An Agricultural Law Research Article

COMMUTERS, ILLEGALS AND AMERICAN FARMWORKERS: THE NEED FOR A BROADER APPROACH TO DOMESTIC FARM LABOR PROBLEMS

Public Lands Council v. Babbitt: Tenth Circuit Decides that the Taylor Grazing Act "Breathes Discretion at Every Pore"*

I. INTRODUCTION

In *Public Lands Council v. Babbitt*,[1] the United States Court of Appeals for the Tenth Circuit reversed in part and affirmed in part the holding of the United States District Court for the District of Wyoming in *Public Lands Council v. United States Department of Interior*.[2] The Tenth Circuit held that three of four of the Secretary of the Interior's new regulations, held invalid by the District Court for the District of Wyoming, were indeed valid.[3] The Tenth Circuit affirmed the district court's findings that one of the new regulations was beyond the scope of the Secretary's authority.[4] In reversing most of the district court's holdings, the Tenth Circuit recognized the Secretary of the Interior's broad discretionary power under the Taylor Grazing Act and emphasized deference to the Secretary's decisions.[5]

II. THE CASE

The Secretary of the Interior promulgated new regulations in 1995 governing the administration of livestock grazing on the public lands managed by the Bureau of Land Management (BLM).[6] The Secretary promulgated these regulations under the Taylor Grazing Act of 1934[7] (TGA), the Federal Lands Policy and Management Act of 1976[8] (FLPMA), and the Public Rangelands Improvement Act of 1978[9] (PRIA).[10] The Public Lands Council (PLC), along with several other livestock industry groups, brought suit against the Secretary in the District Court for the District of Wyoming, challenging the facial validity of ten new regulations on the grounds that the Secretary had exceeded his statutory authority or lacked a reasoned basis for departing from the previous

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[1] 167 F.3d 1287 (10th Cir. 1999).

[2] 929 F. Supp. 1436 (D. Wyo. 1996).

[3] *See Public Lands Council*, 167 F.3d at 1289.

[4] *See id.*

[5] *See generally id.*

[6] *See id.* at 1289.

[7] 43 U.S.C. §§ 315–315r (1994).

[8] 43 U.S.C. §§ 1701–1784 (1994).

[9] 43 U.S.C. §§ 1901–1908 (1994).

[10] *See Public Lands Council*, 167 F.3d at 1289.

rules.[11] The district court held four of the challenged regulations invalid and enjoined their enforcement.[12] The four challenged regulations concerned:

> (1) the use of the terms "grazing preference" and "permitted use" to denote priorities and specify grazing use for purposes of issuing grazing permits (permitted use rule); (2) ownership of title to range improvements (range improvements rule); (3) the elimination of the requirement that applicants for permits must "be engaged in the livestock business" (qualifications rule); and (4) the issuance of permits for "conservation use" in addition to permits for the grazing of livestock (conservation use rule).[13]

The Secretary appealed the district court's decision and the Tenth Circuit reversed the district court's holding regarding "the permitted use rule, the range improvements rule, and the qualifications rule," holding them valid.[14] The Tenth Circuit then affirmed the district court's finding that the conservation use rule was invalid.[15]

A. Standard of Review

The Tenth Circuit reviewed the district court's decision de novo,[16] applying the two-part test for reviewing an agency action that the United States Supreme Court set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[17] Under *Chevron*, a court must look at whether Congress has spoken directly to the issue at hand.[18] If Congress' intent is clear, then the court and the agency must give effect to the unambiguously expressed intent of Congress and the court's inquiry is over.[19] If Congress has remained silent or is ambiguous concerning the particular issue, then the court looks to whether the agency's action is based on a permissible construction of the statute, and if so, the court must then find that the action is valid.[20] The court's standard of review was also governed by *United States v. Salerno*,[21] which set forth the test for a facial

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[11] *See id.* at 1292–93.
[12] *See id.* at 1290, 1293.
[13] *Id.* at 1289.
[14] *Id.*
[15] *See id.*
[16] *See id.* at 1293.
[17] 467 U.S. 837 (1984).
[18] *See Public Lands Council*, 167 F.3d at 1293.
[19] *See id.*
[20] *See id.* at 1294.
[21] 481 U.S. 739 (1987).

challenge to a statute or regulation.[22] In order to prevail on a facial challenge, PLC had to demonstrate that "no set of circumstances exists under which the [regulation] would be valid."[23]

B. Permitted Use Rule

PLC argued that the Secretary exceeded his statutory authority in promulgating the 1995 regulations when he changed the definition of "grazing preference" to mean "a priority position against others for purposes of permit renewal."[24] PLC also argued that the Secretary exceeded his statutory authority when he added the term "permitted use" to mean "the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and expressed in [animal unit months]."[25] "[O]ne [animal unit month] represents the amount of forage necessary to sustain either one cow, one horse, five sheep, or five goats for one month."[26] The district court ruled that these changes ended the practice of "recognizing" grazing privileges, as was allegedly practiced under prior regulations, and eliminated the "right" to graze predictable numbers of stock that the TGA granted to original grazing permittees.[27] The district court also ruled that the Secretary was not "adequately safeguard[ing]" the prior grazing adjudications as required by the TGA.[28] In its analysis, the Tenth Circuit first discussed the history of the BLM's regulations governing issuance of grazing permits.[29] Afterwards, the court compared the governing statutes to the 1995 regulations[30] and concluded that the Secretary was authorized to issue the 1995 rules.[31]

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[22] *See Public Lands Council*, 167 F.3d at 1293.
[23] *Id.* (quoting Reno v. Flores, 507 U.S. 292, 301 (1993) (alteration in original)) (citations omitted).
[24] *Id.* at 1292, 1297.
[25] 43 C.F.R. § 4100.0–5 (1995).
[26] *Public Lands Council*, 167 F.3d at 1291.
[27] *See id.* at 1293.
[28] *See id.*
[29] *See id.* at 1295–98.
[30] *See* 43 C.F.R. § 4100 (1995).
[31] *See Public Lands Council*, 167 F.3d at 1298–1302.

