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DISADVANTAGED BY DESIGN: HOW THE LAW INHIBITS AGRICULTURAL GUEST WORKERS FROM ENFORCING THEIR RIGHTS

Michael Holley*

I. INTRODUCTION

In the last few years, growers have begun to demand more visas for foreign guest workers who perform seasonal agricultural labor in the United States. Almost every year since 1996, the growers' lobby has pushed legislation that would streamline procedures for importing seasonal workers under the federal H-2A agricultural guest worker program ("H-2A program"). These proposals, if passed, would have increased twenty-fold the number of workers admitted into the United

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1. The term "grower" is used throughout this Article to refer to the whole host of types of agricultural employers, including everything from corporate farming to the individual proprietorship farm.

States each year under the H-2A program. Even without such amendments, the use of H-2A workers has tripled from 1995 to 1999.

Under the current H-2A statutes and federal regulations, H-2A workers have, at least on paper, substantive rights superior to those of domestic farmworkers. For example, H-2A workers are entitled to higher rates of pay than domestic workers, free housing, and free transportation to their job site. As one employer of H-2A workers observes: "'[i]t's not cost-efficient' [...]" Notably, many of the pro-grower legislative proposals would hardly affect these substantive rights. If H-2A workers are not cost effective, why are more and more growers ready to jump through bureaucratic hoops to import H-2A workers? There are two obvious possibilities: (1) there is a domestic labor shortage, causing wages to rise such that H-2A workers will actually be cost-effective, or (2) H-2A workers do not cost as much as it appears on paper. A third possibility—that growers are ignoring the bottom line—is highly unlikely in a business as competitive as agriculture.

Over the past few years, several empirical studies, including a 1997 study by the U.S. General Accounting Office, have shown that there is no shortage of farmworkers in the United States. At the peak of the employment season about forty-four percent are jobless. The real wage for farmworkers has continued to drop over the last two decades, even as the export of labor-intensive crops has increased. These studies and statistics seem to belie the first proposal.

4. See Susan Ferriss, Mexico's Fox to Push Fresh View of an Old Problem: Undocumented Workers, COX NEWS SERV., July 26, 2000 [hereinafter Ferriss, Mexico's].
5. See infra note 135 and accompanying text.
7. See Fagan, Compromise, supra note 2; Fagan, Contentious, supra note 2.
10. See GAO Report, supra note 8, at 96-97; Steven Greenhouse, U.S. Surveys Find Farm Worker Pay Down for 20 Years, N.Y. TIMES, Mar. 31, 1997, at A1; Daniel Rothenberg, Agriculture's Cynical Answer to Farm Workers' Poverty, CHI. TRIB., Nov. 4, 1999, at 29 [hereinafter Rothenberg, Agriculture's]
This Article investigates the second proposal—that H-2A workers do not cost as much as they appear on paper. This Article proposes that H-2A workers are currently desirable because they are especially vulnerable. That is, H-2A workers are desirable because, as a practical matter, they cannot hope to enforce their relatively generous substantive rights. Federal statutes, regulations and case law have helped to render H-2A workers vulnerable, inhibiting them from enforcing their employment rights guaranteed by their H-2A contracts.

This Article takes the following approach. Section I briefly surveys the history of seasonal farm labor in the United States, highlighting the fact that growers have repeatedly been able to use the law to prevent farmworkers from gaining compensation commensurate with the difficulty of their labor. Section II looks specifically at the current H-2A agricultural guest worker program, showing that the administrative and judicial remedies available to H-2A workers are so inadequate that H-2A workers are even more vulnerable to workplace abuses than are domestic farmworkers. Finally, Section III suggests that, in order for the federal government to satisfy provisions of both the H-2A statute and the North American Free Trade Agreement, the federal government must, at the very least, put H-2A workers on an equal footing with domestic workers in terms of their ability to enforce their employment agreements.

II. A GENEALOGY OF AMERICA’S LOW-WAGE FARMWORKER

"[H]e’s as free as a bird of the air."—A grower describing the life of a migrant farmworker.12 "When you leave home . . . . you are nothing, nobody."—A migrant farmworker describing the life of a migrant farmworker.13

The starting point for analyzing farmworker issues is the recognition that seasonal field work is generally undesirable work.14 Farm work is physically taxing, requiring the day-long performance of repetitive motions while stooping, kneeling, walking or crawling. It is also extremely dangerous: farm work consistently ranks with mining and construction work as one of the most dangerous occupations in the

Exposure to pesticides is common in the fields, yet little is done to protect farmworkers from those hazards. Plus, most farmworkers must travel from their homes to perform their work, living in temporary, ramshackle shelters during the work season. Finally, field work is sporadic—it is difficult to predict when particular work seasons will begin and it is uncertain how long they will last. Farmworkers usually manage to get farm work for just twenty-three to twenty-five weeks per year.

Today, farm work comprises just two percent of all employment in the United States. Other occupations, not associated with farm work, are more appealing to job-seekers since they are not so arduous, dangerous, do not require long absences from home, and provide a steady, reliable income. Still this quantum of labor is indispensable to agribusiness because certain tasks, such as harvesting delicate fruits and vegetables, require human skills, hands and care.

In fact, at harvest time, the demand for this temporary human labor

15. See Donna Glenn, Danger Down on the Farm, COLUMBUS DISPATCH, Nov. 28, 1999, at 1A; see also Raul Hernandez, Danger on the Farm, SCHRIPS-MCCLATCHY W. SERV., Aug. 8, 2000, available at http://shns.scripps.com/cgi-bin/webed.show_story?pk=FARMDANGERS-08-08-00 (last visited Feb. 2, 2001) (adding that farming accidents are under-reported by about 30% to 100%).

16. See Viviana Patiño, Migrant Farm Worker Advocacy: Empowering the Invisible Laborer, 22 HARV. C.R.-C.L. L. REV. 43, 47-48 (1987); Lela Klein, Labor Camps Deny Visitors to Migrant Farm Workers, NEWS & REC. (Greensboro, N.C.), Feb. 24, 2000, at A11 (citing a 1999 report by the Institute for Southern Studies that shows work conditions on many farms include exposure to dangerous pesticides); Victoria Riskin & Mike Farrell, Profit on the Backs of Children, CLEVELAND PLAIN DEALER, Oct. 16, 2000, at 9B (describing exposure to pesticides). This conclusion regarding the lack of protection is also supported by the findings of Scott Cook, a law student at the University of Texas, who reviewed the files of the Texas Department of Agriculture ("TDA") in fiscal year 1999. See Interview with Scott Cook, Law Student, University of Texas (Oct. 29, 2000). Cook reviewed the files for all reported cases of pesticide exposure except for Region 4, the Dallas area. See id. He ascertained that the TDA issued just a single administrative penalty, of six hundred dollars, for exposing an agricultural field worker to pesticides. See id. By far, the most common response by the TDA to a case of wrongfully exposing a worker to pesticides was to merely issue a warning letter, rather than to impose an administrative penalty. See id.


18. See NATIONAL AGRICULTURAL WORKERS SURVEY, supra note 9, at 24; see also Yzaguirre & Davis, supra note 17, at B5 ("Most migrant workers spend half the year moving from crop to crop.").

19. See ROTHEMBERG, HANDS, supra note 13, at 62.


21. See ROTHEMBERG, HANDS, supra note 13, at 12.
tends to be extraordinarily high because growers produce perishable products whose values are dictated by a volatile commodity market. A season’s work and investment can be rendered worthless overnight by a sudden change in market expectations or in the weather. This uncertainty makes the grower want to get all the goods to market as soon as possible. As a result, the grower demands farm labor on the shortest possible notice and in the greatest possible quantity (and also, correlative, for the shortest period of time possible). For example, in Texas, before cotton production was firmly tied to eastern commodity markets, the cotton harvest regularly lasted ten weeks. But once cotton was harnessed to those markets, the timing of the marketing became of paramount importance and so Texas cotton farmers insisted on harvesting their crop in the first two weeks of the ten week harvest season, thereby increasing the demand for field workers by five hundred percent. Assuming that growers would like to harvest their crops on the first day possible, theoretically, the demand for farm labor is nearly unlimited.

In practice, though, how is this potentially unlimited demand for difficult, dangerous, short-term labor actually satisfied? Many workers travel the country following the usual harvests and looking for work (“freewheeling”), while many others are recruited by labor contractors in close proximity to their homes—usually in home base states such as Texas, Florida and California—to work a certain season. Still others are recruited by labor contractors at the United States-Mexico border where they enter the country, some legally, others illegally, to obtain work. In any case, the grower usually must manage to attract a significant number of workers to his fields from hundreds or thousands of miles away in order to work during an unpredictable and relatively brief time period. All this must be done despite the language barrier, the farmworkers’ usual lack of a stable address or telephone number, and the farmworkers’ financial situation.

It would appear that there are two types of methods a grower uses.
to get the right number of workers to the fields at the right time to perform this difficult, dangerous, and sporadic field work: (1) by offering a premium wage and/or benefits (as done with teachers, roughnecks and many construction workers, for example), or (2) by recruiting workers who are effectively constrained to accept work regardless of the conditions.29 Usually when an unskilled worker obtains a permanent, full-time job working at minimum wage near his home in an air conditioned fast food restaurant, for example, it would take something extra to get that same person to travel far from home to perform taxing physical labor for weeks on end: either the employer offers extra benefits, or the worker must be extraordinarily vulnerable.30

A quick look at the actual circumstances of farm work makes it evident that growers have not offered premium benefits. Farmworkers are paid at a rock-bottom rate: less than half the hourly wage rate of nonsupervisory workers in the private non-farm sector.31 While such non-farmworkers are paid on average $12.78 per hour, farmworkers are either paid an average of $6.18 per hour, or slightly higher than the federal minimum wage, which is lower than some States’ minimum wage.32 As explained later on, these minimal wages often must compensate seasonal farmworkers not only for their hourly labor, but also for travel time, expenses, and housing costs while performing that job. Moreover, farmworkers manage to capture very little of the surplus value of their labor. For example, the United Farmworkers emphasized, when recently campaigning to unionize strawberry workers, if Americans paid just five cents more for their two-dollar pints of strawberries, the field workers’ wages could be doubled.33 Americans only spend approximately eight percent of their income on food and alcohol, easily less than half of any other nation in the world, besides the

29. See Rothenberg, Hands, supra note 13, at 72.
30. The leading recruiter of H-2A workers has stated: “‘Nobody wants to do this kind of work [i.e., agricultural] anymore’ . . . . ‘Burger King can’t find people to flip burgers for six bucks an hour, and that’s indoor work and it’s a lot less physically demanding.’” Ned Glascock, Foreign Labor on Home Soil, NEWS & OBSERVER, Aug. 29, 1999, at IA.
31. See CRS REP., supra note 2, at 1.
32. See id. Ten states and the District of Columbia have set a minimum wage which exceeds the federal minimum wage of $5.15/hour: Washington and Oregon at $6.15; Connecticut, Rhode Island and Washington DC at $6.15; Massachusetts at $6.00; California and Vermont at $5.75; Alaska and Delaware at $5.65; Hawaii at $5.25. See Robert D. Hershey, Jr., The Cost of Not Living on a $5.15 Minimum, N.Y. TIMES, Sept. 19, 2000, at C1.
French who spend about sixteen percent. Finally, in the labor-intensive sector of fresh fruits, vegetables, and horticulture, U.S. agribusiness nearly quadrupled its exports between 1986 and 1997. Therefore, it is evident that both agribusiness and consumers are benefiting from the farmworkers’ low wages.

Looking at the actual circumstances of farm work makes it evident that historically growers tend to rely on non-economic coercion to get farm work done, rather than bargaining at arm’s length for the labor needed. For example, in antebellum America, slaves were forced to do most of America’s farm work. Following the Civil War, to continue tying workers to the land which they worked for their creditors’ (formerly, “owners”) profit, debts sanctioned by law replaced the legal institution of slavery. With the advent of national markets for agricultural commodities in the late 19th century, growers no longer

34. See Balancing Acts, supra note 14; see also ROTHENBERG, HANDS, supra note 13, at 59.
35. See Obledo, supra note 11.
37. See Jim Chen, Of Agriculture’s First Disobedience and Its Fruit, 48 VAND. L. REV. 1261, 1277 (1995) (“Slavery, simply put, was American agriculture’s original sin.”).

After the Civil War, the mobilizing mechanism that produced an adequate supply of farm labor and allowed the continuance of profitable, large-scale agrarian enterprises was tenant farming, or sharecropping. In sharecropping, the tenant farmer (i.e., sharecropper) was allowed to farm land owned by someone else in return for a share of the revenue obtained from the sale of his crops. Under this system, at the beginning of the growing season the landowner provided the sharecropper with the seed and other materials necessary to farm the land. The sharecropper would pay the landowner for the seed and other materials he was provided with when the crops were sold at the end of the growing season. Because the sharecropper owed the landowner a debt for the entire growing season, this arrangement effectively obligated the sharecropper to work on the land for the entire crop season. A second factor that allowed the continuance of the plantation economy in the post-Antebellum period was the absence of alternative labor opportunities for unskilled labor. This was especially true for blacks, who knew they would face discrimination in the North were they to migrate from the South in search of better job opportunities.

