range of rights for participating workers than the U.S. H-2A program. See Agreement for the Employment in Canada of Seasonal Agricultural Workers from Mexico—2007, available at <http://www.hrsdc.gc.ca/en/epb/lmd/fw/forms/2007mexicansawp-e.pdf>. See also TANYA BASOK, TORTILLAS & TOMATOES: TRANSMIGRANT MEXICAN HARVESTERS IN CANADA 37–40 (2002).

211. See 20 C.F.R. 653.501(d)(4) (2006) (discussing the H-2A program); U.S. Dep't of Labor, Foreign Labor Certification: Prevailing Wage Determinations for Nonagricultural Programs, (Aug. 1, 2005), available at <http://www.foreignlaborcert.doleta.gov/wages.cfm> (discussing the H-2B program).

212. Once the National Processing Center determines that the employer is in compliance with all requirements, "the National Processing Center will grant the temporary foreign agricultural labor certification for the number of job opportunities for which it has been determined that there are not sufficient U.S. workers available." U.S. Dep't of Labor, H-2A Certification, <http://www.foreignlaborcert.doleta.gov/h-2a.cfm> (last visited Mar. 11, 2007); U.S. Dep't of Labor, OFLC Frequently Asked Questions and Answers: H-2B Temporary Labor Certifications (Nonagricultural), [www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2b1](http://www.foreignlaborcert.doleta.gov/faqsanswers.cfm#h2b1) (last visited Mar. 11, 2007) ("Certification is issued only or [sic] a specific job opportunity, for a specific number of workers, and for a specific employment period."). Employers often contract out the responsibility for this certification process to an employers' association (such as the North Carolina Growers' Association) or a labor contracting firm (such as Global Horizons).

213. See, e.g., Fred Krissman, *Farm Labor Contractors: The Processors of New Immigrant Labor from Mexico for Californian Agribusiness*, 12 AGRIC. & HUM. VALUES 18, 26 (1995).

214. These contractors and recruiters routinely charge workers steep fees for visa processing, with additional bribes on the side for priority in the selection process. They often demand the money well in advance of departure, working in tandem with local lenders who charge interest of upwards of 30%, with the result that workers leave the country deeply in debt. WORLD BANK, AT HOME AND AWAY: JOB OPPORTUNITIES FOR PACIFIC ISLANDERS THROUGH LABOUR MOBILITY 117, 131 (2006), available at <http://go.worldbank.org/FU6EIDBG30>; Krissman, *supra* note 213, at 26–27. Mexico's federal labor law does technically regulate labor contractors recruiting workers for foreign employment. The law is limited in scope but contains some essential guarantees, including mandating that the employer cover all transportation, food, visa and border-crossing costs, and requiring the contractor to post a bond to ensure that these and other obligations (including the provision of a written contract) are met. Ley Federal del Trabajo [L.F.T.] [Federal Labor Law], Título II, Capítulo I, Artículo 28, 1997 (Mex.). Like

The U.S. government steps in again after receiving workers' passports from contractors, as the U.S. consulate interviews and fingerprints the workers, and—presuming that there are no security risks or immigration violations—approves their visas. Migrants are then transported by the private contractors to their ultimate destination. They must remain with the employer who contracted them for their entire stay in the United States. When that job ends, they must return home.

#### A. TRANSNATIONAL LABOR CITIZENSHIP: THE PROPOSAL

Transnational labor citizenship is based on the theory that the only way to create a genuine floor on working conditions within a context of heavy competition is to link worker self-organization with the enforcement power of the state in a way that crosses borders just as workers do.<sup>215</sup> In its full form, transnational labor citizenship would reconfigure the relationship between sending countries and the United States, rework core assumptions of the U.S. immigration system, and reshape the way that the U.S. government and civil society workers' organizations relate with regard to labor migrants.<sup>216</sup> The changes I propose are vast, and I will explore them more fully in a separate venue. In the remaining pages of this Article, I will do three preliminary things: sketch the outlines of the transnational labor citizenship proposal, suggest a "micro" version that might be possible to implement at this time, and, in Part VI, outline and briefly respond to some of the concerns that might be raised about the model.

##### 1. A Binational Collaborative Framework

The framework for transnational labor citizenship would be established through negotiations between the U.S. and Mexican

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many labor-protective laws in Mexico, however, it is essentially unenforced. *See, e.g., No Guarantees: Sex Discrimination in Mexico's Maquiladora Sector*, 8 HRW (Hum. Rts. Watch/Women's Rts. Project), Aug. 17, 1996, available at <http://www.hrw.org/reports/1996/Mexi0896.htm> (documenting the Mexican government's failure to enforce a range of laws intended to protect women from sex discrimination at work); Interview with Rachel Micah-Jones, Founder and Executive Director, Centro de los Derechos del Migrante, Inc., Zacatecas, Mex. (May 24, 2006).

215. For a discussion on the role of civil society organizations in regulatory enforcement, see note 218, *infra*. *See also* ARCHON FUNG, DARA O'ROURKE & CHARLES SABEL, CAN WE PUT AN END TO SWEATSHOPS? (2001); Orly Lobel, *The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought*, 89 MINN. L. REV. 342 (2004); Charles Sabel & Michael Dorf, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

216. As noted above, this is a U.S.-centric proposal, designed to address the erosion of labor citizenship within the United States and to tackle the problems faced by labor migrants to the United States. A more comprehensive—and genuinely transnational—proposal would entitle transnational labor citizens to travel and work freely across all national borders.

governments<sup>217</sup> with considerable input from nongovernmental organizations with experience in the labor or migration fields. It would be implemented through a collaborative process involving government agencies and nongovernmental organizations within and across the two nations.<sup>218</sup> A network of transnational labor organizations in both countries would play an essential role in the process, both individually and through a coordinating body.<sup>219</sup>

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217. The Mexican government has called for a framework of “shared responsibility” in place of the current unilateral system. *See, e.g.*, Mexico and the Migration Phenomenon, Mex. Fed. Cong. Res. (2006), available at <http://internationalrelations.house.gov/archives/109/Mexico%20Migration%20Phenomenon.pdf> (“The migration phenomenon has international implications that demand from Mexico actions and international commitments . . . [which] should be guided by the principle of shared responsibility.”).

Indeed, for the negotiations to be truly transnational, they would need to take into account the role of Mexico and the Central American nations as both sending and receiving countries. Mexico is home to tens of thousands of migrants from Central America who travel there in search of better work opportunities than they can find in their home countries. There is large-scale migration between Central American countries as well. Sarah J. Mahler & Dusan Ugrina, *Central America: Crossroads of the Americas*, MIGRATION INFO. SOURCE (Migration Pol’y Inst., Wash., D.C.), Apr. 1, 2006.

218. Claus Offe’s theories of “corporatism from below” and the idea of associational democracy, as articulated by political scientists Joel Rogers and Joshua Cohen, provide a conceptual framework for this process. In a nutshell, Offe argues that we have erred in conceiving of an impermeable dividing wall between government and civil society organizations, and that democracy would benefit by creating a wider role for nongovernmental groups in governance. CLAUS OFFE, *DISORGANIZED CAPITALISM: CONTEMPORARY TRANSFORMATIONS OF WORK AND POLITICS* (1985). Rogers and Cohen and others who have elaborated a theory of associative democracy take this idea one step further, exploring ways that people directly affected by government programs might play concrete roles in decisionmaking about those programs. *See generally* Joel Rogers & Joshua Cohen, *Secondary Associations and Democratic Governance*, in *ASSOCIATIONS AND DEMOCRACY 7* (Joel Rogers & Joshua Cohen eds., 1995). Transnational labor citizenship would implement aspects of associational democracy on a global scale.