1. The Regulatory Scheme

After Congress passed the TGA, the Secretary began to establish grazing districts and issue grazing permits.[32] The number of qualifying applicants exceeded the amount of grazing permits available; thus, the Department of the Interior engaged in a detailed adjudication process whereby it gave priority to applicants as required by the TGA.[33] The Secretary gave priority to "applicants who owned land or water, i.e. base property, in or near a grazing district."[34] In addition, the Secretary gave priority to landowners "who were dependent on the public lands for grazing," who had used their base property for livestock operations in connection with the public grazing lands for five years prior to passage of the TGA, or whose land or water required the use of public rangelands for economic livestock operations.[35] The Secretary's initial regulations promulgated under the TGA were referred to as the Federal Range Code.[36]

Congress enacted the FLPMA to address the deterioration of public rangelands and to authorize the Secretary to institute a "land use planning process."[37] The Secretary was to create land use plans and manage the lands in accordance with the principles of "sustained yield" and "multiple use."[38] As a result of the FLPMA, the Secretary issued new regulations in 1978 that "effected significant changes in the process for issuing grazing permits."[39] The 1978 regulations still recognized the priority of livestock operators who currently held grazing permits, but emphasized that all grazing permits had to be issued in accordance with land use plans.[40] Permittees or lessees seeking renewal could only be given first priority if "the permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer."[41] The regulations further made "cancellation of grazing preferences mandatory when necessary to maintain compliance with land use plans."[42] The Secretary issued regulations in 1994 that "effectively soften[ed] the requirement that

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[32] *See id.* at 1295.
[33] *See id.*
[34] *Id.*
[35] *Id.*
[36] *See id.* n.2.
[37] *Id.* at 1295 (citing Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 843, 857 (E.D. Cal. 1985)).
[38] *See id.* at 1290.
[39] *Id.* at 1295 (citations omitted).
[40] *See id.*
[41] *Id.* at 1296 (quoting 43 C.F.R. § 4130.2(e)(3) (1978)).
[42] *Id.* (quoting 43 C.F.R. § 4110.3-2(b) (1978)).

grazing preferences must at all times be consistent with land use plans."[43] However, shortly thereafter, the Secretary's implementation of the 1995 regulations returned to the strict requirement that grazing permits be subject to terms and conditions that conform to land use plans.[44]

2. The Controlling Statutes

The Tenth Circuit then assessed whether the permitted use rule was in accordance with the TGA and the FLPMA, given the history that produced the permitted use rule.[45] The TGA states that "grazing permits shall be [issued] for a period of ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior . . . [and that] grazing privileges recognized and acknowledged shall be adequately safeguarded."[46] The Tenth Circuit held that the TGA did not preclude the Secretary from issuing the permitted use rule, which simply states that "[p]ermitted use is granted to holders of grazing preference and shall be specified in all grazing permits and leases."[47] The court said that nothing in the TGA makes any references to the prior grazing adjudications, other than granting them a mere preference that is given in the Secretary's discretion: "The TGA gives no hint, much less the unambiguous direction required by *Chevron*, that the issuance of a grazing permit . . . requires permanent 'recognition' of the numbers of the stock authorized to graze in that permit."[48]

PLC argued that the purpose of the TGA was to promote stability on the grazing lands and that by disregarding the prior grazing adjudications, the Secretary was acting contrary to the TGA's mandate.[49] The Tenth Circuit responded, "[t]he Act clearly states that the need for stability must be balanced against the need to protect the rangeland."[50] The court lastly explained that the notion of maintaining grazing adjudications from the 1940s into perpetuity was contrary to the other provisions of the Act.[51] The "statute mandates that the Secretary shall specify the numbers, stock, and season of use from time to time," and another provision, which states that permit periods are not to exceed ten

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[43] *Id.*
[44] *See id.* at 1297.
[45] *See id.* at 1298–99.
[46] *Id.* at 1298 (quoting 43 U.S.C. § 315(b) (1994)).
[47] *Id.*
[48] *Id.* at 1299.
[49] *See id.* at 1298.
[50] *Id. See also* 43 U.S.C. § 315(a) (1994).
[51] *See Public Lands Council*, 167 F.3d 1299.

years, refutes the idea of permanent grazing permit preferences.[52] Thus, the court said "[t]he mandatory renewal process contemplates that the substance of the grazing privilege, as opposed to the preference right of renewal, is to be periodically adjusted in accordance with the condition of the rangeland."[53]

In addition, the FLPMA mandates "that the Secretary must specify terms and conditions consistent with land use plans in every grazing permit."[54] The Tenth Circuit decided that the FLPMA, too, makes no reference to prior grazing adjudications and is, therefore, not in conflict with the permitted use rule.[55] The court said that since the permitted use rule provides that grazing permits shall specify numbers of stock and seasons of use, it is "easily within the scope of the Secretary's authority under the FLPMA."[56]

The Tenth Circuit lastly answered PLC's argument that the Secretary had failed to "adequately safeguard" recognized grazing privileges by noting that the Secretary provides the same procedural safeguards under the 1995 regulations that was provided under previous regulations.[57] Next, the court held that PLC's claim that the permitted use rule would undermine the stability of the livestock industry was speculative and "not ripe for consideration on a facial challenge."[58] Under *Salerno*, a facial challenge required PLC to demonstrate that no circumstances existed under which the permitted use rule could be valid, and, here, PLC could not make such an allegation until the rule was actually applied.[59]

C. Title to Permanent Range Improvements

PLC next argued that the range improvements rule was invalid because the TGA requires that range improvements be owned by the permittees who construct the improvement:

> No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior.[60]

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[52] *Id.* (citing, in part, 43 U.S.C. § 315(b) (1994)).
[53] *Id.* (emphasis omitted).
[54] *Id.* at 1301 n.9.
[55] *See id.* at 1301.
[56] *Id.*
[57] *See id.* (citing, in part, 43 U.S.C. § 315(b) (1994)).
[58] *Id.* at 1302.
[59] *See id.* at 1301.
[60] *Id.* at 1303 (quoting 43 U.S.C. § 315(c) (1994)) (emphasis omitted).