Id. at 52.
found it profitable to have tenant farmers living on "their" land year round—it became cheaper to get large numbers of workers to come work for short bursts when needed.\(^{39}\) A pool of landless peasants, who migrated to do seasonal work, gradually replaced the sharecropper population.\(^{40}\)

To manipulate this new class of landless peasants, some nineteenth century growers used vagrancy laws to force individuals to do farm work when wages alone were not high enough to entice them.\(^{41}\) They also convinced their county governments to institute pass systems, which prevented workers from leaving a particular county to work elsewhere when higher wages were beckoning.\(^{42}\) Sometimes they would use armed force, such as shotguns, to drive workers away when they complained about being shorted on work or wages.\(^{43}\) These so-called "shotgun settlements" were effected either by the grower himself, or by enlisting the aid of the local sheriff.\(^{44}\)

In many ways, the New Deal forms the cornerstone of the modern era in American history. Unfortunately, the New Deal did not eradicate the systematic abuses of farmworkers, but rather enshrined it in new institutions. The New Deal legislation effectively "institutionalized the second-class status of agricultural laborers,"\(^{45}\) because it explicitly denied farmworkers important substantive rights that it granted to all other workers.\(^{46}\) For example, farmworkers were deprived of the right to collective bargaining under the National Labor Relations Act and the right to minimum or overtime wages under the Fair Labor Standards Act.\(^{47}\) As Professor Mark Linder has shown, these farmworker exclusions were the product of racial discrimination—primarily against African-Americans—as New Dealers agreed to write these exclusions into legislation in order to win support from Southern democrats.\(^{48}\) These

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39. See MONTEJANO, supra note 12, at 175-77.
40. See id. at 175-76.
41. See id. at 178.
42. See id. at 205.
43. See id. at 203.
44. See MONTEJANO, supra note 12, at 202-03.
45. ROTENBERG, HANDS, supra note 13, at 205.
46. See Linder, supra note 38, at 1335.
47. See id. at 1336 & n.12.
48. See id. at 1336; Laurence E. Norton II & Marc Linder, Down and Out in Weslaco, Texas and Washington, D.C.: Race-Based Discrimination Against Farm Workers Under Federal Unemployment Insurance, 29 U. MICH. J.L. REFORM 177, 191-98 (1995-96) (arguing that in order to gain Southern Congressional votes, New Deal legislation purposely excluded farm workers by allowing discrimination of African Americans in the South to continue). Of course, in regions like Texas, this race discrimination would have been aimed at Latinos. See MONTEJANO, supra note 12,
exclusions had the intended impact: while farmworkers earned seventy percent of the industrial wage rate in the early 1900s, they earned just twenty-five percent of that rate by 1940.49

During the New Deal era, the federal government did try to take some responsibility for farm labor. The federal government created employment offices, which aimed to bring job-seekers in contact with labor-seekers.50 It also built labor camps, where workers could live for a nominal amount.51 Growers opposed the housing project because the farmworkers living at these camps were unusually well-positioned to bargain with employers (i.e., they could not be evicted, could hold out for better wages, and were not tied to a certain employer).52 That is, growers complained about governmental involvement insofar as it improved conditions for workers.53 However, growers did seek federal intervention when the federal government decided to supply desperate Mexican workers. From World War II to 1964, the federal government administered the bracero program—the United State’s most ambitious guest worker program to date.54 While the bracero program was used to import a peak of 400,000 Mexican workers per year,55 another guest worker program, known as the H-2 program, was initiated in 1943 to import Caribbean workers to the East coast in much smaller numbers.56

The official purpose of the bracero program was to bring in Mexican workers to alleviate the declared shortage of domestic workers during World War II,57 but not to displace domestic workers.58 However,
the program continued after the troops returned home, and in 1951 Congress passed Public Law 78, which re-established the bracero program and reiterated its bedrock principle: to avoid causing adverse effect on domestic workers or their working conditions.59 Therefore, the law included certain safeguards. Growers had to (1) offer domestic workers the same work at the same terms as braceros; (2) certify that they could not get domestic workers for the job before importing braceros; and (3) obtain the Labor Department’s approval of the “prevailing wage,” being paid to braceros.60

These safeguards sounded good on paper, but application was another matter. In his comprehensive study of the bracero program, Ernesto Galarza concluded that “statements of policy had little connection with the real state of affairs.”61 For example, the Labor Department had so few statisticians it could not determine what the actual “prevailing wages” were for farmworkers, so it ended up simply adopting the growers’ representation of what the proper wage should be.62 The Department’s “prevailing wage” turned out to be “only an official veneer laid upon [grower] association[s’] wage fixes.”63 Not surprisingly, the net result of the bracero program was a depression of agricultural wages and the displacement of domestic workers.64 From 1951 to 1957, the percentage of braceros, comprising the total seasonal farm labor force, more than doubled from twelve percent to twenty-eight percent.65 In some regions, braceros comprised almost one-hundred percent of the seasonal workforce.66 In short, the bracero program, like the New Deal exclusions, had its expected effects on domestic farmworkers.67

Why did growers shift so quickly from domestic workers to

59. See id. at 72-73, 199.
60. See id. at 78, 130-31, 134, 136-37, 163.
61. Id. at 218.
62. See id. at 121, 135-42, 199.
63. GALARZA, supra note 58, at 136.
64. See id. at 199-200, 203.
65. See id. at 94.
66. See id. at 94-95.
67. See id. at 199-200. Of course, there is nothing necessarily wrong with transferring jobs from Americans to Mexicans. It represents a much needed transfer of wealth. Growers did not overlook their own generosity, promoting the bracero program as one designed to educate and financially assist Mexicans. See GALARZA, supra note 58, at 229-30. But the problem is that this transfer of wages from American workers to Mexican workers was being made solely in order that growers could capture a greater percentage of the profits from the workers’ labor. In other words, it was being made in order that, whichever workers ended up getting the jobs available, those workers would be guaranteed to be working in conditions far inferior to anyone else’s in the United States.
braceros? According to growers, the braceros were more dependable than domestic workers, but it seems that “dependable” was merely a euphemism for “vulnerable.”

Braceros were so vulnerable, and therefore dependable, because they had paid bribes and fees with borrowed money to get the chance to work in the United States, they desperately needed wages, they were isolated in a labor camp in a foreign country where they did not speak the predominant language, and they were accustomed to living under an authoritarian regime. Growers profited from this vulnerability by importing an excessive number of braceros, giving them minimal work, over-charging them for meals of the poorest quality, and housing them in squalid quarters. All of these violations effectively meant more money in the growers’ pockets.

Looking back, a bracero, who is happy to have had the opportunity to support his family by working in the United States, describes his experience: “They treated us like animals . . . . But, as a bracero, you knew you couldn’t complain.” This is the most fundamental expression of the growers’ advantage in using braceros: a bracero knew he could not complain. If he complained, he would be fired without any practical recourse, blacklisted and sent home with debts still owing. As Galarza’s study shows, due to the many physical and procedural impediments to filing a complaint, braceros rarely even lodged them, much less prevailed. Although violations were widespread, only one in every 4,300 braceros officially voiced a grievance.

The bracero program ground to a halt in 1964. Upon its demise the Chicano movimiento and the union organizing efforts of the United Farmworkers and Texas Farmworkers Unions followed. These social

68. See id. at 237.
69. See id. at 86, 196; Rothenberg, Hands, supra note 13, at 37.
70. See Galarza, supra note 58, at 226.
71. See id. at 183-97.
72. Rothenberg, Hands, supra note 13, at 38.
73. See Galarza, supra note 58, 197-98 (describing the steps in a bracero’s grievance “process”: 1) complain to the field man for the growers’ association; 2) next, move on to the association manager; 3) then speak to the local Employer Service Representative representatives (usually available only via the association or employer); 4) then complain to the overworked Mexican consul; and 5) complain to the Labor Department for a process which offered no right to present evidence or participate.) In 1959, the Labor Department stated: “[T]he first responsibility for compliance with regulations is upon the growers themselves. Then the state has authority, and the Federal Government should be the last to take action.” Id. at 169.
74. See id. at 183.
75. See Eaton, supra note 54, at 756-57.
movements reaped some gains for farmworkers. By 1966, most farmworkers were partially incorporated into the Fair Labor Standard Act and therefore covered by its minimum wage provisions. In 1963, in order to give federal protections to farmworkers, Congress passed the Farm Labor Contractor Registration Act, and then strengthened it in 1974. Since this Act proved ineffective, Congress replaced it with a somewhat stronger Migrant and Seasonal Agricultural Workers' Protection Act ("AWPA") in 1983.

AWPA gave farmworkers important rights vis-à-vis their employers, which were needed in their line of work and due to their susceptibility to exploitation. Today, AWPA continues to provide farmworkers with many rights. First, it provides them access to federal court, by creating federal question jurisdiction over such claims. Second, its venue provision gives farmworkers the ability to establish proper venue in any court where personal jurisdiction exists over the defendant. Third, its detailed and broad anti-retaliation provision protects farmworkers from retaliation. Lastly, it gives farmworkers

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80. See Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985) (stating the purpose of federal farmworker legislation is to "deter and correct the exploitive practices that have historically plagued the migrant farm labor market").
82. AWPA includes a special venue provision: "Any person aggrieved by a violation of this chapter . . . may file suit in any district court of the United States having jurisdiction of the parties . . . without regard to the citizenship of the parties . . . " 29 U.S.C. § 1854(a). This provision has regularly been interpreted as conferring venue coextensive with personal jurisdiction. See Stewart v. Woods, 730 F. Supp. 1096, 1097 (M.D. Fla. 1990); Lozano v. Gonya Farms, Inc., No. M-89-119, slip op. at 4 (S.D. Tex. Apr. 11, 1990) (order denying Defendant's Motion to Dismiss or Transfer)(declaring venue proper under 29 U.S.C. § 1854(a), which "codifies the significant policy interests behind insuring that migrant workers have access to the judicial system").
83. See 29 U.S.C. § 1855(a). The prohibited activities are:
No person shall intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against any migrant or seasonal agricultural worker because such worker has, with just cause, filed any complaint or instituted, or caused to be instituted, any proceeding under or related to this chapter, or has testified or is about to testify in any such proceedings, or because of the exercise, with just cause, by such worker on behalf of himself or others of any right or protection afforded by this chapter.
explicit substantive rights governing workers' recruitment, employment, housing, and transportation.\textsuperscript{84} Substantively, AWPA basically requires growers to make their promises in writing and then fulfill them; and it also requires growers, who provide housing or transportation, to ensure that those services meet minimum health and safety standards.\textsuperscript{85} Furthermore, beginning in around 1974, legal aid programs funded by the federal Legal Services Corporation began employing more advocates who specialized in farmworker issues.\textsuperscript{86} In the eyes of at least one contemporary grower: "There are a lot of new laws that have created an incredible amount of rights for farmworkers."\textsuperscript{87}

With all of these new rights, post-AWPA farmworkers could be depended on to make more complaints than their predecessors.\textsuperscript{88} But these rights have not been asserted so often as to put farmworkers' employment conditions on a par with those of other unskilled laborers in the United States. As one lifetime advocate remarks, "the situation is not much better now than it was in the 1960s."\textsuperscript{89} Today, seventy-three percent of farmworkers earn less than $10,000 per year,\textsuperscript{90} placing sixty-one percent of farmworkers living below the poverty level.\textsuperscript{91} Those who work exclusively in agriculture average under $6,000 per year in wages.\textsuperscript{92} As of 1998, more than ten percent of farmworkers did not get paid the minimum wage.\textsuperscript{93} A recent investigation "found an astonishingly high risk of heart disease, stroke, hypertension, diabetes and obesity" among the migrant farmworkers studied.\textsuperscript{94} Despite this problem, farmworkers' use of needs-based social services is minimal, at just seventeen percent.\textsuperscript{95} In fact, despite the "incredible amount of rights" that farmworkers have gained and despite the boom in the export of

\begin{itemize}
\item \textsuperscript{84} See 29 U.S.C. §§ 1821-1844 (1994).
\item \textsuperscript{85} This is an extreme simplification of the substantive provisions of AWPA.
\item \textsuperscript{86} See Varner, supra note 78, at 436; Alan W. Houseman, Political Lessons: Legal Services for the Poor—A Commentary, 83 Geo. L.J. 1669, 1684 (1995). See generally Warren E. George, Development of the Legal Services Corporation, 61 CORNELL L. REV. 681 (1976) (discussing the Legal Services Corporation Act of 1974 and efforts to provide legal council for those who were otherwise unable to obtain sufficient legal services).
\item \textsuperscript{87} ROTHENBERG, HANDS, supra note 13, at 88.
\item \textsuperscript{88} See Varner, supra note 78, at 436.
\item \textsuperscript{89} ROTHENBERG, HANDS, supra note 13, at 206; see HAHAMOVITCH, supra note 51 at 13.
\item \textsuperscript{90} See National Agricultural Workers Survey, supra note 9, at 46.
\item \textsuperscript{91} See id. at 39.
\item \textsuperscript{92} See Hollis Pfitsch, Guestworker Proposal Threatens All Workers' Rights, SEATTLE TIMES, Sept. 27, 2000.
\item \textsuperscript{93} See National Agricultural Workers Survey, supra note 9, at 33.
\item \textsuperscript{94} Still a Harvest of Shame, S.F. CHRON., Dec. 15, 2000, at A34; see also Brian Melley, Farm Scene: Study Finds Many Farm Hands in Poor Health, ASSOC. PRESS, Nov. 28, 2000.
\item \textsuperscript{95} See National Agricultural Workers Survey, supra note 9, at 41.
\end{itemize}
labor-intensive agricultural products, farmworkers' real wages have dropped by twenty to twenty-five percent over the past two decades, falling farther behind non-farm sector wages.96