The emerging field of Global Administrative Law offers useful insights with regard to how such a regime might ensure accountability and establish democratic governance procedures. *See* N.Y.U. School of Law, Inst. Int’l L. & Just., Research: Global Administrative Law, [http://www.iilj.org/global\\_adlaw/](http://www.iilj.org/global_adlaw/) (last visited Mar. 11, 2007); Benedict Kingsbury, Nico Krisch & Richard B. Stewart, *The Emergence of Global Administrative Law* (Inst. Int’l L. & Just., Working Paper No. 2004/1, 2004), available at [http://www.iilj.org/publications/wp\\_globadminlaw.htm](http://www.iilj.org/publications/wp_globadminlaw.htm). In such a regime, questions of potential co-optation and the challenges of sharing responsibility in a context of vastly unequal power come to the fore. However independently an advocacy network operates at the outset, the state has tremendous power to shape its goals and functioning, particularly where the relationship between the two is explicitly designed as a collaborative one.

219. The literature on transnational advocacy networks (“TANs”) is suggestive with regard to how the individual transnational labor organizations would be established, how they would develop a consistent internal culture and organizing approach, and how their interactions with each other—the network—would be governed and monitored. For examples of TAN-led campaigns on issues related to human rights, the environment, women’s rights, and labor rights, and for discussion of the structure, function and efficacy of TANs in general, see MARGARET E. KECK & KATHRYN SIKKINK, *ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS* (1998); Dave Trubek, Jim Mosher & Jeffrey S. Rothstein, *Transnationalism in the Regulation of Labor Relations: International Regimes and Transnational Advocacy Networks*, 25 L. & SOC. INQUIRY 1187 (2000).

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The resulting program could address problems beginning at the point of recruitment and continuing through the migrant's return home through joint efforts to regulate labor contractors, eradicate fraud and corruption, eliminate labor abuses, and ensure compliance with program requirements at all levels. It would also extend beyond the immediate migratory flow, to establish a mutual commitment to sustainable development in both sending and receiving countries and to genuinely enforceable labor rights in all signatory countries.

## 2. Migrant Rights and Obligations

In practical terms, transnational labor citizenship would permit its holder to work for any employer in the United States with full labor rights and eventual conversion to permanent residence if the migrant so desired. The migrant, and his or her family, could come and go between the United States and Mexico, remaining here when jobs were plentiful and returning home at slow times, for the harvest on their own farm, for family events, or for holidays.<sup>220</sup>

The benefits of the program need little elaboration: the right to travel freely, to work, and to adjust to permanent residence over time would be enormous attractions for many. But the obligations participants incur would be serious ones as well. In order to be certified as eligible to apply for transnational labor citizenship by the Mexican government, interested migrants would have to join a Mexican independent transnational labor organization working in or near their sending community. To remain in the United States more than a month beyond entry, migrants would also have to join another transnational labor organization that was actively organizing within the industry in which they worked, in the geographic area of the United States where they settled. Equally important, each migrant would be asked to take a "solidarity oath" as a condition of membership, promising to take no job that violated basic workplace laws or that paid less than the minimum set by the transnational labor organizations, to report employer violators to their transnational labor organizations once discovered, and to uphold union solidarity with other workers (for example, refusing to cross picket lines). Failure to adhere to these requirements would be grounds for removal from membership in the transnational labor organizations and withdrawal of the visa.

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220. In this sense transnational labor citizenship would do a far better job of supporting what Maria Ontiveros has termed the "transnational lives" of labor migrants than our current system does. Maria Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 *MAINE L. REV.* 158, 180 (2002).

These features distinguish transnational labor citizenship from the “good guest worker” proposals outlined in the previous part. Different, too, is the absence of numerical restrictions. Transnational labor citizenship would be made freely available to those willing to comply with the oath and membership conditions.<sup>221</sup>

### 3. The Role of Transnational Labor Organizations

The centerpiece of this proposal is a network of transnational labor organizations, grassroots groups located in sending and receiving communities. Such organizations might emerge from existing NGOs, worker centers, or unions, or might be founded independently. These organizations would work intensively with migrants on the ground. In Mexico, transnational labor organizations would hold a series of meetings for would-be migrants, first to introduce them to the program and its requirements, and—after visas were approved—to orient them to “how work works” in the United States. This would include introducing them to the transnational labor organization network in the United States and providing training about labor laws, the labor and immigration history of the United States, mechanisms for protecting rights, and the structure and operation of the labor movement in the United States.

When the migrants arrived in the United States, the U.S. transnational labor organizations in their area would hold welcome meetings, orienting them to the region, laying out the options for membership, and inviting the migrants to know-your-rights classes, English classes, and social, cultural,

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221. In this sense, transnational labor citizenship is related to calls for open borders, although there are key differences between the two. Open borders have long been advocated by libertarians and pro-business conservatives. The *Wall Street Journal*, for example, has periodically reiterated its open border position in editorials since the mid-1980s. See, e.g., Robert L. Bartley, Op-Ed, *Thinking Things Over: Liberty's Flame Beckons a Bit Brighter*, WALL ST. J., July 3, 2000, at A13 (proposing a constitutional amendment mandating open borders, and stating “We stand . . . for ‘free markets and free men’ . . . . Someone who believes in the free trade in goods and free movements of capital will quite naturally believe in free movement of labor, another factor of production.”). Progressives have advocated for open (or more open) borders on moral and human rights grounds, as well as a matter of sound policy. See, e.g., Joseph H. Carens, *Aliens and Citizens: The Case for Open Borders*, 49 REV. POL. 251 (1987); Kevin R. Johnson, *Open Borders?* 51 UCLA L. REV. 193 (2003).

The transnational labor citizenship proposal is like an open border regime in that it would make visas available to as many immigrants as were willing to comply with its membership and solidarity requirements. The lack of numerical limits is a pragmatic element of the proposal, born of the belief that efforts to restrict immigration will recreate a pool of undocumented workers. But unlike some open borders proposals, transnational labor citizenship proposes continued (and in some cases increased) engagement by agencies of various governments in regulation of the migration process, and introduces a new role for transnational labor organizations in advocating and enforcing better wages and working conditions in the industries where the new immigrants labor.

and organizing activities. In the best-organized sectors, the transnational labor organizations would be administering collective bargaining agreements that covered transnational labor citizens together with other workers. In those areas, transnational labor organization staff would also provide copies of the contract and explain its benefits and grievance process to the new arrivals.

The goal of the U.S. transnational labor organizations—and of the program as a whole—would be to foster genuine labor citizenship not only among the migrants as a group, but also among all workers in the area across the boundaries of nationality, race, and immigration status. Essential to that end would be concrete shared projects that involved local unions, worker centers, and community groups, with the transnational labor organization at the center. A good part of the energy thus generated would be directed toward defending the rights of transnational labor citizens on the job, through legal representation, protest, and media work.<sup>222</sup> This would serve the self-interest of unions because of their need to defend the floor on the labor market but would also be an opportunity for the new migrants and union members to get to know each other. These links could then be strengthened through joint trainings on health and safety issues and/or job skills, and through apprenticeship programs to draw migrants into existing unions.<sup>223</sup>

As migrants returned home, the Mexican transnational labor organizations would staff ongoing organizing and leadership development efforts and provide critical links between and support for ongoing

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222. One obvious objection to the transnational labor citizenship proposal is that by improving wages, it will cut into the number of jobs. This is the same objection that is routinely made to any effort to set or raise a floor on wages and working conditions. See, e.g., D. Mark Wilson, *Increasing the Mandated Minimum Wage: Who Pays the Price?*, BACKGROUNDER (Heritage Found., Wash., D.C.), Mar. 5, 1998. One response is to argue that there are conditions of work that do not comport with basic human rights, and that jobs lost as the result of an effort to eradicate such conditions are not jobs we should have in this country. Another, more subtle approach is to explore ways for transnational labor organizations to move with sensitivity to local conditions to incorporate those workers in the labor market rather than displacing them. For models of similar approaches, see Jane E. Larson, *Negotiating Informality Within Formality: Land and Housing in the Texas Colonias*, in LAW AND GLOBALIZATION FROM BELOW 140 (Boaventura de Sousa Santos & César A. Rodríguez-Garavito eds., 2005) [hereinafter LAW AND GLOBALIZATION] (calling for informal, flexible housing regulation that is sensitive to the needs of poor residents); SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS 166 (1998) (calling for flexible schemes of economic regulation to support the growth of small businesses currently located in the underground economy).