The dissent argued that the TGA's use of the phrase "such improvements constructed and owned by a prior occupant" unambiguously communicates "that when a permittee constructs an authorized improvement, he or she holds title to that improvement."[61] The majority, however, disagreed and reasoned that under the second step of *Chevron*, the Secretary could still promulgate the range improvements rule within a "permissible construction" of the TGA.[62] The Tenth Circuit stated that "[w]hile the language at issue may allow the dissent's reading of it, the entire payment provision can also equally be viewed as purely conditional, operative only if the Secretary allows both construction and ownership."[63]

The Tenth Circuit also found that the FLPMA indicates that a permittee who constructs land improvements does not necessarily own them.[64] Congress states in section 1752(g) that "[w]henever a permit or lease for grazing domestic livestock is canceled . . . the permittee . . . shall receive from the United States a reasonable compensation . . . of his *interest in* authorized permanent improvements placed or constructed by the permittee."[65] The Tenth Circuit held that by using the term "interest in" rather than "ownership of" permanent improvements in the FLPMA, Congress must not have strictly required that permittees who constructed improvements on the grazing lands actually hold title to those improvements.[66] Lastly, the court found that because the permanent improvements rule is based on a permissible construction of the TGA, the court must defer to the Secretary's rule.[67] Further, the Secretary had not failed to provide a reasoned basis for departing from the previous regulations.[68] The government asserted that "management of permanent improvements according to FLPMA's multiple use and sustained-yield mandate would be simplified if BLM could avoid having to negotiate with permittees as titleholders to permanent improvements."[69]

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[61] *Id.* at 1317.
[62] *See id.* at 1303.
[63] *Id.* at 1304.
[64] *See id.*
[65] *Id.* (quoting 43 U.S.C. § 1752(g) (1994)) (emphasis added).
[66] *See id.*
[67] *See id.* at 1305.
[68] *See id.*
[69] *Id.*

D. The Qualifications Rule

PLC argued that the Secretary acted contrary to the TGA by eliminating the requirement that "in order to qualify for a grazing permit, an applicant had to 'be engaged in the livestock business.'"[70] However, the Tenth Circuit found that the TGA clearly states that "bona fide settlers, residents, and other stock owners" may apply for grazing permits and that PLC's argument failed in the face of such clear language.[71] The court held that it must give effect to the plain meaning of the words chosen by Congress.[72] Thus, the court did not need to see if the Secretary's departure from the previous regulations were supported by a reasoned basis as the agency was "simply giving effect to the unambiguously expressed intent of Congress."[73]

E. The Conservation Use Rule

Finally, PLC argued that the Secretary exceeded his statutory authority by adding "conservation use" as a permissible use of a grazing permit.[74] The court agreed with PLC and the district court in this instance, holding that under the Chevron analysis, Congress has spoken directly to this issue.[75] The plain language of the TGA provides that the Secretary may issue "permits to graze livestock on . . . grazing districts."[76] The FLPMA's and PRIA's language defines "grazing permit" as "any document authorizing use of public land . . . for the purpose of grazing domestic livestock."[77] The Tenth Circuit, therefore, concluded that Congress specifically intended grazing permits to be used only for grazing.[78] The court stated, "[t]he Secretary's assertion that 'grazing permits' for use of land in 'grazing districts' need not involve an intent to graze is simply untenable."[79]

The Secretary argued that resting the grazing lands is a perfectly acceptable practice on the rangelands and furthers the underlying purposes of the TGA by helping to preserve the rangelands from "destruction or unnecessary injury."[80] The conservation use rule would also further the FLPMA's purposes

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[70] *Id.* (quoting 43 C.F.R. § 4110.1 (1995)).
[71] *Id.* at 1306 (quoting 43 U.S.C. § 315(b) (1994)).
[72] *See id.* (citing Bartlett v. Martin Marietta Operations Support, 38 F.3d 514, 518, (10th Cir. 1994)).
[73] *Id.* (quoting *Chevron*, 467 U.S. at 843).
[74] *See id.* at 1292.
[75] *See id.* at 1307.
[76] *Id.* (quoting 43 U.S.C. § 315(b) (1994)).
[77] *Id.* at 1307-08 (quoting 43 U.S.C. §§ 1702(p), 1902(c) (1994)).
[78] *See id.*
[79] *Id.* at 1308.
[80] *Id.* at 1307 (citing 43 U.S.C. § 315(a)).

by helping to achieve the goals of multiple-use, which require the Secretary to consider the long term needs of the rangelands while managing the lands according to numerous purposes without inflicting damage.[81] However, the court responded that the TGA clearly states that "the primary purpose of a permit must be grazing: . . . [I]t is true that the TGA, FLPMA, and PRIA, [sic] give the Secretary very broad authority to manage the public lands. . . . Permissible ends such as conservation, however, do not justify unauthorized means."[82]

III. BACKGROUND

In *Chevron*, the United States Supreme Court issued a two-part test for reviewing the validity of an agency's action, drawing its ruling from a long history of precedent.[83] The Supreme Court explained its deferential policy in *Chevron* by stating that the agency's construction need not be the only permissible construction of the statute, or even a construction that the court would have reached if the court itself had interpreted the statute.[84] The Court explained that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency," and, thus, the Court will give an agency's determination legislative and controlling weight.[85]

In *Chevron*, the Supreme Court ruled that the Environmental Protection Agency's (EPA) regulations concerning "nonattainment" areas were permissible under Congress's Clean Air Act Amendment of 1977.[86] The Court accorded EPA deference, as Congress had not expressly intended that the agency use the term "stationary source" in only one manner.[87] The Court decided that EPA's interpretation of the statute was reasonable, given the technical nature of the inquiry and the policy decisions that the agency had to assess.[88] The Court concluded that "when a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[89]

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[81] *See id.*

[82] *Id.* at 1308.

[83] *See Chevron*, 467 U.S. at 842–43.

[84] *See id.* at 843 n.11.

[85] *Id.* at 843–44.

[86] *See id.* at 866. *See also* Clean Air Act, 91 Stat. 685 (1977) (codified, as amended, at 42 U.S.C. §§ 7401–7671q (1994)).

[87] *See Chevron*, 467 U.S. at 865.

[88] *See id.*

[89] *Id.* at 866.