The downward spiral is partly the consequence of the continued handicaps that federal law imposes on farmworkers. Farmworkers are the only statistically significant group of workers that remain excluded from FLSA’s overtime provisions,97 and they also remain deprived of the right to engage in collective bargaining.98 Farmworkers' increasing poverty is also a reason why growers have managed to keep using desperate Mexican and Central American workers en masse by illegally hiring undocumented workers even after the discontinuation of the bracero program.99 In 1986, Congress approved an amnesty for seasonal workers, which allowed approximately 1.2 million undocumented workers to become legal permanent residents.100 This number of workers comprised about thirty-one to fifty percent of the nation's farm workforce at that time.101 However, this “fix” did not last for long. Upon gaining legal status, farmworkers tend to switch to safer, steadier and less arduous work.102 Also, because most farmworkers do not engage in field work after the age of forty-four, most of the workers amnestied in 1986 are, in the year 2000, already reaching the end of their work life as farmworkers.103 It is estimated that roughly forty to fifty percent of today’s seasonal farmworkers are undocumented.104

96. See Greenhouse, supra note 10, at A1; Rothenberg, Agriculture’s, supra note 10, at 29.
97. See Linder, supra note 39, at 1335.
99. See Philip Martin, Guest Worker Programs for the 21st Century, BACKGROUNDER (Center for Immigration Studies), Apr. 2000, at 2 [hereinafter Martin, Guest Worker].
101. See Martin, Guest Worker, supra note 100, at 2; CRS REP., supra note 2, at 2.
103. See CRS REP., supra note 2, at 5.
104. See NATIONAL AGRICULTURAL WORKERS SURVEY, supra note 9, at 22 (reporting fifty-two percent of farmworkers as being undocumented); Martin, Guest Worker, supra note 99, at 2 (about fifty percent of farmworkers being undocumented); Marcus Stern, Lobbying on Guest Workers Bears Fruit: Growers Win Backing of Former Opponent, SAN DIEGO UNION-TRIB., Mar.
Are these undocumented workers necessary to get the crops picked? Statistics say “no.” A recent study shows that, even in July, when the demand for farm labor is at its peak, only fifty-six percent of farmworkers were employed. From 1994 to 1998, a period during which the unemployment levels for all other Americans decreased, the unemployment level for farmworkers remained essentially unchanged. Meanwhile, there was a decrease in the average number of work days, which a farmworker could obtain. As the Congressional Research Service recently concluded, the foregoing statistics indicate a surplus, rather than a shortage, of farmworkers in the United States. Moreover, after investigating this in 1997, the U. S. General Accounting Office found that “[a] widespread farm labor shortage does not appear to exist now and is unlikely in the near future.” In 1998, based on a Labor Department study, former Labor Secretary, Robert Reich, agreed stating: “In fact, there’s an overabundance of (resident) farm workers and they tend to be very poor.”

Like any other group of employers, growers like their workers to be plentiful and vulnerable, which guarantees that they will be dependable. Undocumented workers are vulnerable, but they are not guaranteed to remain plentiful. In recent years, the federal government has again made overtures—such as INS sting operations against employers of undocumented workers and Border Patrol operations that close parts of the border—towards actually preventing the entry or employment of undocumented workers. When growers see their inexhaustible reserve of labor threatened in this manner, they turn back to the guest worker “solution.”

10. Holley: Disadvantaged By Design: How the Law Inhibits Agricultural Guest Published by Scholarly Commons at Hofstra Law, 2001

105. See CRS REP., supra note 2, at 11.
106. See id. at 10.
107. See id. at 12.
108. See id. at 10, 15.
111. See notes 106-09 and accompanying text.
113. See Davis, supra note 113, at E8; Salazar-Calderon v. Presidio Valley Farmers Ass’n, 765 F.2d 1334, 1338 (5th Cir. 1985) (“[T]he Immigration and Naturalization Service informed growers
Thus, since the mid-1990s, growers have been engaged in lobbying efforts to expand the H-2A guest worker program.\textsuperscript{114} This program was instituted in 1943 to import a small number of Caribbean workers to the east coast to labor mostly in the sugar and apple harvests.\textsuperscript{115} In 1986, the H-2A program was revamped to streamline the procedures, which growers had to follow in order to use the program.\textsuperscript{116} Under the current H-2A program, a grower may import guest workers to perform seasonal agricultural labor if, among other things, the grower: (1) gains certification from both the Labor Department and the Attorney General that there is a shortage of domestic workers and the employment of guest workers will not adversely affect domestic labor;\textsuperscript{117} (2) engages in affirmative and adequate recruitment efforts to employ domestic workers before importing H-2A workers;\textsuperscript{118} and (3) guarantees certain minimal


\textsuperscript{115} See \textit{Hearing}, supra note 2, at 37.


\textsuperscript{117} Employers who are unable to find sufficient U.S. farmworkers may apply for permission to recruit and employ foreign guest workers. See 8 U.S.C. § 1188(a). In order for the Attorney General (via the INS, as designated in 8 C.F.R. § 100.2) to approve such a request for guest workers, the employer must first petition the Secretary of Labor to certify that:

[T]here are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services involved in the petition, and . . . the employment of the alien in such labor or services will not adversely affect the wages and working conditions of workers in the United States similarly employed.

\textit{Id.}

\textsuperscript{118} Employers are required to recruit U.S. workers by circulating job offers through the United States Employment Service system, an interstate network using state employment services to communicate job opportunities throughout the United States, see 29 U.S.C. §§ 49-49(l)(1) (1994 & Supp. IV 1994), and independently to engage in "positive recruitment efforts within a multi-state region of traditional or expected labor supply." 8 U.S.C. § 1188(b)(4); see 20 C.F.R. § 655.105. The Regional Administrator of the Employment and Training Administration of the Department of Labor will certify that the employer may hire sufficient temporary foreign workers to fill remaining needs based on whether the employer has made sufficient recruitment efforts and whether the employer has not adversely affected U.S. workers by offering foreign workers better conditions of employment than extended to U.S. workers. See 20 C.F.R. §§ 655.92, .102(a), .105(a).
conditions of employment.\textsuperscript{119} Even after the H-2A workers have begun the farm work, the employer must ensure the preference for domestic workers by hiring any domestic worker who applies for the farm work during the first fifty percent of the H-2A employment season (the fifty percent guarantee).\textsuperscript{120} In 1996, 1998, 1999 and again in 2000, Congress came close to approving bills that would have (1) amended the H-2A program to allow for the importation of as many as one million guest workers, (2) relaxed housing and wage requirements, and (3) streamlined certification procedures.\textsuperscript{121} In January 2001, the Bush Administration and Republican Senators immediately began pushing for a new guest worker agreement with Mexico.\textsuperscript{122}

Just as the bracero program was relied upon in certain sectors, certain groups of growers have begun to rely heavily on the amendments to the H-2A program that growers desire even though Congress has not adopted them. In 1996, growers contracted only about 15,000 H-2A workers.\textsuperscript{123} But, by 1999 the use of H-2A workers nearly tripled to about 42,000 workers.\textsuperscript{124} This increase is mostly attributable to the recent attraction of southern growers—in North Carolina, Georgia and Kentucky—to the program.\textsuperscript{125} North Carolina growers alone employed over 10,000 of the guest workers contracted in 1999.\textsuperscript{126} Once a group of growers begins applying for H-2A workers, they tend to adopt illegal practices to make it easier to ensure continued access to guest workers.\textsuperscript{127} They may drive away domestic workers by flatly refusing domestic applicants,\textsuperscript{128} by pretending they have no housing for the families of

\begin{itemize}
\item \textsuperscript{119} See 20 C.F.R. § 655.102 (stating the contents of job offers); 20 C.F.R. § 655.103 (providing assurances). These substantive guarantees are discussed in more detail within this Article.
\item \textsuperscript{120} See 20 C.F.R. § 655.103(e).
\item \textsuperscript{121} See CRS REP., supra note 2, at 1 (explaining how the 1999 Senate bill was introduced to substantially change the H-2A program); Goldstein, Press Release, supra note 2; Fagan, Compromise, supra note 2 (providing background about visa legislation in House of Representatives in 2000); Fagan, Contentious, supra note 2; Bart Jansen, Deal Sought on Illegal Farm Labor, WASH. POST, Dec. 4, 2000, at A25; Doyle, supra note 2, at A25. In September 2000, the Labor Department did respond to grower requests and relaxed some of its H-2A regulations, reducing fees paid by growers and giving growers the power to unilaterally extend their stated employment season for a two week period. See Goldstein, Press Release, supra note 2.
\item \textsuperscript{122} See Susan Ferriss, Legal Guest-Worker Plan for Mexicans to Be Pushed, COX NEWS SERV., Jan. 11, 2001 [hereinafter Ferriss, Legal].
\item \textsuperscript{123} See GAO Report, supra note 8, at 4.
\item \textsuperscript{124} See Ferriss, Mexico's, supra note 4; Jansen, supra note 121, at A25.
\item \textsuperscript{125} See Ferriss, Mexico's, supra note 4.
\item \textsuperscript{126} See HUMAN RIGHTS WATCH, supra note 37 at 38.
\item \textsuperscript{127} See Hearing, supra note 2, at 48.
\item \textsuperscript{128} See id. at 48-49.
\end{itemize}
domestic workers,129 or inventing performance tests that can be manipulated to disqualify domestic applicants.130 “Failure to find home-grown employees usually is just a dodge,” reported a journalist investigating H-2A employers in 1998.131 Still, the Labor Department approves the importation of ninety-nine percent of the workers requested.132

Considering the bundle of substantive rights which H-2A workers are granted upon entering an employment contract, this explosive growth in the practice of employing H-2A workers is puzzling. As in the bracero program, these rights are granted in order to implement the bedrock principle of the H-2A program: that the use of guest workers will not adversely affect domestic workers or work conditions.133 These rights include free transportation to and from the worksite, free housing during employment, workers’ compensation insurance, a guarantee of at least three-fourths of the total amount of work offered in the job announcement, and payment at the highest of three minimum wages: (1) the federal or applicable state minimum wage; (2) the local, job-specific “prevailing hourly wage;” or (3) the H-2A “adverse effect wage” or AEWR.134 The AEWR, usually the highest of the three measures, is the “regional average hourly wage for nonsupervisory field and livestock workers,” as determined by the Labor Department.135 For example, the wage in North Carolina is $6.98 per hour and in Washington the par rate is $7.64 per hour.136 In 1999, a Kentucky grower reported that it effectively cost him nine-dollars per hour for H-2A labor because he had to provide free housing, transportation, and workers’ compensation insurance.137 In contrast, under AWPA, an ordinary farmworker is guaranteed only whatever wage is promised (at least minimum wage if
whatever terms of housing are promised, and whatever terms of transportation are promised. In short, the H-2A worker must be provided free housing, transportation and insurance, which others are not entitled to, and the H-2A worker also tends to earn a higher hourly wage.

If these substantive rights were enforced, an H-2A worker would likely have few problems. He would be paid a fair wage, provided with a substantial amount of work, and housed and transported for free in a safe manner. If these substantive rights were enforced, the adverse effect on domestic workers would be minimized since the employment of guest workers would clearly be costing the grower more dollars per hour than employment of domestic counterparts. If these substantive rights were being enforced, no profit-minded grower would jump through bureaucratic hoops to hire H-2A workers when fifty-six percent of farmworkers in the United States were idle at the peak of the season. Yet curiously, the number of H-2A workers has nearly tripled in the last three years.