223. A particularly promising development in this regard was the initiation of a historic partnership in the summer of 2006 between the National Day Laborer Organizing Network (“NDLON”) and the AFL-CIO. Steven Greenhouse, *Labor Federation Forms a Pact with Day Workers*, N.Y. TIMES, Aug. 10, 2006, at A18 (describing the new partnership and its implications).

organizing campaigns and lawsuits related to the migrants' work in the United States. Transnational labor citizens would be able to draw on the transnational labor organizations' legal resources (either from within the United States or from the sending country) to pursue claims against employers in the United States for violations of workplace law, from being paid less than minimum wage, to denials of workers compensation for on-the-job injury, to sexual harassment. They would also have access to a variety of other services, from notarization, to English classes, to health care accessible in both countries.

U.S. and Mexican transnational labor organizations would be linked through a network that enabled them to collaborate to defend the rights of their members through a combination of government enforcement, lawsuits, and collective pressure. As a part of that network, all transnational labor organizations would be members of, and participate in, a parent organization, the Transnational Worker Collaborative, with offices in the United States and Mexico. The Transnational Worker Collaborative would be run by a board of representatives from all of the transnational labor organizations, elected representatives from the pool of transnational labor citizens, and others as invited (advocates, workers, academics, and other experts from both countries). Its main function would be oversight and accreditation of the member organizations, monitoring of the migration process, and policy reform efforts. In the sending country, as migrants applied for transnational labor citizenship, Transnational Worker Collaborative staff would act as observers during the selection process to ensure that the rules established about eligibility for visas were followed. The Transnational Worker Collaborative would be free-standing, not a part of an already-existing labor union or worker center either in the United States or Mexico. It would, however, have strong ties to and support from such groups in both countries.

#### B. TRANSNATIONAL LABOR CITIZENSHIP: THE MICRO VERSION

I offer the transnational labor citizenship proposal in its full form even as I recognize that its achievement is not currently feasible. Such a massive overhaul of the current cross-border migration scheme would face obstacles that are profound. For the realization of transnational labor citizenship, the most necessary feature—the participation of the U.S. government—is also the most unlikely.<sup>224</sup> And yet, the project of concretely imagining how a

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224. Nonetheless, there are some incentives for the business lobby (the primary moving force behind the guest worker proposal) to accept transnational labor citizenship. It gives the Chamber of

more just system would operate is critically important, *especially* when, as now, the changes necessary to get there seem impossibly distant. Furthermore, to recognize that the whole cannot be realized should not mean giving up on the parts.<sup>225</sup>

The question at hand, then, is what a concrete and positive vision of transnational labor citizenship might look like in a world where the U.S. government remains determined to act unilaterally regarding its immigration policy and, in so doing, continues to be highly responsive to the demands of the business lobby. A new guest worker program crafted in the current political moment is likely to contain some form of contract between employer and worker, a visa status dependent on continuous employment, a long path, if any, to permanent residence, and no rights for family accompaniment. Is there any room in such a framework for positive steps toward transnational labor citizenship?

I believe there is. In the United States, Canada, Mexico, and elsewhere around the world, there are experiments underway today that give hope that a micro version of transnational labor citizenship might be possible in the near term even in the context of a traditional guest worker program and without permission or even participation from the U.S. government. These experiments are emerging from a range of binational and multinational agreements, internal initiatives by sending-country governments, and efforts led by unions and nongovernmental organizations. I describe here three features of a realistic micro-experiment in transnational labor citizenship: regulation by the Mexican state of key aspects of the migration process, unionization of guest workers, and transnational legal advocacy to

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Commerce and its industry allies precisely what they say they want: access to employees at a fair wage where U.S. workers are unwilling to do the work at that level of compensation. And it eliminates the features of the current program that draw the most frequent fire from its business beneficiaries. Corporations will not have to bear the paperwork burden currently associated with the H-visa, about which they frequently complain, and will not have to predict their hiring needs in advance as the current program requires them to do. See *Guestworker Visa Programs: Hearing Before the Subcomm. on Immigration and Claims of the H. Comm. of the Judiciary*, 107th Cong. 15–32 (2001) (statement of Randel Johnson, Vice President of Labor and Employee Benefits, U.S. Chamber of Commerce).

225. I approach the construction of my micro-experiment in the spirit suggested by Boaventura de Sousa Santos and César Rodríguez-Garavito in the introduction to their co-edited book, *LAW AND GLOBALIZATION*, *supra* note 222. They argue for what they label the “sociology of emergence,” which “entails interpreting in an expansive way the initiatives, movements, and organizations that resist neoliberal globalization and offer alternatives to it.” *Id.* at 17. This approach seeks to “underscore the signals, clues, or traces of future possibilities embedded in nascent or marginalized legal practices or knowledge.” *Id.*

enforce guest worker rights. Each has its roots in a recent development on the ground that I set out below.<sup>226</sup>

### 1. Unilateral Regulation by Mexican Federal and State Governments

Take as a starting point a guest work program set up exclusively by the U.S. government, with (again, for the sake of simplicity) Mexico as the sole sending country. Even in such a unilateral regime, the Mexican government has latitude to shape the guest worker program, derived from its sovereignty in the domestic realm and the presence within its borders of the labor that U.S. employers seek.<sup>227</sup> The federal government or the various governments of the Mexican states could, for example, take direct responsibility for recruitment, eliminating exploitative labor contractors.<sup>228</sup>

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226. There are a number of other promising developments that space does not permit me to engage here. I save for a future date exploration of the parallels and lessons for my proposal from the EU's experimentation with greater labor mobility among EU countries, and from incipient efforts by building trades unions around the world to create an "international hiring hall," among other fertile possibilities.

227. For an overview of Mexico's efforts to control emigration from 1900 to the early 1970s, see David Fitzgerald, *State and Emigration: A Century of Emigration Policy in Mexico* (Ctr. for Comp. Immigr. Stud., Working Paper No. 123, 2005). Today, Mexico has largely abandoned restrictions on out-migration. Instead, it seeks to ensure that migration continues, to keep remittance dollars flowing. Mexican migrants currently send home over \$20 billion per year. *Id.*; INTER-AMERICAN DEVELOPMENT BANK, REMITTANCES 2005: PROMOTING FINANCIAL DEMOCRACY 33 (2006).

228. Another objection to such a proposal from the Mexican perspective is that it might render Mexico less competitive in the global tournament to supply workers to the United States. Although guest work programs are frequently discussed as if they were exclusively U.S.-Mexican affairs (an impression furthered by articles such as this one, which use Mexico as their primary example even as they acknowledge that guest worker sending countries are scattered across the globe), there are no country limitations on H-visas, nor do most current legislative proposals before the U.S. Congress anticipate a country-specific guest work stream. The Mexican government, then, is acutely aware of the need to minimize barriers to recruitment if it is to retain its favored status as the supplier of most guest workers to the United States, something that it very much wants to do to ensure the continued flow of remittances back home. When individual Mexican states consider inserting themselves into the recruitment process, they face the same concern on the level of competition between states for visas and remittances. This concern leads directly to the recognition that any full version of the proposal must be not only bilateral, but also multilateral, involving all of the major sending countries.