In a case similar to *Public Lands Council*, the Nevada District Court in *Natural Resources Defense Council v. Hodel*[90] also emphasized a policy of deference. The district court acknowledged that the plaintiffs' complaints may have had factual merit in suggesting bad management or environmental insensitivity by the BLM, but ultimately did not give rise to a need for judicial intervention.[91] The judge lamented his inability "to adopt one theory of range management over another" as well as his "powerless[ness] to substitute [his] judgment for that of the BLM in these matters."[92] The plaintiffs in *Hodel* argued that the FLPMA and PRIA provide standards under which the defendants' actions may be deemed "arbitrary, capricious, or contrary to the law."[93] The court responded that the provisions held general terms and clauses that "can hardly be considered concrete limits upon agency discretion. Rather, it is language which 'breathes discretion at every pore.'"[94]

In addition, in *McLean v. Bureau of Land Management*,[95] the appellants protested when the Area Manager refused to grant the appellants forage allotments.[96] The appellants argued that the Area Manager's allocation of surplus forage violated both the Federal Range Code and the terms of the 1970 Allotment Agreement.[97] The administrative court held that the BLM's 1978 regulations made clear that "the entire basis upon which grazing preferences were determined was drastically altered."[98] The court further held that the precedential value of departmental adjudications rendered prior to the 1978 regulations was greatly reduced and "future adjudications of grazing use would be based on criteria vastly different from those provided in the Federal Range Code."[99]

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[90] 624 F. Supp. 1045 (D. Nev. 1985).
[91] *See id.* at 1047.
[92] *Id.* at 1048.
[93] *Id.* at 1058.
[94] *Id.* (quoting Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979)).
[95] 133 IBLA 225 (1995).
[96] *See id.* at 226
[97] *See id.* at 230.
[98] *Id.* at 233.
[99] *Id.* at 233–35.

IV. ANALYSIS

The Tenth Circuit strictly followed the *Chevron* test in analyzing the validity of the Secretary's regulations, deferring to the Secretary whenever possible. In analyzing the permitted use rule, the court decided that the rule "comports with the authority granted the Secretary of the Interior under the TGA and FLPMA and demands our deference under Chevron."[100] The court seemed to purport that PLC's contention that grazing permits should accord with the original grazing adjudications was in conflict with the statutes: "[p]erpetuating grazing decisions handed down in the 1940s may well be inconsistent with the ongoing statutory command that the Secretary protect the federal lands."[101] The court stated that the dissent's and PLC's suggestion that Congress meant the original grazing decisions should become "ongoing 'grazing preference[s]'" conflicted with Congress' mandate that the Secretary should grant renewal of grazing permits according to the changing state of the rangelands.[102] The court also suggested that the permitted use rule was directly in accord with the FLPMA by providing "that grazing permits shall specify the numbers of stock and seasons of use according to [the dictates of applicable] land use plans."[103] With the FLPMA, Congress first required "that the Secretary must specify terms and conditions consistent with land use plans in every grazing permit."[104] Thus, the permitted use rule was certainly in accord with the law, the TGA, and the FLPMA, and the court must give deference to the Secretary.

In regard to the range improvements rule, the court stated that "nothing in the statutory language directs where such [permanent range improvements] title must lie."[105] The court spoke of the explicit discretionary language found in the TGA by which the Secretary may do "any and all things necessary" to accomplish the purposes of the Act.[106] The TGA also uses plain language to give the Secretary "discretionary authority to decide whether to allow necessary range improvements."[107] Conversely, the dissent found that the TGA unambiguously requires that title to structural improvements constructed by a permittee must be owned by the permittee.[108] However, the majority proposed other interpretations

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[100] *Public Lands Council*, 167 F.3d at 1294.
[101] *Id.* at 1299 (citations omitted).
[102] *Id.*
[103] *Id.* at 1301.
[104] *Id.* at 1301 n.9.
[105] *Id.* at 1302.
[106] *Id.* at 1302–03 (citing 43 U.S.C § 315(a) (1994)).
[107] *Id.* at 1303.
[108] *See id.* at 1317.

of the statute that would also allow the government to hold title to permanent improvements: "[the] . . . provision can also equally be viewed as . . . operative only if the Secretary allows both construction and ownership."[109] The court further held that "[t]he language . . . is not rendered meaningless . . . because the provision will still apply to temporary improvements."[110] The court stated that "[t]he dissent's construction is, quite simply, not the only one the language supports,"[111] implying that the dissent did not consider the second step in *Chevron*.

In applying *Chevron* to the qualifications rule, the court decided that the regulation easily passed the first part of the test because Congress' intent was clear that the Secretary could grant permits to persons other than those engaged in the livestock business.[112] The court stated that the TGA did confer preference to issuance of grazing permits to "landowners engaged in the livestock business."[113] However, this ruling does not support PLC's argument that the Secretary can issue grazing permits to only those involved in the livestock business because "landowners engaged in the livestock business are not even the only group entitled to this preferential treatment."[114] The court then decided that it need not look at the legislative history in order to ascertain Congress' intent because Congress made its intent clear with the statutory language.[115]

The court applied a similar analysis to the conservation use rule and concluded that "Congress has spoken directly to this precise question and answered it in the negative."[116] As with the qualifications rule, the court found it did not need to engage in the second step of the *Chevron* analysis. The conservation rule was facially invalid because "there is no set of circumstances under which the Secretary could issue such a permit."[117]

Although *Hodel* is not controlling precedent, it illustrates the deference that must be conferred to the Secretary within the rangeland context. The Tenth Circuit cited *Hodel* in its permitted use analysis and followed *Hodel*'s idea that "the courts are not at liberty to break the tie choosing one theory of range management as superior to another"[118] in deferring to the Secretary's decisions to issue the challenged rules. The court also followed *McLean* in its analysis of

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[109] *Id.* at 1304.
[110] *Id.*
[111] *Id.*
[112] *See id.* at 1306.
[113] *Id.* (citing 43 U.S.C. § 3156 (1994)).
[114] *Id.*
[115] *See id.*
[116] *Id.* at 1307.
[117] *Id.* at 1308 (citations omitted).
[118] *Hodel*, 624 F. Supp. at 1058 (quoting *Perkins*, 608 F.2d at 807).

the permitted use rule, striking down the concept that grazing permits issued under the Federal Range Code must exist in perpetuity.[119] In all, the Tenth Circuit reinforced the principle that grazing permit preferences will no longer have as much weight as preferences did in the past.

V. CONCLUSION

The Tenth Circuit in *Public Lands Council v. Babbitt* reversed the district court's ruling that three of the Secretary of the Interior's 1995 regulations concerning grazing permits were invalid. It found that the Secretary had acted within his authority in issuing the permitted use, range improvements, and qualifications rules and, as such, deserved complete deference. However, the court found that Congress had specifically spoken concerning the conservation use rule, and, therefore, the court was obligated to affirm the district court and find the rule invalid.