The foregoing sketch of the historical evolution of the low-wage farmworker suggests an explanation to this conundrum: that H-2A workers—like their forerunners, the slaves, sharecroppers, migrants restricted by pass systems, day laborers compelled by vagrancy laws, workers chased away at the point of a shotgun, and braceros—are exceptionally vulnerable and therefore, exceptionally desirable. In the following section, this Article reveals how federal statutes and regulations—despite quixotic promises to cause “no adverse effect”—have been written in a manner which deliberately renders H-2A workers more vulnerable than domestic workers and even, at least in some respects, more vulnerable than undocumented workers. There is nothing

138. The federal Fair Labor Standards Act, which provides minimum wage coverage for field workers, does not apply to, among others: “local hand harvest laborers,” 29 C.F.R. §§ 516.33(d), 780.310-780.315, 780.319 (2000), or “nonlocal minor” workers who are working at a piece rate, 29 C.F.R. §§ 516.33(e), 780.318-780.320.
141. Indeed, even assuming that fifty percent of the workers in the United States are undocumented, there still remains a large number of domestic workers who are employable. See Goldstein, Press Release, supra note 2.
142. See GAO Report, supra note 8, at 50.
143. This promise is quixotic because it seems an impossible goal. It would seem that the importation of any guest workers whatsoever would adversely affect domestic workers or working conditions, since it would prevent the market price of farm labor from rising according to the domestic supply and demand of that labor.
new under the sun: growers are once again seeking to employ only persons who, due to handicaps created by law, are so disadvantaged that they have no choice but to continue working regardless the conditions of employment.

III. RIGHTS WITHOUT A REMEDY: THE SOPHISTICATED WAY TO SANCTION LABOR ABUSSES

Jeremy Bentham referred to human rights as "nonsense on stilts" because it is nonsense to call a moral ideal a "right" when no institutional apparatus exists to enforce it. Such rights are hobbled because they have no purchase in a particular jurisdiction and because they have no firm connection to an adjudicatory process that would enable them to become a reality here on earth.

If the H-2A program’s substantive rights for H-2A workers are not quite as tenuous as "nonsense on stilts," then they are at least nonsense seriously hobbled. This Section discusses the disjunction between H-2A workers’ substantive rights and the process of adjudication. Basically, H-2A workers only have a remote possibility of protecting their employment rights because they have no connection to effective institutions to enforce those rights. There are two aspects to this disconnection. First, the material conditions of their employment render H-2A workers inherently vulnerable. Second, federal statutes, regulations and case law, rather than compensating for this exceptional vulnerability, aggravate it by largely excluding H-2A workers from the judicial system.

A. The Unfavorable Material Conditions of Employment for H-2A Workers

H-2A workers essentially share with braceros their condition of living in isolation. H-2A workers travel far from home to live temporarily in a foreign community—usually a rural county where agriculture is king. At best, these communities tend to ignore the temporary workers in their midst and at worst, they subject them to

violent abuse. The H-2A workers do not know of the social services possibly available to them, and they lack the English skills often required to gain assistance. Therefore, they must rely on their employer for any contact with the outside world. More so than other migrant workers, H-2A workers generally live in a world apart from the communities they work in.

Unlike any other farmworker in the United States, an H-2A worker is tied to a single employer. An H-2A worker is not authorized to work for any employer except the one whose contract allowed the worker to gain temporary admission to the United States. If the work is insufficient, the employer is abusive, or the housing is intolerable, the H-2A worker does not have the option of finding another job during the remainder of the work visa; his only option is to tolerate it or quit and return immediately to his native country. In this respect, H-2A workers are significantly more vulnerable than undocumented workers.

H-2A workers are also especially vulnerable because they have had

147. See ROTHENBERG, HANDS, supra note 13, at 215; Kimberly Hefling, Migrants, Farmers, Learn Language, ASSOC. PRESS, Dec. 4, 2000, available at 2000 WL 30318173 (explaining that for those migrants who do not know English, “even simple tasks such as shopping can be difficult”).
149. See id. at 372 (“The migrant farmworkers are a community within but apart from the local scene. They are rootless and isolated.”); ROTHENBERG, HANDS, supra note 13, at 28 (one migrant worker explains: “As a migrant, you find yourself living in a different, uncomfortable world. Because of this, you suffer”); Hefling, supra note 148, at 2000 WL 30318173.
150. See Hearing, supra note 2, at 53; HUMAN RIGHTS WATCH, supra note 37, at 38.
151. One of the primary complaints of farmworkers is that they are not getting enough work. Usually, when they do complain, they complain about being cheated out of wages or not being given enough work, rather than complaining about the abusive treatment or squalid housing that they had to endure at the same time. The problem of too-little work is a serious one for a farmworker. This lack may force the worker to go into further debt while sitting idle and causing the worker to miss his infrequent opportunity to earn the money, he and his family need to survive on all year. Meanwhile, growers err on the side of employing too many workers, because it gives them the security of knowing the crop will be picked as rapidly as possible and gives them leverage against the workers to force them to accept his unfavorable modifications to the terms of employment. See generally, HUMAN RIGHTS WATCH, supra note 37.
152. See, e.g., Somini Sengupta, Farm Union Takes Aim at a Big Pickle Maker, N.Y. Times, Oct. 26, 2000, at A22 (stating that a union organizer reported seeing a grower belt-whip an H-2A guest worker who was allegedly working too slow).
153. See id.
154. See, e.g., New York’s Harvest of Shame, DAILY NEWS (N.Y.), Aug. 1, 1999, at 40 (“Foreigners who come legally are exploited even more than the illegals.”). Notably, the regulations did not have to create this unique vulnerability. Federal law could easily have avoided this situation by granting the H-2A worker the right to take other agricultural employment as long as he registers this employment with the Labor Department.
to make significant capital investments merely for the chance to work in the United States. During the bracero program the federal government took responsibility for the applicant selection process, but today the government leaves the H-2A recruitment process in the hands of private agents and Mexican officials. In order to get selected for an H-2A visa, a Mexican worker typically needs to pay fees or bribes to various recruiters and government officials along the way. Since these workers usually have no savings, they incur debts in order to make these payments. Therefore, in the initial months of their employment, most H-2A workers are laboring to pay off a debt. This prevents them from doing anything that risks losing their jobs. Again, this element makes H-2A workers more vulnerable than other farmworkers in the United States.

Given their inherent vulnerability, it is especially difficult for an H-2A worker to voice complaints about his treatment. Reports have shown that swift retaliation is common against migrant farmworkers in general and against H-2A workers in particular who dare to complain about abuses. In addition, an H-2A worker who complains is likely to be blacklisted by employers and by recruitment services operating in Mexico. In 1999, a Carnegie Endowment study determined that the blacklisting of H-2A workers "appears to be widespread, is highly organized, and occurs at all stages of the recruitment and employment

155. See United States v. Ward, 309 F.2d 640, 641 & n.3-643 (5th Cir. 1962).
156. See Schrader, supra note 115, at A1 (describing H-2A workers' reliance on loans to participate in H-2A program); McCaffery, supra note 17, at A1 (reporting about the illegal charges H-2A workers must pay for the opportunity to work in the United States); see also WILLIAM MADSEN, MEXICAN-AMERICANS OF SOUTH TEXAS 28 (1964) (describing similar experiences for braceros).
157. See McCaffery, supra note 17, at A1.
158. See id.
159. See AMBROSE BIERCE, THE DEVIL'S DICTIONARY 28 (Dover Publications 1958) (1911) (defining debt as "[a]n ingenious substitute for the chain and whip of the slave-driver").
160. While the other workers usually had to invest in their own transportation to the work site, they did not have to pay fees and bribes to recruiters and officials. Again, federal law could have avoided this added burden on H-2A workers by controlling the recruitment process, or at the least, by calculating the prevailing wage owed to H-2A workers to cover these unique expenses.
161. See Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 & n.73 (5th Cir. 1985) (citing legislative history and recognizing that the crucial purpose of such anti-retaliation clauses is to help farm workers "overcome a general background of fear and intimidation caused by the widespread practice of retaliation against those who complain about violations"); HUMAN RIGHTS WATCH, supra note 37, at 11; ROTHENBERG, HANDS, supra note 13, at 43, 55-56; Patiño, supra note 16, at 48-49; Glascock, supra note 5, at 1A; Sengupta, supra note 153, at A22; see generally New York's Harvest, supra note 154, at 40 (comparing legal H-2A workers to indentured servants).
162. See Patiño, supra note 16, at 49.
In 2000, Human Rights Watch investigated the employment of H-2A workers in North Carolina, where almost one quarter of all H-2A workers now labor. Its report vividly shows the conditions of fear and intimidation under which H-2A workers are currently forced to live. Human Rights Watch documented the North Carolina employers engaging in the following practices: (1) leading H-2A workers in “a ritual akin to book-burning by making them collectively trash ‘Know Your Rights’ manuals from Legal Services attorneys;” (2) conditioning the occupancy of housing on the waiver of the basic right to receive visitors at that housing; and (3) using the local sheriff to drive away Legal Services advocates responding to calls from H-2A workers. In a private moment, an H-2A worker told the Human Rights Watch investigator: “They don’t let us talk to Legal Services or the union... They would fire us if we called them or talked to them.”

In sum, H-2A workers are not in a position to voice complaints about their conditions of employment. There are many practical barriers to their expression of any complaint such as isolation from the local community, the unique dependence on the singular employer, the need to pay debts incurred in order to work, and the palpable fear of retaliation and blacklisting. Moreover, growers even take affirmative steps to bar an H-2A worker’s access to the legal services providers who are essentially the H-2A workers’ only non-governmental ally in the country.

B. How Federal Law and Regulations Prevent H-2A Workers from Enforcing Their Substantive Rights

The practice of using the local sheriff to chase off legal aid advocates is a contemporary replay of the “shotgun settlement” in which growers would pull out a shotgun (or get the sheriff to pull one out) to chase off workers who complained about being cheated out of wages.

164. See HUMAN RIGHTS WATCH, supra note 37, at 146, 148.
165. Notably, Human Rights Watch states that the stories they recount in their report were chosen because they are typical, not because they are exceptional. See id. at 71.
166. Id. at 148.
167. See id. at 147.
168. See id. at 155.
169. HUMAN RIGHTS WATCH, supra note 33, at 156.
The main difference in these tactics is that the wanton use of force is now being applied when a worker tries to gain access to the institutional apparatus where he could enforce his rights, rather than at the point where the worker is actually trying to enforce his substantive rights. Formerly, there were “substantive shotgun settlements,” now there are procedural ones.\(^{170}\)

Congress, the Labor Department, and federal courts have helped to avoid such “procedural shotgun settlements” by largely obviating the growers’ need to cut off an H-2A worker’s access to judicial or administrative relief by cutting H-2A workers off from the realistic chance of gaining relief through administrative or judicial bodies themselves. Rather than addressing the unique vulnerability of H-2A workers, federal law has further weakened this class of workers by denying them the procedural rights enjoyed by their domestic counterparts. As explained herein, federal law provides H-2A workers with a patently inadequate administrative remedy, virtually bars them from federal court, and banishes them to unpredictable treatment in an inconvenient and often biased state court venue.

1. The Administrative Remedy Created and Administered by the Labor Department is Inadequate

The Department of Labor has issued various regulations governing the practice of obtaining and employing H-2A workers.\(^{171}\) These regulations include provisions giving the Labor Department the ability to resolve certain foreseeable complaints—from either growers or workers—in the course of certification and employment.\(^{172}\)

In particular, the Labor Department has issued regulations governing investigations into alleged violations of H-2A employment

\(^{170}\) This is not to say that the old style shotgun settlement tactics are no longer employed. Legal Aid advocates still receive complaints where the grower has called on the local law enforcement officers to force workers to accept paychecks, which are allegedly insufficient. See Arrest Made in Farm Worker Shooting, ASSOCIATED PRESS, Aug. 18, 2000 (commenting on the Colorado farmer who was arrested on suspicion of shooting and wounding migrant farmworkers that allegedly caused a disturbance at a labor camp); Estes Thompson & Michael Melia, Mexican Worker Wins Labor Complaint Against N.C. Grover, ASSOCIATED PRESS, Nov. 19, 2000, available at http://web2.westlaw.com/result/tex...service=Search&ss=Doc&Tab=Cite+List (last visited Feb. 21, 2001) (reporting that an employer was sued for physically assaulting a worker who made a complaint about working conditions).


contracts. These regulations do not create specific procedures for initiating or investigating such a complaint. The regulations allow that: "[a]ny person may report a violation of the work contract obligations" to the Labor Department. Meanwhile, the Labor Department, "pursuant to a complaint or otherwise," can investigate suspected violations "as may be [deemed] appropriate" by the Secretary. If it so desires, the Department can enforce the regulations by imposing the denial of a labor certificate to the grower, instituting administrative proceedings to enforce contractual obligations, assessing a civil monetary penalty, or petitioning a federal district court for injunctive relief or specific performance. Thus, the regulations create a very loose procedure. Basically, if an H-2A worker complains in some unspecified manner, the Labor Department may take whatever investigative or enforcement action it deems appropriate, if any at all.

This set of regulations is mostly remarkable for what it lacks. There are no time tables or deadlines applicable to the Labor Department's action upon receipt of a complaint. In fact, the Labor Department has neither an obligation to institute proceedings in response to a complaint, nor must it notify the complainant that it has taken action or has declined to take action in response to the complaint. Therefore, if an H-2A worker complains to the Labor Department, he has no grounds to demand so much as a reply from it. Rather, the worker must wait indefinitely for a response that may never come.