In the meantime, however, and for the micro version, it is important to remember several things. One is the overwhelming advantage that Mexico has because of its physical proximity with the United States, which contributes greatly to the ease and relative cheapness of the recruitment process. A recent legal holding has strengthened Mexico's position in this regard. In 2002, the Eleventh Circuit ruled that employers are responsible for guest workers' travel costs from the hometown to the U.S. workplace. *Arriaga v. Fla. Pac. Farms*, 305 F.3d 1228, 1228 (11th Cir. 2002). These travel costs are considerably less expensive for workers coming from Mexico—where the entire journey, although arduous for the worker, can be accomplished by bus—than from other nations that require airfare in addition to ground transportation. Another is that few aspects of the transnational labor citizenship proposal would add in any significant way to the price of labor recruitment. State-run recruiting centers could be as easy and inexpensive for employers to deal with as privately created entities. Further, even the transnational labor organization membership requirement does not impose costs on employers beyond a greater

This may seem politically unlikely, given the officials and private citizens at many levels who benefit from the web of kickbacks and lucrative fees that the current system generates. Yet there is precedent for it. On the federal level, the Mexican government already functions as the sole contractor for its Canadian guest work program, which sends over 10,000 Mexicans to Canada annually. And individual Mexican states have experimented with managing recruitment for U.S. guest work programs through their state-run Migration Institutes, with no contractor involvement.<sup>229</sup>

Once they controlled the recruitment process, Mexican state or federal authorities could set minimum requirements for workers eligible to participate in guest work programs. For participants in its Canada program, for example, the Mexican government prioritizes those with the lowest educational levels, the largest families, and the fewest assets.<sup>230</sup> The Migration Institute of Zacatecas, Mexico, meanwhile, selected the unemployed and the poorest rural workers for its program.<sup>231</sup> In the context of the micro transnational labor citizenship proposal, this authority could be exercised to mandate membership in a transnational labor organization as a prerequisite for applying for a visa through the state agency, on the grounds that the interests of Mexico and its citizens were best served by sending migrants with a watchdog on their shoulder. Such a policy might better be able to guard against abuses and increase the income of migrants (and thus the remittances they sent, the preservation of which is the primary concern of the Mexican government) than the current system.<sup>232</sup>

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likelihood that they will be required to respect the minimum workplace standards embodied in law, a point that employers are not in a strong position to resist.

229. For a description of the program in Zacatecas, where it was most fully developed, see Miguel Moctezuma Longoria, *Trabajadores Temporales Contratados por EE.UU.: Informe Sobre el Programa Piloto del Gobierno de Zacatecas*, (Temporary Workers Contracted by the U.S.: Report on the Pilot Program of the Government of Zacatecas) (on file with author) (describing the state-run contracting process in Zacatecas, in which the Zacatecan government screens and selects workers for placement in participating companies, eliminating the role of the labor recruiter). The states of Michoacán and Guanajuato have created similar experiments. Interview with Rachel Micah-Jones, *supra* note 214.

230. BASOK, *supra* note 210, at 98–99.

231. Longoria, *supra* note 229, at 5.

232. In the Mexico-Canada program, a Mexican consul meets the workers in Canada to monitor employer compliance with the terms of the program. BASOK, *supra* note 210, at 39. The transnational labor organization arrangement might reasonably be understood as serving the same goal at lower cost to the Mexican government. In this regard, however, it is important to note that my proposal (unlike the Mexico-Canada program) relies on the Mexican government to recruit workers but not to enforce their rights once they arrive. Historically, the Mexican federal government has been ineffective as a guarantor of its citizens' rights in migration programs. The Mexican government was supposed to play this role with regard to the *bracero* program, but abuses were legion. GALARZA, *MERCHANTS OF LABOR*, *supra* note 12, at 146, 183–98. The Mexican government was later sued together with the U.S.

## 2. Guest Worker Organizing

As I note in the opening paragraphs of this Article, there are recent models for how migrants might enter the United States as members of labor organizations. Since 2004, both the FLOC, an agricultural workers union concentrated in the Midwest, and the UFW have negotiated collective bargaining agreements protecting H-2A workers. The UFW agreement with Global Horizons, a labor contractor, was only announced in the spring of 2006,<sup>233</sup> and it is too soon to know how it will work on behalf of the nearly 4000 workers it covers.<sup>234</sup> But the FLOC contract went into effect in 2005, and its early experience in representing another 5000 guest workers offers promising outlines of how a transnational labor organization might function.<sup>235</sup> It is FLOC's meeting with workers in Monterrey, Mexico, that I describe in opening this Article.

FLOC's contract with the North Carolina Growers' Association ("NCGA")—the largest employer of guest workers in the United States—dramatically changes the landscape for the H-2A workers it covers. It establishes a hiring system that allots employment slots in order of seniority and, within seniority rank, by union membership.<sup>236</sup> It mandates a

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government for its failure to accurately account for millions of dollars withheld by authorities from *bracero* paychecks and sent to Mexico for distribution to the workers once they returned home. Pam Belluck, *Mexican Laborers in U.S. During War Sue for Back Pay*, N.Y. TIMES, Apr. 29, 2001, § 1, at 1. In the context of the modern Mexico-Canada program, the Canadian government has failed to deliver the full range of rights guaranteed to participant workers by the agreements establishing the program, and the Mexican government again has been unwilling or unable to hold it to its promises. BASOK, *supra* note 210, at 111–14 (“[T]he [Mexican] consulate . . . is unwilling to interfere when workers experience problems with their *patrones*.”); UFCW CANADA NATIONAL REPORT ON THE STATUS OF MIGRANT FARM WORKERS IN CANADA, UNITED FOOD AND COMMERCIAL WORKERS CANADA 3, 9 (2004) (“The [Canadian] government has indicated that consulates of the sending countries and their staffs are responsible for supporting and advocating on behalf of workers, even when that support is not up to the task . . . . The [Canadian] government insists it has no authority . . . to enforce the terms and conditions of the contract.”).

233. See Jerry Hirsch, *California and the West*, L.A. TIMES, Apr. 12, 2006, at C2.

234. *Id.*

235. Karin Rives, *Guest Workers Note Progress*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 29, 2005, at B4.

236. Teófilo Reyes, 8000 “Guest Workers” Join Farm Worker Union in North Carolina, LAB. NOTES, Oct. 2004; Resumen del Acuerdo: Contrato Laboral Entre FLOC y la NCGA 2004–2008 (Summary of the Agreement: Labor Contract Between FLOC and the NCGA 2004–2008) 7–11, 13–16, 28, 50 (document prepared by FLOC, on file with author) (describing the seniority system, the governance system, and the protections against unjust firing and failure to rehire). The priority offered members has been limited in scope by the courts. The contract as originally negotiated mandated that (with the exception of workers specifically requested by a former employer, who are the first to be called) all migrants who were union members would be called back for work in order of seniority before any migrants who did not belong to the union. This provision was later invalidated as a violation of North Carolina's “Right to Work” laws. The current, modified seniority system reflects a more

just cause standard for both firing and refusal to rehire, creates a grievance procedure exclusively available to H-2A workers under the FLOC contract, and gives FLOC the right to oversee recruitment in Mexico.<sup>237</sup>

Most interesting for the purposes of my proposal is the union's new transnational approach. In March, 2005, FLOC opened an office in Monterrey, Mexico.<sup>238</sup> Only time will tell what road blocks this effort faces and whether it ultimately succeeds.<sup>239</sup> But the structure that the union has established and begun to implement is instructive—indeed, inspirational—with regard to the idea of how transnational labor citizenship might be brought to life through the efforts of workers organizations on both sides of the border.<sup>240</sup>

FLOC's Monterrey office carries out three significant functions: enforcing the contract rights of members still in Mexico, particularly regarding seniority for those yet to be called for work; fighting exploitative labor contractors; and, increasingly, serving as the headquarters for the

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limited priority for members. After the specifically requested migrants depart, the remaining migrants are called for work in order of the number of seasons worked since 2000; at each level of seniority (for example, "four seasons worked"), union members are called first, followed by nonmembers. Interview with Brendan Greene & Cástulo Benavides, FLOC staff, in Monterrey, Mex. (May 22, 2006) [hereinafter Greene & Benavides Interview].