The court recognized that the judiciary should defer to an agency's decisions concerning how the agency interprets statutory commands. A court is not to substitute its judgment for the policies and decisions effected by an agency. Also, the *Babbitt* court further reduced the importance of grazing permit preference "rights" under the TGA. Because the TGA authorizes the Secretary's discretion in issuing grazing permits, the Secretary's authority in making such decisions has been greatly increased by the Tenth Circuit's reading of both *Chevron* and the TGA.

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[119] *See McLean*, 133 IBLA at 233.

NOTES

COMMUTERS, ILLEGALS AND AMERICAN FARMWORKERS: THE NEED FOR A BROADER APPROACH TO DOMESTIC FARM LABOR PROBLEMS

I

INTRODUCTION

Over 30 years ago, John Steinbeck depicted the anguish and anomie of the life of American farmworkers in his moving novel, *The Grapes of Wrath*.[1] Edward R. Murrow's classic television documentary, *Harvest of Shame* (1960), provided a more contemporary and less naturalistic reminder that domestic farmworkers, and particularly migrant workers, were still denied a fair share of the bounty they reap. But both are more than history; the lives of the Joad family and those of today's farmworkers are often all too similar.[2] A dual tragedy prevails here: the first is that such problems ever existed; the second and greater tragedy is that after so many decades they remain unremedied.

The purpose of this Note is not to dramatize the plight of America's farmworkers; others have ably done so. Rather, this Note will examine the effectiveness of present federal programs in resolving the major problems of domestic farmworkers. We will then look beyond present programs to some of the basic nondomestic causes of these problems—in particular, to the impact of "commuters" and illegal aliens upon the farm labor situation, for virtually all of the serious problems confronting domestic farmworkers are severely aggravated by low-cost competition from thousands of these alien laborers. Previous legislative attempts to assist farmworkers have not adequately considered the effect these aliens have had on farmworker problems or on the implementation of effective farmworker legislation. Thus, by examining the efficacy of present legislation and by exploring some of the basic causes and complications of farm labor problems, we will emphasize the need for a broader and more perceptive approach to the solution of these problems.

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[1] J. Steinbeck, The Grapes of Wrath (1939).

[2] For an excellent and recent overview of the problems confronting American farmworkers, see Hearings on Migrant and Seasonal Farmworker Powerlessness Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 91st Cong., 1st & 2d Sess., pts. 1-8C (1969-70) [hereinafter Powerlessness Hearings]. For an earlier examination of some of the problems to be discussed in this Note, see Hearings on National Farm Labor Problems Before the Subcomm. on Migratory Labor of the Senate Comm. on Education and Labor, 76th Cong., 3d Sess. (1940) [hereinafter Farm Labor Hearings]. Given the remarkable similarity of the nature of farmworker problems now and 30 years ago, it seems quite true that "the farm poor are, for the most part, without a real voice in the United States." M. Harrington, The Other America 59 (1963).

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In *Public Lands Council v. Babbitt*,[1] the United States Court of Appeals for the Tenth Circuit reversed in part and affirmed in part the holding of the United States District Court for the District of Wyoming in *Public Lands Council v. United States Department of Interior*.[2] The Tenth Circuit held that three of four of the Secretary of the Interior's new regulations, held invalid by the District Court for the District of Wyoming, were indeed valid.[3] The Tenth Circuit affirmed the district court's findings that one of the new regulations was beyond the scope of the Secretary's authority.[4] In reversing most of the district court's holdings, the Tenth Circuit recognized the Secretary of the Interior's broad discretionary power under the Taylor Grazing Act and emphasized deference to the Secretary's decisions.[5]

II. THE CASE

The Secretary of the Interior promulgated new regulations in 1995 governing the administration of livestock grazing on the public lands managed by the Bureau of Land Management (BLM).[6] The Secretary promulgated these regulations under the Taylor Grazing Act of 1934[7] (TGA), the Federal Lands Policy and Management Act of 1976[8] (FLPMA), and the Public Rangelands Improvement Act of 1978[9] (PRIA).[10] The Public Lands Council (PLC), along with several other livestock industry groups, brought suit against the Secretary in the District Court for the District of Wyoming, challenging the facial validity of ten new regulations on the grounds that the Secretary had exceeded his statutory authority or lacked a reasoned basis for departing from the previous

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[1] 167 F.3d 1287 (10th Cir. 1999).

[2] 929 F. Supp. 1436 (D. Wyo. 1996).

[3] *See Public Lands Council*, 167 F.3d at 1289.

[4] *See id.*

[5] *See generally id.*

[6] *See id.* at 1289.

[7] 43 U.S.C. §§ 315–315r (1994).

[8] 43 U.S.C. §§ 1701–1784 (1994).

[9] 43 U.S.C. §§ 1901–1908 (1994).

[10] *See Public Lands Council*, 167 F.3d at 1289.

rules.[11] The district court held four of the challenged regulations invalid and enjoined their enforcement.[12] The four challenged regulations concerned:

> (1) the use of the terms "grazing preference" and "permitted use" to denote priorities and specify grazing use for purposes of issuing grazing permits (permitted use rule); (2) ownership of title to range improvements (range improvements rule); (3) the elimination of the requirement that applicants for permits must "be engaged in the livestock business" (qualifications rule); and (4) the issuance of permits for "conservation use" in addition to permits for the grazing of livestock (conservation use rule).[13]

The Secretary appealed the district court's decision and the Tenth Circuit reversed the district court's holding regarding "the permitted use rule, the range improvements rule, and the qualifications rule," holding them valid.[14] The Tenth Circuit then affirmed the district court's finding that the conservation use rule was invalid.[15]

A. Standard of Review

The Tenth Circuit reviewed the district court's decision de novo,[16] applying the two-part test for reviewing an agency action that the United States Supreme Court set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.[17] Under *Chevron*, a court must look at whether Congress has spoken directly to the issue at hand.[18] If Congress' intent is clear, then the court and the agency must give effect to the unambiguously expressed intent of Congress and the court's inquiry is over.[19] If Congress has remained silent or is ambiguous concerning the particular issue, then the court looks to whether the agency's action is based on a permissible construction of the statute, and if so, the court must then find that the action is valid.[20] The court's standard of review was also governed by *United States v. Salerno*,[21] which set forth the test for a facial