According to U.S. Supreme Court case law, such an administrative complaint "system" is inadequate. In Coit Independence Joint Venture v. Federal Savings & Loan Insurance Corp., the Supreme Court, in

174. See 29 C.F.R. § 501.5(d).
175. See 29 C.F.R. § 501.5(a).
176. See 29 C.F.R. § 501.16(a)-(d).
177. See 29 C.F.R. § 501.16 ("Whenever the Secretary believes that the H-2A provisions of the INA or these regulations have been violated such action shall be taken and such proceedings instituted as deemed appropriate . . . .") (emphasis added).
178. This situation is reminiscent of one of Franz Kafka's absurdist parables. In Before the Law, Kafka's protagonist comes from the country in order to stand before the door where he is to pray for admittance to the Law. See FRANZ KAFKA, Before the Law, in THE PENAL COLONY 148 (Willa Muir & Edwin Muir Trans., 1948). There he waits until he dies. See id. at 148-49. As he passes away, the Law's doorkeeper tells him that this door was created especially for him. See id. at 150. In this parable, due process is turned on its head: legal procedures are not designed to ensure equal treatment for all persons, rather, they feature special provisions which deliberately deny adequate treatment to particular persons.
deciding whether a plaintiff had to exhaust all possible administrative remedies before filing suit in court, analyzed the administrative complaint system created by the FSLIC for handling certain claims regarding the ownership of funds within the FSLIC's possession. The applicable regulations allowed the FSLIC to indefinitely defer making a decision on such claims, as long as the FSLIC periodically informed the complainant that action on the claim was being deferred. As the Court explained, "the regulations do not place a clear and reasonable time limit on FSLIC's consideration of whether to pay, settle, or disallow claims.... [N]o time limit is established for FSLIC's consideration of those claims retained for further review." The Court criticized such a Kafkaesque administrative remedy as being akin to a "black hole," concluding that "[t]he lack of a reasonable time limit in the current administrative claims procedure renders it inadequate." Consequently, the Court determined that the plaintiff acted properly in filing suit without first exhausting the potentially interminable administrative remedy.

It should be recognized that the Court in Coit Independence declared the potentially interminable administrative remedy to be categorically "inadequate" in the context of deciding whether that administrative remedy had to be exhausted prior to resorting to the courts for relief. In other words, Coit Independence did not prohibit agencies from creating such "black hole" administrative remedies. Nevertheless, the decision espouses the principle that it is fundamentally unfair to force a complainant to wait indefinitely for an administrative agency to act on a complaint. Although administrative remedies requiring a relatively long wait have been found to be "adequate" in this same context, the Supreme Court found that the FSLIC remedy was inadequate due to the uncertainty of the length of delay. Other courts have followed suit in the context of the Privacy Act (which required...

180. See id. at 586-87.
181. See id. After this ruling, Congress promptly enacted the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA") which created an administrative remedy consistent with the Supreme Court's holding in Resolution Trust Corp. v. W.W. Dev. & Mgmt., 73 F.3d 1298, 1306-07 (3rd Cir. 1996).
182. Coit, 489 U.S. at 586.
183. Id. at 586, 587.
184. See id. at 586-87. Following Coit, the Privacy Act's administrative remedy for correcting errors in personal records has been criticized as inadequate for the same reason. See Schaeuble v. Reno, 87 F. Supp. 2d 383, 388-90 (D.N.J. 2000). The Privacy Act requires the agency to make a "prompt[ly]"] response to complaints. Id. at 389.
185. See Coit, 489 U.S. at 587.
186. See id.
merely a "prompt[ ]" reply to a complaint) and state law administrative remedies as well.187 The message is that a remedy subject to endless deferral is insufficient.

Basically, the Labor Department has created a "black hole" variety administrative complaint system for handling H-2A workers' complaints against growers. Unlike the FSLIC system, the H-2A system does not even require the agency to notify the complainant of the status of the complaint. Unlike the Privacy Act system, the H-2A system says absolutely nothing about when or in what manner the agency must act. Therefore, the H-2A remedy appears to be the blackest of the black hole remedies created by federal agencies to date. Clearly, this type of administrative procedure does not give the kinds of guarantees that inspire reliance.

Furthermore, a broader review of the H-2A regulations suggests that the creation of an inadequate remedy for workers' complaints reflects not mere carelessness on the Labor Department's part, but rather an institutional bias in favor of growers. While this "black hole" is the only remedy that the Labor Department has created for workers, the Department provides a host of rapid-response remedies for growers.

For example, the Labor Department's regulations provide an instant remedy for growers when they suspect that domestic workers are abusing the fifty percent guarantee188 by intentionally withholding their applications until after the H-2A workers are already at work.189 In this way, farmworker unions or organizations could turn the fifty percent guarantee safeguard into a tool for undermining the H-2A program, forcing growers to discharge the H-2A workers and causing the grower to incur additional expense for having tried to employ guest workers.

The regulations create an expeditious, elaborate remedy to address this rather extraordinary eventuality.190 Of course, the ordinary complaint


188. Basically, even after the H-2A workers have begun the farm work, the employer must ensure the preference for domestic workers by hiring any domestic worker who applies for the farm work during the first fifty percent of the H-2A employment season. See 20 C.F.R. § 655.103(e) (2000).

189. See 20 C.F.R. § 655.106(g) (2000).

190. There are no reported cases involving such circumstances. Allegations such as this made by a grower were investigated and determined to be groundless by the Labor Department. See Vega v. Nourse Farms, Inc., 62 F. Supp. 2d 334, 339-40 (D. Mass. 1999). In Vega, an H-2A employer failed to hire certain U.S. citizen workers at the very start of the season after already offering jobs to those workers. See id. at 338-39. When the U.S. workers complained, the grower alleged that the workers were intentionally withheld. See id. at 339, 345. The Labor Department found the grower's allegations without merit. See id. at 339-40. Even after investigating the workers' complaints and
system under 29 U.S.C. § 501 provides a remedy to the grower in such circumstances: the grower could complain to the Labor Department pursuant to 29 C.F.R. § 501.5(d) and wait indefinitely for a resolution.\footnote{191} But due to the special administrative remedy, growers need not resort to the “black hole” remedy in these circumstances. If a U.S. worker applies for work and the grower suspects such a withholding-of-labor scheme is afoot, the grower can make a complaint to the Labor Department pursuant to 20 C.F.R. § 655.106(g).\footnote{192} Within five working days of receiving the complaint, the Department’s local agents must complete an investigation that must include, at a minimum, interviews of the grower, the worker, and any suspected union or group involved in the alleged scheme.\footnote{193} Then, within thirty-six working hours of receiving the initial investigation, the Labor Department must issue a final decision on the issue.\footnote{194} There is no reciprocal remedial scheme for a U.S. worker when an H-2A employer rejects U.S. workers who apply for jobs held by H-2A workers.\footnote{195}

Similarly, the regulations create a rapid administrative remedy that a grower can use in the event that the Labor Department denies an application for permission to import H-2A workers.\footnote{196} An employer whose application has been denied can choose to get an administrative law judge’s decision on his application based either upon a review of the written record or upon a \textit{de novo} hearing.\footnote{197} If the grower opts for the ruling on a written record, the Labor Department must issue the decision finding the grower in violation of the regulations, the Labor Department declined to sanction the grower. \textit{See id.} 191. \textit{See 29 C.F.R. § 501.5(d) (2000).} Presumably, the grower could also sue the workers for intentional tortious interference with contractual relations. 192. \textit{See 20 C.F.R. § 655.106(g).} 193. \textit{See id. § 655.106(g)(2)-(3).} In contrast, the ordinary administrative remedies for violations of the H-2A obligations impose no specific requirement on the steps to be taken in an investigation. 194. \textit{See 20 C.F.R. § 655.106(g)(4).} It could be assumed that this special remedy was created for the benefit of H-2A workers. However, that assumption would not comport with the long string of cases that indicate that H-2A regulations were not passed to benefit H-2A workers. \textit{See infra} note 221 and accompanying text. Thus, the only reasonable assumption is that this special remedy was created to protect the interests of the H-2A employers. 195. \textit{See Donaldson v. United States Dep’t of Labor, 930 F.2d 339, 348 (4th Cir. 1991)} (“[I]t is obvious that this administrative complaint procedure does not provide the remedies that would be available under a private right of action.”). In fact, the U.S. worker is not entitled to adequate relief by making an administrative complaint. The only penalties available against a grower who has rejected qualified U.S. workers in favor of H-2A workers is to bar the grower from future participation in the H-2A program. \textit{See 20 C.F.R. §§ 655.210(a), 658.501(c), 658.503, 658.504(a)(2)(ii) (2000).} 196. \textit{See 20 C.F.R. § 655.112 (2000).} 197. \textit{See id. § 655.112(a)-(b).}
within five working days of receipt of the complaint. If the grower opts for the hearing, the hearing must be held within five working days of receipt and a decision must be issued no later than ten days after the hearing. The ALJ’s decision “shall specify the reasons for the action taken and shall be immediately provided to the employer.”

Finally, the “black hole” complaint procedure itself provides detailed rules allowing for the appeal of any action taken by the Labor Department—such as ordering a grower to pay workers’ wages due or fining a grower for substandard housing or transportation practices. If requested, a hearing with the ALJ must be held within sixty days of the complaint, and the ALJ’s decision must be rendered sixty days thereafter. The Secretary of Labor must review this decision within ninety days if a review is sought, and then this final decision is subject to review by the federal courts. This extensive and prompt system of review and appeal was created exclusively to protect growers, since it is extremely unlikely that the Department will ever impose an administrative penalty on an H-2A worker.

In sum, the Labor Department’s regulations do not treat H-2A workers nearly as well as their employers. Under these regulations, an aggrieved grower has the right to a reasoned decision from the ALJ within a definite, and frequently very brief, time period. In contrast, an aggrieved H-2A worker is free to make a complaint to the Labor Department, but is not even entitled to a report on the status of that complaint.

The disparity between the formal treatment of growers and workers under the H-2A regulations is symptomatic of the Labor Department’s historical bias in managing guest worker programs. As Galarza concluded in his study of the bracero program, growers dominated in the Department’s policy setting, using the Department essentially as their

198. See id. § 655.112(a)(2); see also Ariz. Farmworkers Union v. Buhl, 747 F.2d 1269, 1271-72 (9th Cir. 1984) (noting that there is no need to give labor union parties with interest in such a dispute the opportunity to participate in this review).
199. See 20 C.F.R § 655.112(b)(ii)-(iii).
200. Id. § 655.112(a)(2).
203. See id. §§ 501.45, 501.47.
204. See, e.g., New York’s Harvest, supra note 154, at 40 (“Like everything the government does in agriculture, the H-2A program favors the farmers, all in the name of supporting the family farm. Indeed, a spokesman for the state Agriculture Department admits that the agency exists partly to ‘defend farmers’ against allegations of worker exploitation.’
205. See, e.g., id.
own recruitment agency. As such, the "merchants of labor [i.e. the Labor Department] could not be disciplinarians [of the growers] as well." There is no reason to believe that the taint of this historical bias has been purged from the H-2A program. The basic contours of the current H-2A provisions were established during the bracero era. Also, as will be explained below, federal courts looking at the H-2A program have concluded that the H-2A provisions were not even created with the intent to benefit H-2A workers, but rather solely with the intent to protect domestic workers. Furthermore, even if today's Labor Department is staffed with personnel intent on protecting workers' rights, it has far too few employees to begin to provide H-2A workers the protections they need. Since the Department requires many resources to fulfill its role of protecting farmworkers, yet needs few resources to approve growers' labor certificates and to place a seal of approval on growers' actions, an understaffed Labor Department is de facto a Labor Department with a pro-grower bias. As recently as 1993, the Helsinki Commission recommended the abolishment of the H-2A program in light of the Labor Department's failure to enforce H-2A workers' rights. In sum, H-2A workers can hope for little administrative relief when an understaffed Labor Department continues to implement regulations with built-in preferences for growers.