237. Resumen del Acuerdo, *supra* note 236, at 7–11, 28.

238. *U.S. Unions' Mexico Office Will Aid Guestworkers*, 19 LAB. REL. WEEK (BNA) 424 (Mar. 31, 2005); Ansley, *supra* note 174; Press Release, FLOC, Office Opening Thursday, March 17 in Monterrey, Mexico (Mar. 17, 2005) (on file with author) [hereinafter FLOC, Office Opening]. Its location is critically important to FLOC, as in Mexico the union is free of North Carolina's "Right to Work" laws and thus able to ask that workers sign FLOC membership cards at the same time that they enroll in the H-2A program. Ironically, FLOC is confident in its judgment that North Carolina's "Right to Work" law does not apply in Monterrey because of an earlier court ruling that went against the union. In the late 1990s, FLOC sued the North Carolina Growers' Association for age discrimination in the H-2A recruitment process. The judge in that case held that U.S. laws such as the Age Discrimination in Employment Act did not apply in Monterrey, Mexico, where the growers did their recruiting. *Reyes-Gaona v. N.C. Growers Ass'n, Inc.*, 250 F.3d 861, 864–65 (4th Cir. 2001). FLOC is operating on the assumption that the same would be found with regard to "Right to Work" legislation. Velasquez, *supra* note 184.

239. There are recent indications that growers are beginning to pull out of the North Carolina Growers' Association in order to avoid the union contract. Kristin Collins, *Farmers Avoid Migrants' Union Contract; Growers Look Outside of N.C. Association to Find Workers*, NEWS & OBSERVER (Raleigh, N.C.), Feb. 13, 2006, at B1 ("This year, the association is down to about 500 farmers [from 1,000 at the time the contract was signed] and will only bring in about 2000 workers [from 10,000 before the contract was signed], director Stan Eury said. He said that if membership dips below 350 farmers, the association will probably shut down.").

240. As another interesting fragment of a potential transnational labor citizenship regime, see the role of the United Food and Commercial Workers Canada in monitoring and ameliorating the treatment of guest workers there through a network of five regional Migrant Worker Support Centers. UFCW CANADA NATIONAL REPORT, *supra* note 232, at 3. Such centers share a number of characteristics with the transnational labor organizations I propose.

union's Mexico-based organizing efforts. In the winter, when migrants have returned to their home villages, FLOC's staff visit the Mexican villages where they have the greatest concentration of members. There they hold house meetings to discuss worker concerns and union strategies, and convene regional gatherings for members to get to know each other across villages, to receive training on contract enforcement, and to elect local representation.<sup>241</sup>

This binational organizing strategy, in which guest workers are labor citizens engaged with their transnational labor organization on departure, while in the United States, and during their return home, provides a model for the membership aspect of transnational labor citizenship. In lieu of an entire network of transnational labor organizations, two or three pilot projects could be founded in heavy migrant-receiving areas of the United States, perhaps in collaboration with worker centers or unions.<sup>242</sup> Parallel pilot institutions would be established in major migrant-sending regions of Mexico, with additional work being done by existing Mexican NGOs and independent unions. These transnational labor organizations would work closely together to defend and expand the labor rights of migrants across the U.S.-Mexican border.

### 3. Cross-border Legal Advocacy

Migrants who move back and forth between countries face special challenges when seeking to use courts or administrative agencies to demand that employers in the United States comply with the law. It is prohibitively difficult to gather physical evidence, interview witnesses, and take deposition testimony across borders.<sup>243</sup> Although individual lawyers have grappled with these challenges for decades, in the past year two experiments with larger-scale solutions have come into being. The Centro de los Derechos del Migrante, Inc. (The Center for Migrants Rights, or CDM) and the Global Workers Justice Alliance extend the reach of U.S. based lawyers into Mexico and Central America. CDM, located in Zacatecas, describes itself as "the first transnational workers' rights law firm" based in central Mexico. Among other functions, it provides support

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241. Greene & Benavides Interview, *supra* note 236.

242. These communities might be selected according to a variety of other characteristics as well, including the presence of locally rooted industries that would be likely to remain in place during an organizing campaign, the existence of workers organizations and unions interested in supporting such an effort, and the strength of the ties of the migrants in that community to an area in the sending country that itself contained institutions in a position to support the effort.

243. See Ansley, *supra* note 174, at 44-45; Fundraising Proposal, Global Workers Justice Project (2005) (on file with author).

to lawyers pursuing workplace justice cases on behalf of migrants, and does outreach to inform the migrants of their rights before departure and after their return.<sup>244</sup> The Global Workers Justice Alliance seeks to establish a network of collaborating advocates in the United States, Mexico, and Guatemala.<sup>245</sup> The Alliance will train these attorneys in the relevant law and bring them into a formal network for the purposes of collaborative representation across borders.<sup>246</sup> These projects reflect a growing recognition that the current single-country framework for the law of the workplace is inadequate to address the realities of transnational workers. They lay the groundwork for a cross-border justice network into which the transnational labor organizations could feed cases and to whose growth and strength they would contribute.<sup>247</sup>

All of the efforts that I outline in this Part suggest the possibility of implementing a partial version of transnational labor citizenship without the participation of the U.S. government.<sup>248</sup> Migrants would thus travel as

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244. See Centro de los Derechos del Migrante, Inc., <http://www.cdmigrante.org> (last visited Mar. 11, 2007); Site visit, Centro de los Derechos del Migrante, Inc., Zacatecas, Mex. (May 24–26, 2006); Centro de los Derechos del Migrante, Inc., Programs, <http://www.cdmigrante.org/Programs.html> (last visited Mar. 11, 2007).

245. See Global Workers Justice Alliance, <http://www.globalworkers.org/programs.html> (last visited Mar. 11, 2007).

246. *Id.*

247. Other potentially important actors in this regard are the sending-country consulates. Some consular offices have staff dedicated to addressing the work-related complaints of their nationals. See, e.g., Consulado General de Mexico en Nueva York, Protección a Mexicanos, <http://www.consulmexny.org/esp/proteccion.htm> (last visited Mar. 11, 2007) (listing a staff member dedicated to “labor and immigrant matters” and promising assistance to Mexicans whose labor rights are violated in the United States). Historically, however, the consuls’ record is poor. Although consuls were assigned a role in resolving *bracero* complaints, they often ignored workers’ claims in order to maintain good relationships with employers. See GALARZA, *MERCHANTS OF LABOR*, *supra* note 12, at 163, 183–98; NGAI, *supra* note 12.

248. Other elements of such a regime—such as cross-border benefits—are also emerging through both public and private efforts. Social security “regularization” is one example. Recently, lobbying by transnational companies has resulted in the United States signing bilateral “totalization” agreements with twenty-one foreign governments (the latest with Mexico), providing that in the limited circumstance where a U.S. company employs U.S. workers in one of those countries, or a foreign company employs its nationals in the United States, the companies are not required to pay into both social security systems, and workers can aggregate credit for time worked in both countries to collect benefits under either one. Soc. Sec. Online, United States/Mexico Totalization Agreement (June 2004), <http://www.ssa.gov/pressoffice/factsheets/USandMexico.htm>.

Increasingly, health insurance plans, too, are available in cross-border forms. Rachel Maguire, U.S.-Mexico Cross-Border Health Insurance: Opportunities for U.S. Insurance Companies, U.S. Dep’t of State (Aug. 10, 2004). Blue Shield of California, for example, offers a plan called “Access Baja” that costs 40–50% less than comparable coverage within the United States, but requires that participants obtain all nonemergency medical care in Mexico. Sonya Geis, *Passport to Health Care at Lower Cost to Patient: California HMOs Send Some Enrollees to Mexico*, WASH. POST, Nov. 6, 2005, at A3. U.S. citizens are eligible for the plan. *Id.* Health Net California has a similar plan, as does SIMNSA, a

labor citizens, even without a special designation as such by the United States. This reflects and reinforces the idea that labor citizenship—unlike “economic citizenship”—is not primarily a status granted by the state, but the product of ground-up collaborative worker action.

## VI. EVALUATING TRANSNATIONAL LABOR CITIZENSHIP

Is transnational labor citizenship so different from our current regime as to be unthinkable? The evolution of transnational nation-state citizenship provides some conceptual scaffolding in this regard.