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[11] *See id.* at 1292–93.
[12] *See id.* at 1290, 1293.
[13] *Id.* at 1289.
[14] *Id.*
[15] *See id.*
[16] *See id.* at 1293.
[17] 467 U.S. 837 (1984).
[18] *See Public Lands Council*, 167 F.3d at 1293.
[19] *See id.*
[20] *See id.* at 1294.
[21] 481 U.S. 739 (1987).

challenge to a statute or regulation.[22] In order to prevail on a facial challenge, PLC had to demonstrate that "no set of circumstances exists under which the [regulation] would be valid."[23]

B. Permitted Use Rule

PLC argued that the Secretary exceeded his statutory authority in promulgating the 1995 regulations when he changed the definition of "grazing preference" to mean "a priority position against others for purposes of permit renewal."[24] PLC also argued that the Secretary exceeded his statutory authority when he added the term "permitted use" to mean "the forage allocated by, or under the guidance of, an applicable land use plan for livestock grazing in an allotment under a permit or lease and expressed in [animal unit months]."[25] "[O]ne [animal unit month] represents the amount of forage necessary to sustain either one cow, one horse, five sheep, or five goats for one month."[26] The district court ruled that these changes ended the practice of "recognizing" grazing privileges, as was allegedly practiced under prior regulations, and eliminated the "right" to graze predictable numbers of stock that the TGA granted to original grazing permittees.[27] The district court also ruled that the Secretary was not "adequately safeguard[ing]" the prior grazing adjudications as required by the TGA.[28] In its analysis, the Tenth Circuit first discussed the history of the BLM's regulations governing issuance of grazing permits.[29] Afterwards, the court compared the governing statutes to the 1995 regulations[30] and concluded that the Secretary was authorized to issue the 1995 rules.[31]

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[22] *See Public Lands Council*, 167 F.3d at 1293.
[23] *Id.* (quoting Reno v. Flores, 507 U.S. 292, 301 (1993) (alteration in original)) (citations omitted).
[24] *Id.* at 1292, 1297.
[25] 43 C.F.R. § 4100.0–5 (1995).
[26] *Public Lands Council*, 167 F.3d at 1291.
[27] *See id.* at 1293.
[28] *See id.*
[29] *See id.* at 1295–98.
[30] *See* 43 C.F.R. § 4100 (1995).
[31] *See Public Lands Council*, 167 F.3d at 1298–1302.

1. The Regulatory Scheme

After Congress passed the TGA, the Secretary began to establish grazing districts and issue grazing permits.[32] The number of qualifying applicants exceeded the amount of grazing permits available; thus, the Department of the Interior engaged in a detailed adjudication process whereby it gave priority to applicants as required by the TGA.[33] The Secretary gave priority to "applicants who owned land or water, i.e. base property, in or near a grazing district."[34] In addition, the Secretary gave priority to landowners "who were dependent on the public lands for grazing," who had used their base property for livestock operations in connection with the public grazing lands for five years prior to passage of the TGA, or whose land or water required the use of public rangelands for economic livestock operations.[35] The Secretary's initial regulations promulgated under the TGA were referred to as the Federal Range Code.[36]

Congress enacted the FLPMA to address the deterioration of public rangelands and to authorize the Secretary to institute a "land use planning process."[37] The Secretary was to create land use plans and manage the lands in accordance with the principles of "sustained yield" and "multiple use."[38] As a result of the FLPMA, the Secretary issued new regulations in 1978 that "effected significant changes in the process for issuing grazing permits."[39] The 1978 regulations still recognized the priority of livestock operators who currently held grazing permits, but emphasized that all grazing permits had to be issued in accordance with land use plans.[40] Permittees or lessees seeking renewal could only be given first priority if "the permittee or lessee accepts the terms and conditions to be included in the new permit or lease by the authorized officer."[41] The regulations further made "cancellation of grazing preferences mandatory when necessary to maintain compliance with land use plans."[42] The Secretary issued regulations in 1994 that "effectively soften[ed] the requirement that

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[32] *See id.* at 1295.
[33] *See id.*
[34] *Id.*
[35] *Id.*
[36] *See id.* n.2.
[37] *Id.* at 1295 (citing Natural Resources Defense Council, Inc. v. Hodel, 618 F. Supp. 843, 857 (E.D. Cal. 1985)).
[38] *See id.* at 1290.
[39] *Id.* at 1295 (citations omitted).
[40] *See id.*
[41] *Id.* at 1296 (quoting 43 C.F.R. § 4130.2(e)(3) (1978)).
[42] *Id.* (quoting 43 C.F.R. § 4110.3-2(b) (1978)).

grazing preferences must at all times be consistent with land use plans."[43] However, shortly thereafter, the Secretary's implementation of the 1995 regulations returned to the strict requirement that grazing permits be subject to terms and conditions that conform to land use plans.[44]

2. The Controlling Statutes

The Tenth Circuit then assessed whether the permitted use rule was in accordance with the TGA and the FLPMA, given the history that produced the permitted use rule.[45] The TGA states that "grazing permits shall be [issued] for a period of ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior . . . [and that] grazing privileges recognized and acknowledged shall be adequately safeguarded."[46] The Tenth Circuit held that the TGA did not preclude the Secretary from issuing the permitted use rule, which simply states that "[p]ermitted use is granted to holders of grazing preference and shall be specified in all grazing permits and leases."[47] The court said that nothing in the TGA makes any references to the prior grazing adjudications, other than granting them a mere preference that is given in the Secretary's discretion: "The TGA gives no hint, much less the unambiguous direction required by *Chevron*, that the issuance of a grazing permit . . . requires permanent 'recognition' of the numbers of the stock authorized to graze in that permit."[48]

PLC argued that the purpose of the TGA was to promote stability on the grazing lands and that by disregarding the prior grazing adjudications, the Secretary was acting contrary to the TGA's mandate.[49] The Tenth Circuit responded, "[t]he Act clearly states that the need for stability must be balanced against the need to protect the rangeland."[50] The court lastly explained that the notion of maintaining grazing adjudications from the 1940s into perpetuity was contrary to the other provisions of the Act.[51] The "statute mandates that the Secretary shall specify the numbers, stock, and season of use from time to time," and another provision, which states that permit periods are not to exceed ten