206. See GALARZA, supra note 58, at 121-28.
207. Id. at 169.
208. See Estados Unidos Mexicanos v. DeCoster, 229 F.3d 332, 342 (1st Cir. 2000) (noting that the allegation of amicus curiae show the federal agencies' efforts to protect farmworkers have decreased in recent years); Hearing, supra note 2, at 43 (describing that from 1985 to 1995, the Labor Department's number of investigation of farmworker violations dropped by fifty percent); ROTHENBERG, HANDS, supra note 13, at 216 (discussing that to ensure compliance in the employment of the farmworkers in America, the Department only uses the functional equivalent of 27 full-time employees); New York's Harvest, supra note 154, at 40 (reporting shortage of bilingual officials capable of communicating with farmworkers); Schrader, supra note 115, at A1 (noting that "enforcement of H-2A's safeguards has become lax").
209. The tasks of inspecting housing, transportation and labor conditions is inherently a labor-intensive proposition. See, e.g., HAHAMOVITCH, supra note 51, at 203 (describing the federal Migratory Camp Program) ("[T]here will never be enough federal and local officials to investigate housing conditions on every farm or check every worker's pay stub to see if the proper piece rate has been paid.").
210. Notably, the Bush Administration proposed cutting the DOL's budget by five percent in fiscal year of 2001.
211. See Hearing, supra note 2, at 46.
212. Even when the Labor Department does take enforcement action, it is sometimes wholly inadequate. For example, after one worker was hospitalized, a Colorado sheep rancher was accused of starving, beating and withholding pay from his H-2A workers. See Deborah Frazier, Abuse Case Settled Against Ranch Family, No Fine Is Imposed in Alleged Assaults Against Sheepherders,
2. Federal Law and Decisions Have Virtually Shut the Doors of the Federal Courthouse to H-2A Workers

Given that the administrative remedy is inadequate under *Coit Independence*, an H-2A worker (who manages to find legal representation) can directly seek relief in the courts. However, an H-2A worker—unlike every other farmworker in the United States—should not necessarily plan on going to federal court with his grievance. Action by Congress and the federal courts has to a great extent deprived H-2A workers of the ability to avail themselves of the federal forum. Here, too, the federal government fails the H-2A workers whose very presence in the country it authorizes, facilitates, and supervises.

Domestic and undocumented workers may sue their employers in federal court under AWPA, the federal statute designed especially to protect migrant farmworkers. But the AWPA explicitly excludes H-2A workers from its coverage. Because AWPA provides migrant farmworkers with some valuable procedural advantages to compensate for the special difficulties faced by migrants in bringing suit, the consequences of this exclusion are substantial. Their difficulties arise because farmworkers tend to travel far from their homes to work in places where they are isolated from the community, are especially vulnerable to retaliation, and lack adequate access to legal services. Therefore, it is crucial that, in practice, AWPA allows a farmworker to maintain suit in a federal district court at the place of recruitment, which is usually relatively near the worker’s home.

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213. See *Coit Independence*, 64 F.3d at 380.
216. See Aguero v. Christopher, 481 F. Supp. 1272, 1275 (S.D. Tex. 1980) (“It is well known that many migrant laborers do not have the financial resources necessary to prosecute a claim hundreds of miles from home.”).
217. This right works as follows. A grower, or his or her agents will usually make some representations to farmworkers in the area where they live regarding the terms and conditions of the seasonal agricultural employment that the grower is offering. AWPA requires that these representations take a certain form and not be “false or misleading.” 29 U.S.C. §§ 1821(f), 1831(e)
Thus, AWPA gives all farmworkers a ticket into federal court and allows many of them the advantage of filing suit in their home district. By being excluded from AWPA, H-2A workers are denied these rights. In light of this denial, advocates have sought other means of gaining federal court jurisdiction—some successful, some not.

The most direct approach to federal court has been to assert that H-2A workers have an implied right of action to enforce those provisions of federal law which establish the H-2A program and impose its minimal conditions of employment. However, courts applying the test under Cort v. Ash, have declined to find such an implied right of action for H-2A workers, based partly on the rationale that the H-2A statute and regulations were not "intended to especially benefit alien workers . . . [but,] rather, their stated purpose is to protect the jobs of United States citizens."

Under this view, H-2A workers hold specific substantive rights required by the H-2A statute, yet are not the intended beneficiaries of those rights. According to the courts, they have these rights solely for the benefit of domestic workers, acting essentially as trustees for their domestic counterparts. H-2A workers are entitled to 100 square feet of

(1994). The farmworker then travels to perform the work promised. If during employment, the recruitment promises are not fulfilled, which is a violation of AWPA, when the farmworker returns home, the worker can seek legal representation and file suit in that venue. Section 1854(a) of AWPA provides that venue is "coextensive with personal jurisdiction." Stewart v. Woods, 730 F. Supp. 1096, 1097 (M.D. Fla. 1990). Personal jurisdiction is proper where recruitment took place because that activity ordinarily gives rise to personal jurisdiction under the minimum contacts test. See, e.g., Neizil v. Williams, 543 F. Supp. 899, 904 (M.D. Fla. 1982); Garcia v. Vasquez, 524 F. Supp. 40, 42 (S.D. Tex. 1981); see also Burger King Corp v. Rudzewicz, 471 U.S. 462, 472-76 (1985). Thus, an aggrieved farmworker may return home, seek out legal assistance in the safety of the local community, and maintain his suit in a forum free of the biases that can plague judges and juries in the agricultural regions in which they work.

218. Of course, a Mexican H-2A worker could never bring suit in his home district. However, such a worker could gain personal jurisdiction, and consequently establish proper venue as well, in a border state such as Texas where the Mexican worker enters the United States, shows the grower's agent that he is qualified to work under a visa in the United States, receives again the terms and conditions of the employment offered, effectively enters the H-2A contract, and then accepts the grower's free transportation to the work site in another state. This venue would be preferable to an H-2A worker for the reasons described in the following subsection, and also due to the fact that this may be the place where the worker finds legal representation on his return trip to Mexico.

219. These minimal conditions include the substantive rights granted to H-2A workers, such as the right to be paid at least the "adverse effect wage rate," the right to at least three-fourths of the hours of work promised, and the right to safe, secure housing and transportation. 20 C.F.R. §§ 655.102(b)(1), (5), (6), (9) (2000).


221. Nieto-Santos v. Fletcher Farms, 743 F.2d 638, 641 (9th Cir. 1984); see also Lopez v. Arrowhead Ranches, 523 F.2d 924, 924-26 (9th Cir. 1975); Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 894-95 (10th Cir. 1972).
living area in labor camp housing in order to benefit domestic workers.\textsuperscript{222} H-2A workers are entitled to receive at least three-fourths of the work projected because this entitlement will benefit domestic workers.\textsuperscript{223} H-2A workers get a free trip to work to benefit domestic workers.\textsuperscript{224} This rather strained reasoning has justified federal judges in keeping H-2A workers out of their courts, and its currency goes a long way in explaining why the Labor Department has not effectively protected H-2A workers' substantive rights: the protection afforded to H-2A workers by these rights was incidental, rather than intentional.

To date, H-2A workers' best chance at getting into federal court has been to find an independent ground for federal jurisdiction.\textsuperscript{225} The most likely ground is to allege a violation of the minimum wage guarantee provided by the Fair Labor Standards Act that applies to most workers within the United States, including alien workers.\textsuperscript{226} For example, it is possible that improper deductions taken from H-2A workers' wages will drive their wages below the minimum. Federal question jurisdiction also exists where there are civil R.I.C.O. violations.\textsuperscript{227} Diversity jurisdiction is possible as well, but will only exist if there are some unusual injuries, since the value of the usual ordinary H-2A contract is far less than the federal jurisdictional minimum of \$75,000.\textsuperscript{228}

Thus, the Labor Department is not alone in turning a cold shoulder to H-2A workers. Congress has done so deliberately by denying them the tactical advantage of being able to sue under AWPA. And the federal courts have also done so by denying H-2A workers an implied right of action under the provisions of federal law granting H-2A workers certain guarantees during their employment in the United States. At present, an H-2A worker's most feasible route into federal court is to assert a cause of action that serves as an independent ground for federal jurisdiction.

\textsuperscript{222} See 20 C.F.R. § 655.102(b)(1)(i); 29 C.F.R. § 1910.142(b)(9) (1999).
\textsuperscript{223} See 20 C.F.R. § 655.102(b)(6).
\textsuperscript{224} See 20 C.F.R. § 655.102(b)(5).
\textsuperscript{225} Another, but relatively untested, direct approach to federal court is to assert that an H-2A worker has a federal common law claim for breach of contract. See, e.g., \textit{Nieto-Santos}, 743 F.2d at 642 (rejecting the workers' assertion of this argument).
\textsuperscript{226} See 29 U.S.C. §§ 203(e), 206(a), (e) (1994).
3. State Court Remedies Available to H-2A Workers are Inadequate

The federal government has largely abdicated responsibility for protecting H-2A guest workers from the labor abuses they suffer in the United States. Consequently, this task has fallen to the state court system. State courts are H-2A workers' firmest legal foothold in the country, but, at least in the eyes of farmworker advocates, that foothold is far too unstable to be relied upon. As explained in this Section, while it would be rash to assert that H-2A workers cannot get fair treatment in any state court system, it should be recognized that Mexican guest workers run a considerable risk of suffering biased treatment in many of the state trial courts in the rural regions where they are likely to work. Since biased treatment is a distinct possibility in many of these state courts, the federal government should allow H-2A workers access to the federal court system based on their status as seasonal farmworkers, just as it grants that access to all other seasonal farmworkers.

The traditional justification for allowing federal jurisdiction in diversity cases is to give an out-of-state litigant the ability to avoid the risk of local bias in state court.229 Since there is always complete diversity between a foreign H-2A worker and his domestic employer,230 this traditional justification for federal jurisdiction is relevant in every H-2A lawsuit. The only reason that H-2A workers do not enjoy diversity jurisdiction is that the amount in controversy in their suits is almost always less than the jurisdictional minimum of $75,000.231 Nevertheless, the relatively modest sums they do seek to recover (say roughly a maximum of $10,000 for actual damages for the breach of a season’s contract)232 are of great importance to plaintiffs who have gone into debt to get the chance to work and whose total family income for a year is normally less than $10,000.233 Presumably, having to run the risk of local bias is at least as unfair for a Mexican guest worker seeking to recover his annual wages as it is for an out-of-state insurance company defending a $75,000 claim.

Some modern commentators have suggested that local bias is no

229. See Chemerinsky, supra note 230, at 1314.


231. See, e.g., Nieto-Santos, 743 F.2d at 640 (noting that the H-2A workers’ claims did not satisfy the jurisdictional minimum of the time that was $10,000).

232. Assuming a work season of about thirty weeks, for fifty hours per week at $7 per hour.

233. See NATIONAL AGRICULTURAL WORKERS SURVEY, supra note 9, at 46.
longer a significant danger in today’s state court systems. However, a 1992 survey of practicing attorneys shows that the perception of bias against non-local or out-of-state litigants remains widespread and palpable. The 1992 study assumed that these apprehensions have some basis in reality and concluded that local biases in state courts do exist and remain “most prevalent in the more rural areas of the country, including the Southern and lower Midwest States.” While almost all of the surveyed attorneys opined that federal judges were generally more competent than state judges, those attorneys who reported a specific concern with local bias also tended to report that this perceived superiority affected their filing decisions. The moral is that, especially in rural areas of the Southern and lower Midwestern states, attorneys react to the stronger likelihood of local bias by seeking out the presumed superior competency of the federal bench.

The very nature of H-2A workers’ employment entails that they will be employed in rural, agricultural regions. And, in fiscal year 2000, over sixty percent of H-2A workers were employed in Southern states. Thus, it is a fact that H-2A workers are generally forced to resort to the rural, Southern state trial courts where local bias is widely perceived to be a significant factor in litigation. In light of the findings of the 1992 study, it should be expected that H-2A workers will be hamstrung by local bias in those state courts.

This presumption of an unfavorable bias against these out-of-state workers is fortified by the fact that H-2A workers have absolutely no political weight in the United States, are cultural and ethnic foreigners, and usually challenge powerful local interests when filing suit. By offering discrete and insular minorities access to federal courts, it is precisely this type of bias that federal civil rights statutes such as 42 U.S.C. § 1983 are designed to counterbalance. In sum, although H-2A

235. See id. at 428.
236. Id. at 428. “[A]ttorneys in most Southern States and the less industrialized Midwest reported ... [local] bias as affecting their forum filing decisions in high proportions.” Id. at 410 (citation omitted).
237. See id. at 429, 433-34.
239. See Miller, supra note 234, at 412.
workers as a class of litigants need federal protection from local state court bias more than other out-of-state litigants and farmworkers, they are generally denied access to federal court.

A recent H-2A case suggests just how important local bias appears to be in such cases. In 1996, as Kentucky tobacco farmers began using a significant number of H-2A workers, a crew of several Mexican H-2A workers arrived in Graves county to harvest tobacco and vegetables. The contracting grower allegedly prematurely terminated the employment of many of the workers, forcing them to return to Mexico at their own expense.

In August 1998, these H-2A workers, with the assistance of legal services attorneys, sent a letter to the Kentucky grower explaining their breach of contract claims and proposing settlement discussions. Rather than negotiating, the Kentucky grower filed suit against them in Graves County Circuit Court for allegedly breaching their H-2A employment contract in 1996. As the grower’s attorney candidly told the press, the suit was filed to pre-empt the possibility that the workers would file their own suit in Texas.

By filing this preemptive lawsuit, the grower ran the risk of violating the H-2A regulations’ anti-retaliation provision. This risk

Litigation, 72 CHI.-KENT L. REV. 875, 906-07 (1997) ("Section 1983 was enacted because ‘neutral’ state courts were able to vindicate citizens’ civil rights in theory but not in practice.").