On the nation-state level, millions of people now reside outside their countries of origin while maintaining economic, political, and cultural ties with home. Although immigrants have lived dual lives for centuries, today’s cheap flights, couriers, phone cards, and internet access make it easier than ever before to have one foot “here” and one foot “there.” The soaring amounts of money migrants send home as remittances and other investments have moved sending-country governments to strengthen their bonds with citizens in exile.<sup>249</sup> As a result, the past few decades have seen an explosion in dual citizenship policies, mechanisms for migrant voting and representation, and financial incentives to encourage the continuing flow of income back home.<sup>250</sup> Noncitizens have also increasingly become active and effective political participants in the countries to which they have migrated.<sup>251</sup> These shifts have been discussed at length by scholars under the rubric of “transnational citizenship.”<sup>252</sup> Although such phenomena have by no means obliterated national boundaries, they have

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Mexican company. Approximately 150,000 California workers have elected such coverage. Sarah Skidmore, *The Mexico Option: Cross-border Health Insurance Is a Hit with Employers and Workers*, SAN DIEGO UNION-TRIB., Oct. 16, 2005, at H1. In the United States, such plans seem largely motivated by private insurance companies’ desire to capture the profits to be had by charging slightly less than U.S. prices for much cheaper medical care provided in Mexico and—most recently—India. A Daily Kos blog entry has offered one critique of the plans. Posting of nyceve, *Blue Shield of Calif. Sends Enrollees to Mexico for Health Care!*, to <http://www.dailykos.com/storyonly/2005/11/6/84017/0490> (Nov. 6, 2005). See also Saritha Rai, *Union Disrupts Plan to Send Ailing Workers to India for Cheaper Medical Care*, N.Y. TIMES, Oct. 11, 2006, at C6 (exploring the backlash against companies sending workers abroad for medical treatment).

In the European Union, however, a more comprehensive (and consumer-driven) transnationally portable health plan has emerged. Since 2004, EU residents can use their European Health Insurance Card to obtain health insurance from the public health system of any other EU country or Switzerland while on a temporary stay there. For details on the plan, see European Health Insurance Card, <http://www.ehic.ie/> (last visited Mar. 11, 2007).

249. Chander, *supra* note 6.

250. *Id.*

251. See *supra* note 84.

252. See *supra* note 6 and accompanying text.

opened up new possibilities for political and economic participation that much more closely mirror the reality of many immigrants than the traditional, one-nation citizenship paradigm.<sup>253</sup>

Although the formal citizenship policies of the world's receiving countries have remained remarkably static in the face of a massive global movement of people, sending countries and migrants themselves have developed new structures and practices that facilitate migrants' simultaneous political engagement in both their country of origin and the land where they reside.<sup>254</sup> Transnational political citizenship, then, models a situation where institutions that reflect cross-border lives have taken shape even as the receiving country's formal conception of citizenship has remained static. Furthermore, transnational political citizenship puts migrants in the role of agents, rather than supplicants or victims. Transnational political citizenship thus usefully suggests that change in citizenship models can be successful even when they are partial, and that they do not always require top-down transformation in formal structures.

At the same time, because transnational political citizenship is by its nature focused on participation, rather than more costly social rights or economic benefits, it neither raises nor addresses some of the zero-sum questions of distribution and exclusivity to which transnational labor citizenship gives rise. In what follows, I turn to those issues in greater detail. I begin by considering whether my choice of citizenship as a framework will inevitably recreate the sort of exclusionary regime I have sought to avoid. The defense mentality of traditional labor unions highlights this concern. By way of response, I examine alternative forms of labor citizenship that have a more open and inclusive approach. Finally, I

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253. With its narrative of migrants who remain vigorously engaged with home-country politics despite years of living elsewhere, transnational political participation also tests the communitarian insistence on presence within the bounded territory as a precondition for rich democracy. *See supra* notes 54–55 and accompanying text.

254. It is important to distinguish the claim that something new is afoot in terms of immigrant political participation from the broader assertion that citizenship is now transnational where once it was rooted in one country alone. Critics of the latter position have argued persuasively that for a century or more immigrants to the United States could properly have been labeled “transnational.” Even at the turn of the last century, immigrants from Europe moved back and forth between countries, forged identities that fused old and new roots, and remained highly engaged with home-country political, economic, and cultural structures through the ethnic media, hometown associations, and cultural groups. *See* Nancy Foner, *What's New About Transnationalism? New York Immigrants Today and at the Turn of the Century*, 6 *DIASPORA* 355, 357–62 (1997). What is different today is a proliferation of formal structures for political participation of emigrants in home-country politics (such as dual citizenship and congressional seats representing the population in exile), on the one hand, and on the other an upsurge of informal (that is, not state-sanctioned) political participation in the United States by new and even undocumented immigrants. Foner, *supra*, at 365–69. *See also supra* note 84.

return to the tension between solidarity and defense that I identify in traditional labor citizenship, and ask whether transnational labor citizenship perpetuates or eases that conflict.

#### A. CITIZENSHIP AS AN EXCLUSIONARY CONCEPT

As I acknowledge at the beginning of this Article, citizenship is a problematic notion. One of its core difficulties is the way its inclusive and emancipatory rhetoric can mask a dangerous reliance on exclusion. Declarations of citizenship are circle-drawing exercises.<sup>255</sup> As Alexander Aleinikoff has noted, “By defining insiders, the concept of citizenship necessarily defines outsiders . . . .”<sup>256</sup> As members establish their privileges in contrast with those who are not members, the idea of citizenship crystallizes in opposition to those who have not and cannot achieve that status.<sup>257</sup> Since Aristotle developed his foundational definition of citizenship, which excluded women, foreigners, and slaves,<sup>258</sup> society after society has proudly proclaimed the universality and inclusiveness of its citizenship framework while continuing to formally and informally exclude significant numbers of its residents—and enormous numbers of nonresidents—from the status and/or the benefits of citizenship. In the United States, “universal” citizenship long excluded women, African-Americans, and other people of color. Although the legal status of citizenship was extended to these groups over time, many continue to experience a diminished or “second-class” version of its privileges.<sup>259</sup> At

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255. See Alexander Aleinikoff, *Citizenship Talk: A Revisionist Narrative*, 69 *FORDHAM L. REV.* 1689, 1692 (2001); Bosniak, *supra* note 23, at 342–43; Ediberto Román, *The Citizenship Dialectic*, 20 *GEO. IMMIGR. L.J.* 557, 568–72, 573–75 (2006); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 *YALE L.J.* 1563, 1574–5 (1996) (reviewing LINDA GORDON, *PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE* (1994); JILL QUADAGNO, *THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY* (1994)). See also Freeman, *supra* note 56, at 52 (“[T]he concept of membership implies the existence of persons who are not members and who are, therefore, excluded from the process of sharing.”).

256. Aleinikoff, *supra* note 255, at 1692.

257. Indeed, they *must not* achieve the status; if they did, it would threaten the meaning of citizenship for many of its holders. See Roberts, *supra* note 255, at 1573–76.