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[43] *Id.*
[44] *See id.* at 1297.
[45] *See id.* at 1298–99.
[46] *Id.* at 1298 (quoting 43 U.S.C. § 315(b) (1994)).
[47] *Id.*
[48] *Id.* at 1299.
[49] *See id.* at 1298.
[50] *Id. See also* 43 U.S.C. § 315(a) (1994).
[51] *See Public Lands Council*, 167 F.3d 1299.

years, refutes the idea of permanent grazing permit preferences.[52] Thus, the court said "[t]he mandatory renewal process contemplates that the substance of the grazing privilege, as opposed to the preference right of renewal, is to be periodically adjusted in accordance with the condition of the rangeland."[53]

In addition, the FLPMA mandates "that the Secretary must specify terms and conditions consistent with land use plans in every grazing permit."[54] The Tenth Circuit decided that the FLPMA, too, makes no reference to prior grazing adjudications and is, therefore, not in conflict with the permitted use rule.[55] The court said that since the permitted use rule provides that grazing permits shall specify numbers of stock and seasons of use, it is "easily within the scope of the Secretary's authority under the FLPMA."[56]

The Tenth Circuit lastly answered PLC's argument that the Secretary had failed to "adequately safeguard" recognized grazing privileges by noting that the Secretary provides the same procedural safeguards under the 1995 regulations that was provided under previous regulations.[57] Next, the court held that PLC's claim that the permitted use rule would undermine the stability of the livestock industry was speculative and "not ripe for consideration on a facial challenge."[58] Under *Salerno*, a facial challenge required PLC to demonstrate that no circumstances existed under which the permitted use rule could be valid, and, here, PLC could not make such an allegation until the rule was actually applied.[59]

C. Title to Permanent Range Improvements

PLC next argued that the range improvements rule was invalid because the TGA requires that range improvements be owned by the permittees who construct the improvement:

> No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior.[60]

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[52] *Id.* (citing, in part, 43 U.S.C. § 315(b) (1994)).
[53] *Id.* (emphasis omitted).
[54] *Id.* at 1301 n.9.
[55] *See id.* at 1301.
[56] *Id.*
[57] *See id.* (citing, in part, 43 U.S.C. § 315(b) (1994)).
[58] *Id.* at 1302.
[59] *See id.* at 1301.
[60] *Id.* at 1303 (quoting 43 U.S.C. § 315(c) (1994)) (emphasis omitted).

The dissent argued that the TGA's use of the phrase "such improvements constructed and owned by a prior occupant" unambiguously communicates "that when a permittee constructs an authorized improvement, he or she holds title to that improvement."[61] The majority, however, disagreed and reasoned that under the second step of *Chevron*, the Secretary could still promulgate the range improvements rule within a "permissible construction" of the TGA.[62] The Tenth Circuit stated that "[w]hile the language at issue may allow the dissent's reading of it, the entire payment provision can also equally be viewed as purely conditional, operative only if the Secretary allows both construction and ownership."[63]

The Tenth Circuit also found that the FLPMA indicates that a permittee who constructs land improvements does not necessarily own them.[64] Congress states in section 1752(g) that "[w]henever a permit or lease for grazing domestic livestock is canceled . . . the permittee . . . shall receive from the United States a reasonable compensation . . . of his *interest in* authorized permanent improvements placed or constructed by the permittee."[65] The Tenth Circuit held that by using the term "interest in" rather than "ownership of" permanent improvements in the FLPMA, Congress must not have strictly required that permittees who constructed improvements on the grazing lands actually hold title to those improvements.[66] Lastly, the court found that because the permanent improvements rule is based on a permissible construction of the TGA, the court must defer to the Secretary's rule.[67] Further, the Secretary had not failed to provide a reasoned basis for departing from the previous regulations.[68] The government asserted that "management of permanent improvements according to FLPMA's multiple use and sustained-yield mandate would be simplified if BLM could avoid having to negotiate with permittees as titleholders to permanent improvements."[69]

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[61] *Id.* at 1317.
[62] *See id.* at 1303.
[63] *Id.* at 1304.
[64] *See id.*
[65] *Id.* (quoting 43 U.S.C. § 1752(g) (1994)) (emphasis added).
[66] *See id.*
[67] *See id.* at 1305.
[68] *See id.*
[69] *Id.*

D. The Qualifications Rule

PLC argued that the Secretary acted contrary to the TGA by eliminating the requirement that "in order to qualify for a grazing permit, an applicant had to 'be engaged in the livestock business.'"[70] However, the Tenth Circuit found that the TGA clearly states that "bona fide settlers, residents, and other stock owners" may apply for grazing permits and that PLC's argument failed in the face of such clear language.[71] The court held that it must give effect to the plain meaning of the words chosen by Congress.[72] Thus, the court did not need to see if the Secretary's departure from the previous regulations were supported by a reasoned basis as the agency was "simply giving effect to the unambiguously expressed intent of Congress."[73]

E. The Conservation Use Rule

Finally, PLC argued that the Secretary exceeded his statutory authority by adding "conservation use" as a permissible use of a grazing permit.[74] The court agreed with PLC and the district court in this instance, holding that under the Chevron analysis, Congress has spoken directly to this issue.[75] The plain language of the TGA provides that the Secretary may issue "permits to graze livestock on . . . grazing districts."[76] The FLPMA's and PRIA's language defines "grazing permit" as "any document authorizing use of public land . . . for the purpose of grazing domestic livestock."[77] The Tenth Circuit, therefore, concluded that Congress specifically intended grazing permits to be used only for grazing.[78] The court stated, "[t]he Secretary's assertion that 'grazing permits' for use of land in 'grazing districts' need not involve an intent to graze is simply untenable."[79]

The Secretary argued that resting the grazing lands is a perfectly acceptable practice on the rangelands and furthers the underlying purposes of the TGA by helping to preserve the rangelands from "destruction or unnecessary injury."[80] The conservation use rule would also further the FLPMA's purposes

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[70] *Id.* (quoting 43 C.F.R. § 4110.1 (1995)).
[71] *Id.* at 1306 (quoting 43 U.S.C. § 315(b) (1994)).
[72] *See id.* (citing Bartlett v. Martin Marietta Operations Support, 38 F.3d 514, 518, (10th Cir. 1994)).
[73] *Id.* (quoting *Chevron*, 467 U.S. at 843).
[74] *See id.* at 1292.
[75] *See id.* at 1307.
[76] *Id.* (quoting 43 U.S.C. § 315(b) (1994)).
[77] *Id.* at 1307-08 (quoting 43 U.S.C. §§ 1702(p), 1902(c) (1994)).
[78] *See id.*
[79] *Id.* at 1308.
[80] *Id.* at 1307 (citing 43 U.S.C. § 315(a)).