241. See Brief for Appellant at 1, 3, Villegas-Alanis v. Wurth, appeal filed, No. 00-50399 (5th Cir. 2000).

242. See id. at 6-8.

243. See id. at 8.

244. See id. at 9. Inexplicably, a second grower in the region joined the employer as a plaintiff in this suit, although the second grower had no contractual relationship with the H-2A workers. See id.

245. See James Malone, Legal Fight Prompts Farmers to Sue Migrant Workers First; Strategy Aims to Keep the Case in Kentucky, COURIER-J., Aug. 20, 1999, at 5A. Notably, the H-2A workers did file their own suit in Texas federal court, giving rise to an interjurisdictional struggle. See Brief for Appellant at 10, Villegas-Alanis v. Wurth, appeal filed, No. 00-50399 (5th Cir. 2000).

246. See 20 C.F.R. § 655.103(g), (g)(5) (2000). This section provides:

The employer shall not intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, and shall not cause any person to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any manner discriminate against, any person who has with just cause exercised or asserted on behalf of himself/herself or others any right or protection afforded by § 216 of the INA (8 U.S.C. 1186), or this subpart or any other DOL regulation promulgated pursuant to § 216 of the INA.

Id. The act of filing a lawsuit against a former employee may constitute an act of unlawful retaliation. See Durham Life Ins. Co. v. Evans, 166 F.3d 139, 157 (3rd Cir. 1999) (recognizing that "Title VII prohibits retaliation against employees who engage in a protected activity"); Shafer v. Dallas County Hosp. Dist., 76 Fair Empl. Prac. Cas. (BNA) 1555, 1560 (N.D. Tex. 1997) ("It is well established that filing a retaliatory lawsuit may be actionable under Title VII."); Urquiola v. Linen Supermarket, Inc., No. 94-14-CIV-ORL-19, 1995 U.S. Dist. LEXIS 9902, at *3 (M.D. Fla.
was apparently worth it to the grower due to the perceived importance of establishing Kentucky county court as the forum for the dispute. And it appears the growers did not stop there. Within months, two Kentucky Congressmen introduced a bill to the House of Representatives. It mandated that an H-2A worker could file suit against an H-2A employer only in the county in which the worker was employed. Also, within months, a U.S. Senator from Kentucky announced that he was going to investigate the legal services program representing the H-2A group for allegedly “using federal funds to sue farmers in several states”—which, ironically enough, is the very activity which the migrant legal services grant monies have been designed to support.

Why have Kentucky tobacco growers clung to their county courts? Possibly because tobacco is king in these counties, and the growers can count on the king to influence the judge or the jury. Notably, all

Mar. 23, 1995) ("[A] state court defamation suit filed in retaliation for making an EEOC charge clearly violates Title VII."); EEOC v. Levi Strauss & Co., 515 F. Supp. 640, 643 (N.D. Ill. 1981) ("There is little doubt that a state court defamation action filed in retaliation for having engaged in conduct protected by § 704(a), including the filing of a charge with the Commission, violates this section."); see also Bill Johnson’s Rest., Inc. v. NLRB, 461 U.S. 731, 744 (1983) ("[W]e hold that it is an enjoinable unfair labor practice to prosecute a baseless lawsuit with the intent of retaliating against an employee for the exercise of rights protected by § 7 of the NLRA.").

247. See Congressman Plans Bill Aimed at Lawsuits, MONITOR (McAllen, Tex.), Apr. 22, 2000, at 8C.

248. See id.


251. Judges could be influenced because they are all elected in Kentucky. See KY. CONST. § 117; William H. Fortune & Sarah N. Welling, Criminal Procedure, 72 KY. L.J. 381, 396 (1983-84). Even if the judge is completely neutral, the jury could be prejudiced. If an H-2A worker draws an impartial judge, it may be possible to obtain a transfer of venue due to the likelihood of bias in the fact-finder. See Plaintiff’s Motion for Change of Venue at 1-7, 10, Buenrostro v. Wash. State Apple Adver. Comm’n, No. 87-2-00491-5 filed, (Wash. Super. Ct. Chelan County Oct. 1, 1987)
Kentucky state judges are elected, and eighty-one percent of Kentuckians polled indicated that they believe their state court system is influenced by politics.

Furthermore, these counties are culturally alien to Mexican H-2A workers. For example, Graves County is approximately ninety-three percent white and ninety-eight percent Protestant. Moreover, in rural Kentucky there are regular reports of discrimination against Latino migrants or immigrants. In the year 2000, a state legislator from Graves County testified to Kentucky’s House State Government Committee: “‘Whenever [Hispanic immigrants] come into a community, those people bring quite a bit of disease with them.’” Another legislator from western Kentucky agreed that immigrants—described as “‘mostly your Mexicans’”—have caused problems in his region.

In sum, given the greater existence of local bias in Southern state courts in rural regions, the influence of agricultural operations in many such regions, and the possibility that both officials and citizens of many of those same regions hold anti-Latino sentiments, an H-2A worker runs a substantial risk of prejudice when he seeks to enforce his bargain with
a grower in a local trial court. It would be rash to claim that an H-2A worker cannot get fair treatment in a state court, but it appears there is a significant risk that local bias will substantially diminish his or her chances.

4. Federal Statutes and Regulations Largely Deny H-2A Workers Access to the Legal Services Used By Farmworkers

Not only has federal law left H-2A workers without an adequate forum for protecting their rights, it has also denied them adequate access to legal representation. As a practical matter, the only legal assistance that any farmworker is likely to get is from legal services.258 This rule holds even more firmly for an H-2A worker who has fewer resources and ties to U.S. institutions than does the domestic farmworker. In order to effectively assert their rights, H-2A workers—who are poor, Spanish-speaking, unfamiliar with American institutions, and domiciled in Mexico—need free legal representation more than any other group of farmworkers.

Their is a need largely unattended. The Legal Services Corporation ("LSC") earmarks certain grants to legal aid programs for the representation of migrant farmworkers.259 However, LSC grant monies are scarce and come with special restrictions on the representation of H-2A workers.260

First, LSC grants provide approximately $10.00 per potential client per year to legal aid organizations.261 The vast majority of this funding is used to handle rudimentary problems.262 On average, legal aid programs spend only $150 per client, and more than ninety percent of the cases are resolved without going to court.263 These statistics suggest migrant farmworkers infrequently manage to persuade a legal aid organization to file a suit on their behalf. When they do, they often face a well-funded opponent who can wear them down.264

Second, LSC-funded programs are prohibited from representing

258. See ROTHENBERG, HANDS, supra note 13, at 229; Patifio, supra note 16, at 44.
259. See ROTHENBERG, HANDS, supra note 13, at 229.
260. See id. at 229-30.
261. See Maintaining Legal Aid for the Poor, TAMPA TRIB., July 31, 1999, at 14.
262. See id.
263. See id.
264. See ROTHENBERG, HANDS, supra note 13, at 231 (as a long-time farmworker advocate describes it as "[o]ur problem is that the legal system allows a well-funded defendant to delay, harass, intimidate, and harangue long enough to avoid liability unless our side is willing to dig in for the long fight.").
undocumented individuals.\textsuperscript{265} The 1986 amendments to the H-2A program provides H-2A workers with an exception to this categorical prohibition.\textsuperscript{266} However, this apparent boon for H-2A workers is largely illusory due to restrictions placed on communications with H-2A workers.\textsuperscript{267} LSC regulations have been interpreted as prohibiting LSC-funded programs from conducting outreach in other countries, and thus H-2A workers are effectively denied the opportunity to make their complaints from the safety of their own communities.\textsuperscript{268} Rather, in order for an H-2A worker to gain representation, he usually needs to contact the legal aid program while working in the United States—that is, while housed at the grower’s labor camp or during the brief transit period back to Mexico.\textsuperscript{269}

Significantly enough, grower associations and lobbies have long pushed to deprive migrant workers of access to LSC-funded programs.\textsuperscript{270} In 1996, significant restrictions were placed on all LSC programs, largely at the behest of the growers’ lobby.\textsuperscript{271} In February 2001, an especially disturbing deal was cut between the Virginia Farm Bureau, the Virginia Seafood Council and the Legal Services Corporation of Virginia.\textsuperscript{272} Those two growers’ organizations were pushing state legislation which would impose significant restrictions on the use of all state funding for legal services.\textsuperscript{273} These attacks apparently were levied against Virginia’s legal services as a direct response to the success of


\textsuperscript{267} See generally 45 C.F.R. § 1626.5 - .11. See infra note 268 and accompanying text.

\textsuperscript{268} See Ken Boehm, Legal Services Corporation Uses “Special Commission” and Illegal Closed Door Meetings to Give Lawyers the Green Light to Sue Growers on Behalf of Aliens Not Present in the United States, VIRGINIA FRUIT & VEGETABLE GROWER NEWS, Summer 2000, at 14.

\textsuperscript{269} See id. Perhaps an H-2A workers’ best chance at getting representation is from a legal aid program that does not accept Legal Services Corporation funding, and therefore is not restricted in who they can serve. These programs are becoming more common, although they remain scarce, given the difficulty of obtaining the private funding needed to operate such an organization.

\textsuperscript{270} See BRENNAN CENTER FOR JUSTICE, The Farm Bureau, in HIDDEN AGENDAS: WHAT IS REALLY BEHIND ATTACKS ON LEGAL AID LAWYERS?, 5-10 (2001) (describing history of efforts and stating that “[f]or several decades, LSC—or rather its elimination—has been one of the Farm Bureau’s hot-button issues”.

\textsuperscript{271} See id. at 7-8; In the Kingdom of Big Sugar, VANITY FAIR, Feb. 2001, at 178.


\textsuperscript{273} See id.
legal aid lawyers representing migrant workers. The deal struck by the growers and the LSC of Virginia was that the growers would drop their legislation seeking across-the-board restrictions, while LSC of Virginia would agree to stop funding the representation of migrant workers in employment matters. As a recent newsletter aimed at H-2A employers shows, growers' associations are attempting to put the same kind of pressure specifically on those legal services programs that represent H-2A workers. These growers associations aim to prohibit LSC-funded programs from representing H-2A workers in any way once they have been shipped back to Mexico, essentially making it impossible for them to enforce their rights in court.

5. Summary: H-2A Workers are Left Without a Viable Means of Enforcing Their Substantive Rights

The handicaps imposed by federal law tend to make H-2A workers more "dependable" than their domestic counterparts. Unlike all other farmworkers in the United States, H-2A workers are not entitled to sue in any federal court where personal jurisdiction may be established. Unlike all domestic farmworkers, H-2A workers are limited by the law as to when and how they may gain legal assistance from LSC-funded legal aid programs. These handicaps collectively make it unlikely that even the rare H-2A worker who is bold enough to risk retaliation and blacklisting will actually be able to enforce his rights. Even if an H-2A worker does find a lawyer willing and able to sue a recalcitrant grower, it is likely that the H-2A worker's only legal recourse will be to file a suit in the grower's local county court. Such a suit would be of questionable effectiveness, giving the H-2A worker little negotiating leverage and scant hope of ultimate relief.

The H-2A worker is the latest incarnation of the juridically handicapped—i.e. handicapped by laws and legal institutions—farmworker in American society. Effectively, the current generation of guest workers has been deprived of a voice to protect themselves. The lamentable fact is that this deprivation appears to be the consequence of design, rather than circumstance, because it results in a large part from deliberate decisions of Congress, the courts and the Labor Department. Thus, the H-2A program appears to be yet another example of how

274. See Brennan Center for Justice, supra note 270, at 10.
275. See Bier, supra note 272.
276. See Boehm, supra note 268, at 14.
agribusiness has been able to use its political clout to gain insurmountable legal advantages over its workforce. These advantages essentially allow growers to rely on the exercise of coercive force, rather than on the offer of a competitive wage rate, to get workers to complete the difficult, dangerous and short-term tasks that must be done to bring produce to market.

IV. PUTTING H-2A WORKERS ON EQUAL FOOTING WITH DOMESTIC FARMWORKERS

"What sort of right is it which enjoys absolutely no procedural protection?" 277

It is a maxim of equity that no right should be without a remedy. 278 The logic behind this maxim is simple and pragmatic: if a right has no remedy, then that right is, as a practical matter, meaningless. A right that grants its holder nothing tangible—no compensation, no injunctive relief, no specific performance—is tantamount to being no right at all.