258. Pocock, *supra* note 29, at 33–34.

259. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992); KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989). For discussions of second-class citizenship by virtue of race and ethnicity, see Devon Carbado, *Racial Naturalization*, 57 *AM. Q.* 633 (2005); Lolita Buckner Innis, *Tricky Magic: Blacks as Immigrants and the Paradox of Foreignness*, 49 *DEPAUL L. REV.* 85 (1999); Hope Lewis, *Lionheart Gals Facing the Dragon: The Human Rights of Inter/national Black Women in the United States*, 76 *OR. L. REV.* 567, 618–19 (1997). For discussions of second-class citizenship by virtue of the permanent assumption of “foreignness” for some groups of immigrants, see NGAI, *supra* note 12, at 2 (describing a class of naturalized immigrants who remained “alien citizens,” denied full recognition of

the same time, millions of people physically present inside the United States are formally excluded from citizenship and have no way to legalize their status despite long residence in the country.<sup>260</sup>

Linking a grant of citizenship to work may deepen this exclusionary tendency.<sup>261</sup> As feminist scholars have long pointed out, a scheme that denies full citizenship to those who cannot do paid work excludes large numbers of people, including children, the elderly, the disabled, and those (predominately women) caring for them.<sup>262</sup> In addition, to the extent that many immigrant-heavy jobs such as day labor, construction, and segments of agricultural and industrial work essentially exclude women, it becomes more difficult for women than men to attain transnational labor citizenship. In a transnational labor citizenship regime, this would be partially ameliorated by the fact that freedom of movement across national boundaries would be available to the families of transnational labor citizens as well. But this is only a partial solution, because the nonworking partner's visa is contingent on a continued relationship with the primary visa holder; indeed, this situation might lead to increased dependence and the potential for abuse that has arisen in other derivative-visa situations.<sup>263</sup>

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their citizenship by virtue of their presumed foreignness); Natsu Taylor Saito, *Alien and Non-alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261 (1997); Volpp, *supra* note 31, at 453–55.

260. For some, citizenship's reliance on exclusion would disqualify it as a rallying cry for social change. *See, e.g.*, DE SOUSA SANTOS, *supra* note 26, at 311–12; Donna Baines & Nandita Sharma, *Migrant Workers as Non-citizens: The Case Against Citizenship as a Social Policy Concept*, 69 STUD. POL. ECON. 75, 75, 96 (2002); Rachel Moran, *The Terms of Belonging* (unpublished draft, on file with author).

Others focus their critiques on the way particular citizenship schemes have developed, while retaining their faith in the concept as a whole. Critical race scholars, for example, have detailed the racist foundations of the U.S. citizenship regime, analyzed its disenfranchisement of black voters, and decried its disenfranchisement of black citizens to the substantive benefits of citizenship. *See* Jennifer Gordon & Robin Lenhardt, *Citizenship Talk: Bridging the Gap Between Immigration and Race Perspectives*, *FORDHAM L. REV.* (forthcoming 2007). By and large, however, the remedies they propose are framed in terms of holding citizenship to its promises, rather than of a foundational critique of the concept as a framework. *Id.*

261. Furthermore, because of its focus on work, the transnational labor citizenship proposal does nothing to address the even greater role of national borders in limiting who is eligible for social welfare. *See* Freeman, *supra* note 56, at 50; White, *supra* note 57, at 866, 873–74.

262. *See* SHKLAR, *supra* note 18, at 63–101; Fraser & Gordon, *supra* note 23; Judy Fudge, *After Industrial Citizenship: Market Citizenship or Citizenship at Work?* 60 REL. INDUSTRIELLES/INDUS. REL. 631 (2005); Kessler-Harris, *supra* note 18, at 163; Carol Pateman, *The Patriarchal Welfare State*, in *DEMOCRACY AND THE WELFARE STATE* 231 (Amy Gutmann ed., 1988).

263. Recognizing this danger, in 1994 Congress passed the Violence Against Women Act, which amended the Immigration and Nationality Act to create special provisions by which requirements relating to marriage visas and other immigration benefits are eased for battered spouses once they demonstrate domestic violence. *See* Violence Against Women Act of 1994, Pub. L. No. 103–322, 108 Stat. 1796, 1902 (1994) (codified in scattered sections of 16, 18, and 42 U.S.C.).

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B. ALTERNATIVE FORMS FOR THE LABOR CITIZENSHIP NORM

In response to concerns about citizenship's exclusivity, and in light of traditional labor citizenship's reliance on both union and national borders as a part of its organizing approach, it is worth asking whether labor citizenship can function once it abandons the fortress mentality that has been its underpinning for so long. Can labor citizenship flourish in an open model, founded on the assumption of a constant inflow of new members?

As we have seen, the type of labor citizenship that relies on restricting membership in order to control the price of labor is threatened by a rising influx of workers, because it sees each new migrant as a competitor. But there are other versions of labor citizenship, both within and outside the world of unions. An example of such an approach illustrates the conceptual shift that underlies transnational labor citizenship.

Worker centers are membership-based organizing efforts, most often located in immigrant communities, which seek to defend and expand immigrant workers' rights in the United States.<sup>264</sup> Such centers use a combination of services, education, organizing, and advocacy to establish a baseline of labor protections in the work that their members do. Significantly, membership in most worker centers does not depend on a particular employer-employee relationship. Workers can join independent of the job they hold or the industry in which they work. Through this structure, worker centers reflect the fact that many immigrant workers are willing to, and do, take any available job, without limiting themselves to a particular industry; and that mobility between jobs is high. They accommodate employment patterns where periods of holding two or even three jobs simultaneously, periods of rapid movement between a succession of jobs, and periods of unemployment are irregularly interspersed over the course of a year.<sup>265</sup> And they acknowledge that over time, many low-skilled workers accumulate enough skill and work experience to move into somewhat more stable employment, but that, increasingly, institutional support for such job ladders is lacking.

Worker centers' view of labor citizenship offers an interesting alternative to the perspective of traditional unions. The potential tensions

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264. For a description of the modern worker center model, see generally FINE, *supra* note 73. Worker centers were preceded by other community-based approaches to organizing immigrant workers, including the Workman's Circle and the settlement houses at the turn of the twentieth century. *Id.* at 33-36.

265. For data on this pattern in the Mexican immigrant community, see KOCHHAR, *supra* note 206, at 10-13.

are all there. A new arrival on a day labor street corner where workers have organized to demand a daily minimum wage has every incentive to underbid it.<sup>266</sup> This new worker's presence there could easily be perceived as a threat by members of worker centers and day labor organizations, who work so hard to establish the rules and minimum standards.<sup>267</sup> Indeed, more than any other organizing effort in the United States, the newcomers *are* a direct and immediate threat, not a metaphorical one, to the hard-won gains that worker and day labor centers have eked out on street corners all around the country. Yet rather than seeing the newcomers as competitors, most worker centers would embrace them as potential new members, fellow workers to be informed about the rules and the reasons behind them and invited into the fold.<sup>268</sup> Correspondingly, worker center positions on immigration reflect broad concern for the needs of new immigrants and strong support for ongoing immigration.

One might say that worker centers react this way because—having targeted the newest and most exploited immigrants as their members—they have no choice. But my argument throughout this Article has been that unions that organize in industries where low-wage workers predominate have no choice either, and yet some of them have taken a different route.

Worker centers have shown that even the newest workers are “organizable” in the sense of being interested in coming together to establish and defend basic protections in the workplace. This does not mean that they necessarily have the power to fight for, win, and defend substantial victories in the workplace.<sup>269</sup> But organizing is a long process,

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266. GORDON, *SUBURBAN SWEATSHOPS*, *supra* note 3.

267. A number of worker centers and day labor organizations work with day laborers. *See* National Day Laborer Organizing Network, <http://www.ndlon.org> (last visited Mar. 11, 2007). The results of the first national study of day labor in the United States have just been released. ABEL VALENZUELA, JR. ET AL., *ON THE CORNER: DAY LABOR IN THE UNITED STATES* (2006).

268. This position echoes (although I believe, not knowingly) the position of Bert Corona and La Hermandad Mexicana Nacional in the 1960s and 1970s. Corona repeatedly advocated for the incorporation of undocumented workers into unions and for “an open immigration policy, as far as Mexico was concerned, that did not victimize *mexicanos* because they did not have documents.” GARCÍA, *supra* note 110, at 249. “We understood César’s dilemma but rejected his strategy. We believed that these undocumented farmworkers who were being used to break strikes also had to be organized. Unless we directed ourselves to educate them politically and to organize them, they would always be at the disposal of the growers.” GARCÍA, *supra* note 110, at 287. Referring to UFW staff, Corona recalled: “Some of these people had simplistic answers. They would say, ‘Well, these people are scabs. They should be kicked out, and no more allowed to enter.’ What they didn’t understand was that many of the undocumented could and should have been organized into the union.” GARCÍA, *supra* note 110, at 249.

269. *See generally* Steve Jenkins, *Organizing, Advocacy and Member Power: A Critical Reflection*, 6 *WORKINGUSA* 56 (2002) (elaborating the ways in which worker centers overstate the

with many stages. Workers who become active in fighting for their rights through a worker center, whether by protesting outside an employer's home, establishing a minimum wage on a day labor corner, or advocating for a new law in a city council or state legislature, have begun that process. (In all likelihood, the real beginning came long before, in a home-country cooperative, union or community group.) As these workers change jobs and industries, they bring those skills and their fighting spirit with them. Soon enough, they will end up in an industry where union organizing is ongoing, and they will bring all that to the battle.

Rather than a fortress, this model of labor citizenship evokes the image of a river-fed lake, into and out of which workers flow. The flow is part of the model—it must be, or we will have no model at all. This model rejects the idea that a worker can be categorized as “unorganizable,” or a “strikebreaker,” based on his or her nationality, immigration status, or other characteristics. Instead, it approaches migrants as individuals with the potential to make the decision to stand in solidarity with other workers, wherever they are positioned at the moment. The essential point here is that we must free ourselves from a rigid concept of the organizational *form* of worker representation if we are to realize the *norm* of labor citizenship in a globalized world.

### C. TRANSNATIONAL LABOR CITIZENSHIP AND THE SOLIDARITY/DEFENSE TENSION

I have argued that transnational labor citizenship is better than current alternatives from a union point of view. This is so, first and foremost, because it definitively removes immigration control from the workplace, where it has proven so devastating to labor citizenship, and replaces it with the practice of solidarity. But will the transnational labor citizenship framework, in the end, do a better job of addressing the tensions of labor citizenship than the alternative approaches that unions have tried?

From the U.S. union perspective, the transnational labor citizenship proposal raises the terrifying specter of nearly limitless competition for low-skilled work.<sup>270</sup> But the fear it induces is predicated on the idea that

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importance of consciousness raising efforts and fail to pay sufficient attention to their members' actual social power).

270. Sociologist Paul Johnston has argued that unions should not be so worried about absolute numbers of workers in the labor market. Johnston, *supra* note 77, at 71 n.1 (“It is interesting to consider . . . that the only break-through in private sector U.S. labor organizing on a scale comparable to that which unions hunger after today came not in a tight labor market, but rather in the Great Depression. Similarly, during a short-lived period of success in immigrant worker organizing of the late 1980s and

we do not already live in such a system. We do, though, and worse, because today open labor competition is distorted by the undocumented status of millions of the competitors. Transnational labor citizenship will bring more people into the job market, but it may be able to restructure fundamentally the terms on which those jobs are offered.<sup>271</sup> Transnational labor citizenship definitively resolves the exclusion/inclusion conflict in favor of inclusiveness. The labor movement would pledge its solidarity with *all* newcomers, however many there were and whenever they came; and with a new mutuality, those newcomers would pledge their solidarity in return.

Far from an abdication of the core principles of labor citizenship, this proposal is a call for their intensive application to a world of massive migration. Transnational labor citizenship would represent both an acknowledgment of the inevitability of an ongoing flow of migrant workers and a method for the steady incorporation of those workers into the fold of labor. It would bring labor migrants into legal status *and* into an immediate relationship with labor organizing efforts, two moves that have the potential to dramatically challenge conditions of work at the bottom of the labor market. Transnational labor citizens would arrive in the United States a step ahead of all other migrants in terms of their relationship to the labor movement: they would already be members of a labor organization, and would have committed to the core labor citizenship tenet of solidarity as a condition of their ability to work. By committing union resources to the defense of those workers' rights (as an essential part of the defense of all workers rights) and by developing ladders from transnational labor

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early 1990s, low-wage labor markets were awash in unemployment. In such circumstances, social movement unionism has generated political resources able to overcome the challenge of high unemployment.”). An approach that drew all migrants into a workers organization before they even entered the country would be an extraordinary launching pad for a renewed spurt of organizing along these lines.

271. It is important to remember, though, that some would-be migrants would still be excluded by this system: those who do not agree to, or later do not comply with, the solidarity requirements of transnational labor citizenship. It is worth considering whether their number will be sufficient to generate a new market in illegal labor. Scholars have argued that the growth of legal markets facilitates the development of illegal markets in the same commodity. *See, e.g.,* Chantal Thomas, *Disciplining Globalization: International Law, Illegal Trade, and the Case of Narcotics*, 24 MICH. J. INT'L L. 549, 553–55 (2003). Although immigration is not exactly a market in people (as slavery, tragically, was), it shares some of the same characteristics. The argument that legal immigration programs have paved the way for an increase in illegal migration has been made in the context of the *bracero* program. Philip Martin, *Guest Worker Programs for the 21st Century*, BACKGROUND (Ctr. for Immigr. Stud., Wash., D.C.), Apr. 2000, at 1. In the current era, the communities and networks established by previous legal migrants create social capital that continues to draw subsequent undocumented migrants over time. Douglas S. Massey & Kristin E. Espinosa, *What's Driving Mexico-U.S. Migration? A Theoretical, Empirical, and Policy Analysis*, 102 AM. J. SOC. 939, 957, 963 (1997).

organizations to full union membership, unions would create a permanent and continual path from “new migrant” to “organized worker,” and put themselves in a strong position to maintain labor citizenship for all workers in the country—not in spite of immigration but precisely because of it.

In addition, the practice of transnational labor citizenship has the potential to smooth the road to the integration of these newcomers into the political community of the United States. As I discuss in Part III, unions have a vibrant history of engaging immigrants in political participation in this country, both on the level of gaining formal citizenship and, often long before that is possible, with regard to effective involvement in the process of making change in their communities. Transnational labor organizations would be well-positioned to launch coming generations of migrants onto the path of union membership and full political participation.

## VII. CONCLUSION

In a context of fluid transnational migration, the traditional approach to labor citizenship is unable to achieve the goal of providing good jobs in this country. A guest worker program is no solution. In the end, the problem is that broader guest work programs position guest workers outside the realm of labor citizenship. The transnational labor citizenship I propose here is a response to these problems. It inevitably represents a partial and contradiction-ridden approach to a complex issue. But it has potential as a first step toward addressing the dilemmas of decent work in a globalizing world.

Unions cannot change rules about national citizenship (although they can try). They cannot themselves hold workers back at the borders (although they have tried that too). Their efforts to shift the border into the workplace have undermined labor citizenship at every turn. Wherever labor draws the line dividing those workers with whom it seeks solidarity from those against whom it defends—be it between white workers and African-Americans, between citizens and immigrants, or between those present within the United States by a certain date and those yet to come—it brokers an unstable and ultimately destructive compromise. By its nature, such line-drawing creates a group of outsiders who employers can and will use to undermine the benefits won through the exercise of labor citizenship. History is thick with examples of unions that have turned their back on a group of workers only to see those outsiders bussed in to break strikes or simply hired to replace union workers, breaking the union in the process. Line-drawing undermines the only real protection from competition that

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unions will ever have, the broad solidarity that comes from understanding all workers as potential labor citizens.

What *can* unions do? They can reject the idea that labor citizenship is a fortress and see it instead as a pool of water fed by a spring, defined, and indeed kept fresh and alive, by the constant flow of new workers. They can recognize that the best insurance against unfair competition comes not from the deployment of immigration law but from worker solidarity. And they can work toward a policy of transnational labor citizenship that views migrants as potential labor citizens from the start, and indeed structures them as labor citizens before they even enter the country.

This Article chronicles a labor movement slowly breaking open under pressure from the globalizing world. The same stresses reverberate in the arena of national citizenship. As with most breaking, there is a great deal of pain and very little certainty. But the rupture points the way toward the future of work, of the law that governs work, and of efforts to make work better for workers. The time has come to engage.