Pursuant to the mandatory terms of their H-2A contracts, an H-2A worker has substantive rights that are relatively generous compared to those of other farmworkers. Theoretically, the remedy for a breach of these rights is crystal clear: actual and consequential contract damages. However, in practice, these remedies do not exist because an H-2A worker has such a slim chance of ever enforcing these rights when the grower does not voluntarily respect them. 279

At the very least, H-2A workers should be put on equal footing with domestic farmworkers in terms of being endowed with the ability to enforce their substantive rights. 280 This equalization could largely be achieved by removing the special handicaps, now in place, against H-2A workers. First and foremost, Congress should rescind the provision of AWPA denying AWPA coverage to H-2A workers. There is no sound

279. See ROTHENBERG, HANDS, supra note 13, at 236-37 (stating that a Labor Department investigator with thirty years of experience estimates that at least fifty percent of growers are in serious non-compliance with laws governing the employment of farmworkers, and that no grower is in full compliance).
280. Of course, domestic farmworkers themselves have relatively little chance of asserting their own rights under AWPA since they work in an atmosphere of fear and intimidation, see Beliz v. W.H. McLeod & Sons Packing Co., 765 F.2d 1317, 1332 (5th Cir. 1985), and legal representation is so scarce.
policy justification for this exclusion, which sets H-2A workers apart from all other farmworkers. Second, because aggrieved H-2A workers face such difficulties in gaining legal assistance, LSC-funded programs should be allowed to represent any H-2A worker with respect to H-2A employment grievances, regardless of when and how the H-2A worker came in contact with the legal aid program. Furthermore, because they work so far from home and are tied to a single employer, H-2A workers should be granted certain additional procedural advantages to put them on an equal footing with domestic workers. Domestic workers can usually sue their former employers in the judicial district where they live because they can establish personal jurisdiction over a grower when the grower has recruited that worker near his home. Of course, H-2A workers cannot sue in federal court in their homes in Mexico. However, it is likely that it will be more feasible for the workers and their legal representatives to sue the grower somewhere other than the district where the grower works. Most likely, the most convenient place for an H-2A worker to file suit is where he finds legal representation—in an urban center or in another state on the route home. For this reason, in order to participate in the H-2A program, a grower should be required to consent to personal jurisdiction in any state the worker must pass through on his journey directly from home to the work site.

These changes to federal law should be made to justify the mere continuance of the current H-2A program for a relatively small number of workers. That is, without these modifications, the current H-2A program is indefensible for the simple reason that it creates a class of farmworkers with a significantly diminished ability to enforce their rights. As shown below, provisions of both federal law and NAFTA indicate that it is improper for the H-2A statutes and regulations to create such a class of comparatively disadvantaged guest workers.

A. The Bedrock Principle of the H-2A Program Requires that H-2A and U.S. Workers Be on an Equal Footing

The principle, which officially guides the formation and administration of the H-2A program is the “no adverse effect” principle—that the use of guest workers must not adversely affect domestic workers and their working conditions. Since federal law ensures that an H-2A worker is more vulnerable than a domestic worker, growers have more

281. This proposal seeks only to get rid of the “present in the U.S.” requirement, not solicitation rules in general. See Boehm, supra note 268, at 14.
freedom to take economic advantage of H-2A workers by engaging in the following cost-saving practices: (1) hiring excess workers to create an army of reserve labor at the work site, which allows the grower to keep workers fresh by working them just a few hours a day, to fire workers who assert their rights, and to even lease workers out to other farmers in the area; (2) providing dangerous transportation; (3) providing ramshackle housing; and, (4) engaging in illegal payment schemes to reduce the wages paid to workers; for example, by paying workers an inadequate piece rate or taking illegal deductions from their pay for food, housing or transportation.282

These types of practices undermine the working conditions for domestic farmworkers because when a grower subjects domestic workers to such abuses, the grower runs a comparatively significant risk of facing an enforcement action.283 In other words, a grower cannot abuse domestic workers with as much confidence that he will never have to pay for those abuses. For example, thanks to AWPA, if a grower wrongfully terminates a domestic worker, that worker just might go home, find a Legal Services lawyer, and file suit in federal court hundreds or thousands of miles away.284 In contrast, if a grower wrongfully terminates an H-2A worker, that worker will be sent straight back to Mexico (or Jamaica, or the Dominican Republic), blacklisted, and effectively silenced forever.285 At worst, if the worker is willing to risk further retaliation and manages to find legal assistance, that worker may bring suit in the grower's local county court. Or the Labor Department might take administrative steps to collect wages owed, but it is unlikely it will even impose a fine which would serve to deter other violations.286

In sum, the practical effect of the inequality between H-2A and domestic workers with respect to their procedural rights is to undermine the working conditions of all farmworkers in the United States. Yet Congress and the courts have repeatedly emphasized that the H-2A program aims to avoid precisely this type of adverse effect on domestic working conditions. In order to preserve that fundamental goal of the H-2A program, it is necessary to ensure that H-2A workers have equal

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282. These are the types of violations reported by the few H-2A workers who have dared and managed to voice their complaints in recent years.
283. See supra Section II.B.5.
284. See supra notes 82-84, 87 and accompanying text.
286. See Glascock, supra note 6, at 1A (reporting that a grower who failed to pay over $100,000 in back wages was fined just $650 for that failure).
access to legal assistance and to the federal courts. That is, just as an H-2A worker needs one hundred square feet of living space in order to protect domestic workers, he also needs equal access to legal remedies in order to protect his domestic counterparts. Ironically enough, in light of the “no-adverse-effect” principle, courts have denied H-2A workers an implied right of action to enforce their substantive rights in federal court, reasoning that H-2A workers’ substantive rights are designed to protect domestic workers. Perhaps this logic is faulty because it arbitrarily stops short: in order for the H-2A workers’ substantive rights to actually protect domestic workers, those rights need to be as readily enforceable as the rights which domestic workers themselves enjoy.

B. The Federal Government is Not Doing Enough to Ensure that H-2A Workers are Receiving the Minimal Due Process for Employment Complaints as Required Under NAFTA

Since ninety percent of H-2A workers are from Mexico, their employment in the United States falls under the purview of the North American Free Trade Agreement (“NAFTA”) signed by Mexico and the United States in 1992. NAFTA includes a so-called side agreement on labor issues, the North American Agreement on Labor Cooperation (“NAALC”), which has some provisions relevant to the practice of employing Mexican guest workers in the United States. Although the NAALC does not impose specific substantive standards for the employment of guest workers, it does require that their employment complaints be handled with a minimum of procedural care.

The federal government does not seem to have acknowledged its responsibility to ensure that Mexican guest workers are afforded certain procedural rights. To begin, one could argue that as a matter of common decency the federal government should bear the primary responsibility for ensuring the fair treatment of the foreign nationals it allows to enter

287. See Martin, Economic, supra note 101, at 436.
290. The NAALC sets forth some “guiding principles that the Parties [i.e., Mexico and the United States] are committed to promote, subject to each Party’s domestic law.” Id. at 1515. One of these principles, Principle 11, establishes that the Parties must commit to “[p]roviding migrant workers in a Party’s territory with the same legal protection as the Party’s nationals in respect of working conditions.” Id. at 1516.
291. See id. at 1509-13.
the United States as temporary "guests" in order to work and to profit our national economy. Even the bracero program operated on the assumption that this responsibility should be borne by the federal government. Under the bracero program, if the Labor Department found that back wages were owed to a bracero, the Department paid those wages itself, and then sought restitution of the wages from the offending grower. The current guest worker regime is not so hospitable. It is up to today's H-2A worker to recover these wages directly from the grower, by pressing the claim through administrative or judicial channels.

Recall the absurdity that may befall an H-2A worker who dares to confront his former employer in such straits. The H-2A worker can complain to the Labor Department and then wait for an answer that may never come. Or, if the H-2A worker manages to obtain legal counsel, he can try suing in federal court, but only if he happens to have a claim based on a federal right that is his prerogative to enforce (unlike his substantive employment rights guaranteed under the H-2A regulations). Or, the H-2A worker can try suing in state court where the judges and juries may be biased in favor of the grower. Finally, it is always possible that the state, through a judicial ruling or a legislative act, can close its courthouse doors to guest workers altogether, tossing the political hot potato back to the federal government.

Perhaps the most important potential effect of NAFTA is to highlight the responsibility that federal government should bear for the protection of H-2A workers because, as mentioned above, by entering the NAFTA treaty, the federal government has agreed to guarantee certain minimum standards of treatment for Mexican guest workers. Notably, under international law, the responsibility for fulfilling these guarantees runs to the federal government (i.e., the party that entered the treaty), not to the states.

At least in some circumstances, it could be argued that the federal government's current regime for H-2A workers fails to satisfy the requirements of NAFTA's labor side agreement, the NAALC, regarding the minimal legal process owed to guest workers. The current remedies

293. See supra Part II.B.1.
294. See supra Part II.B.2, 4.
295. See supra Part II.B.3.
296. See MARK W. JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 26-27 (2d ed. 1993). Of course, the federal government has the duty under international law to take such measures as may be necessary for making the provisions of treaties effective within its territories. See id. at 34, 84, 90.
made available to the federal government may be inadequate under Articles 4 and 5 of the NAALC.

Article 4 states: "Each Party [viz. the signatory governments] shall ensure that persons with a legally recognized interest under its law in a particular matter have appropriate access to administrative, quasi-judicial, judicial or labor tribunals for the enforcement of the Party’s labor law." There is no doubt that an H-2A worker has a "legally recognized interest" to obtain the benefit of his bargain under an H-2A contract, and so these workers have a right to "appropriate access" to a forum to enforce those rights. Since the federal government has excluded H-2A workers from AWPA coverage and has decided that an H-2A worker has no private right of action under the H-2A regulations, it appears to fulfill this forum requirement by providing an administrative remedy and allowing suit in state court. But, let us look again at these remedies.

The federal administrative remedy might not satisfy Article 5 of the NAALC due to various flaws in the existing process. Article 5 requires that an administrative proceeding used to enforce a guest worker’s rights must "not entail unreasonable charges or time limits or unwarranted delays." The U.S. Supreme Court’s decision in Coit Independence suggests it is unwarranted to allow an administrative agency to delay action on a complaint for an unlimited period of time. Moreover, Article 5 requires that the decision-maker must issue a final decision on the merits that is "in writing" and that "preferably state[s] the reason for which the decision[] [is] based." As explained earlier, if the Labor Department simply declines to procure any relief for an aggrieved H-2A worker, then the Department need not issue any statement whatsoever—that is, it need not make a statement in writing, nor does it need to give any reasons for its decision not to act on the complaint.

The remaining question is whether the state court remedy is adequate to satisfy the minimum process standards of the NAALC. It may be argued that, as a practical matter, the cost to an indigent H-2A worker of litigating in a foreign state court thousands of miles from home is categorically "unreasonable," thereby rendering that forum insufficient under Article 4. Apart from that potential flaw, however, state courts apparently give Mexican H-2A workers the process due

297. NAALC, supra note 294, at 1503.
298. Id. at 1504.
300. NAALC, supra note 294, at 1504.
301. See supra Part II.B.1. and text accompanying note 179.
under the NAALC. Nevertheless, this resolution is unsatisfactory because it is possible for state court judges to essentially bar H-2A workers from suit in their state courts. In *Joseph v. Okeelanta Corp.*, and *Aguirre v. Workman*, the trial judges ruled that the foreign guest worker plaintiffs had to exhaust their potentially inexhaustible federal administrative remedies before suing in a state court for a breach of contract. While these initial rulings of the trial judges were eventually overturned on appeal, they demonstrate that the United States' compliance with NAFTA ultimately will turn on various decisions of state court judges. It may not be unusual for the federal government to place some reliance on states for the ultimate compliance with an international treaty, but there is little reason for such reliance here. In this case, such reliance on the states could be avoided by simply granting H-2A workers the same AWPA coverage enjoyed by all other farmworkers in the United States (documented and undocumented alike). In that event, H-2A workers would unquestionably have recourse to federal court.

V. CONCLUSION

In the last few decades, many U.S. companies have been moving their manufacturing and assembly plants offshore to take advantage of foreign workers who have minimal legal protections, a lower cost of living, and negligible bargaining power. Growers, unlike these employers, cannot move their work sites to a foreign country, but they can attempt to import a vulnerable, desperate workforce into the United States. The rising demand for agricultural guest workers is a sign that agribusiness is trying, like U.S. manufacturers, to tap into a source of workers with fewer rights and lower expectations.

While the exploitation of workers is hardly defensible, when a manufacturer takes advantage of vulnerable workers overseas, that...

304. *See Joseph, 656 So. 2d at 1320; Aguirre, No. 1998-CA-001367-MR.*
exploitation is at least taking place under the watch of the workers’ own government. Theoretically, those employees have a voice in their own government; they can band together and protest or they can seek the help of their own politicians, administrators, and judges. The same is true for domestic farm workers in this country. In contrast, a guest worker has absolutely no political weight in the country where he or she works.306 A guest worker is a stranger in a strange land. For this reason, it is especially important that guest workers be given adequate legal protections, including procedural protections that ensure as a practical matter that their employers respect their formal rights. The current H-2A regime falls far short of this mark because, rather than being used to provide extra assistance to H-2A workers, the law has been used to put them at a greater disadvantage.

306. As Galarza observed with respect to the bracero workers in the United States: “The law placed the security of one class of citizens [viz., braceros, Mexican citizens] in the hands of a public administration [viz., the Labor Department] which was in no effective manner responsive to them.” GALARZA, supra note 58, at 230.