by helping to achieve the goals of multiple-use, which require the Secretary to consider the long term needs of the rangelands while managing the lands according to numerous purposes without inflicting damage.[81] However, the court responded that the TGA clearly states that "the primary purpose of a permit must be grazing: . . . [I]t is true that the TGA, FLPMA, and PRIA, [sic] give the Secretary very broad authority to manage the public lands. . . . Permissible ends such as conservation, however, do not justify unauthorized means."[82]

III. BACKGROUND

In *Chevron*, the United States Supreme Court issued a two-part test for reviewing the validity of an agency's action, drawing its ruling from a long history of precedent.[83] The Supreme Court explained its deferential policy in *Chevron* by stating that the agency's construction need not be the only permissible construction of the statute, or even a construction that the court would have reached if the court itself had interpreted the statute.[84] The Court explained that "[i]f Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency," and, thus, the Court will give an agency's determination legislative and controlling weight.[85]

In *Chevron*, the Supreme Court ruled that the Environmental Protection Agency's (EPA) regulations concerning "nonattainment" areas were permissible under Congress's Clean Air Act Amendment of 1977.[86] The Court accorded EPA deference, as Congress had not expressly intended that the agency use the term "stationary source" in only one manner.[87] The Court decided that EPA's interpretation of the statute was reasonable, given the technical nature of the inquiry and the policy decisions that the agency had to assess.[88] The Court concluded that "when a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[89]

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[81] *See id.*

[82] *Id.* at 1308.

[83] *See Chevron*, 467 U.S. at 842–43.

[84] *See id.* at 843 n.11.

[85] *Id.* at 843–44.

[86] *See id.* at 866. *See also* Clean Air Act, 91 Stat. 685 (1977) (codified, as amended, at 42 U.S.C. §§ 7401–7671q (1994)).

[87] *See Chevron*, 467 U.S. at 865.

[88] *See id.*

[89] *Id.* at 866.

In a case similar to *Public Lands Council*, the Nevada District Court in *Natural Resources Defense Council v. Hodel*[90] also emphasized a policy of deference. The district court acknowledged that the plaintiffs' complaints may have had factual merit in suggesting bad management or environmental insensitivity by the BLM, but ultimately did not give rise to a need for judicial intervention.[91] The judge lamented his inability "to adopt one theory of range management over another" as well as his "powerless[ness] to substitute [his] judgment for that of the BLM in these matters."[92] The plaintiffs in *Hodel* argued that the FLPMA and PRIA provide standards under which the defendants' actions may be deemed "arbitrary, capricious, or contrary to the law."[93] The court responded that the provisions held general terms and clauses that "can hardly be considered concrete limits upon agency discretion. Rather, it is language which 'breathes discretion at every pore.'"[94]

In addition, in *McLean v. Bureau of Land Management*,[95] the appellants protested when the Area Manager refused to grant the appellants forage allotments.[96] The appellants argued that the Area Manager's allocation of surplus forage violated both the Federal Range Code and the terms of the 1970 Allotment Agreement.[97] The administrative court held that the BLM's 1978 regulations made clear that "the entire basis upon which grazing preferences were determined was drastically altered."[98] The court further held that the precedential value of departmental adjudications rendered prior to the 1978 regulations was greatly reduced and "future adjudications of grazing use would be based on criteria vastly different from those provided in the Federal Range Code."[99]

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[90] 624 F. Supp. 1045 (D. Nev. 1985).
[91] *See id.* at 1047.
[92] *Id.* at 1048.
[93] *Id.* at 1058.
[94] *Id.* (quoting Perkins v. Bergland, 608 F.2d 803, 806 (9th Cir. 1979)).
[95] 133 IBLA 225 (1995).
[96] *See id.* at 226
[97] *See id.* at 230.
[98] *Id.* at 233.
[99] *Id.* at 233–35.

IV. ANALYSIS

The Tenth Circuit strictly followed the *Chevron* test in analyzing the validity of the Secretary's regulations, deferring to the Secretary whenever possible. In analyzing the permitted use rule, the court decided that the rule "comports with the authority granted the Secretary of the Interior under the TGA and FLPMA and demands our deference under Chevron."[100] The court seemed to purport that PLC's contention that grazing permits should accord with the original grazing adjudications was in conflict with the statutes: "[p]erpetuating grazing decisions handed down in the 1940s may well be inconsistent with the ongoing statutory command that the Secretary protect the federal lands."[101] The court stated that the dissent's and PLC's suggestion that Congress meant the original grazing decisions should become "ongoing 'grazing preference[s]'" conflicted with Congress' mandate that the Secretary should grant renewal of grazing permits according to the changing state of the rangelands.[102] The court also suggested that the permitted use rule was directly in accord with the FLPMA by providing "that grazing permits shall specify the numbers of stock and seasons of use according to [the dictates of applicable] land use plans."[103] With the FLPMA, Congress first required "that the Secretary must specify terms and conditions consistent with land use plans in every grazing permit."[104] Thus, the permitted use rule was certainly in accord with the law, the TGA, and the FLPMA, and the court must give deference to the Secretary.

In regard to the range improvements rule, the court stated that "nothing in the statutory language directs where such [permanent range improvements] title must lie."[105] The court spoke of the explicit discretionary language found in the TGA by which the Secretary may do "any and all things necessary" to accomplish the purposes of the Act.[106] The TGA also uses plain language to give the Secretary "discretionary authority to decide whether to allow necessary range improvements."[107] Conversely, the dissent found that the TGA unambiguously requires that title to structural improvements constructed by a permittee must be owned by the permittee.[108] However, the majority proposed other interpretations

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[100] *Public Lands Council*, 167 F.3d at 1294.
[101] *Id.* at 1299 (citations omitted).
[102] *Id.*
[103] *Id.* at 1301.
[104] *Id.* at 1301 n.9.
[105] *Id.* at 1302.
[106] *Id.* at 1302–03 (citing 43 U.S.C § 315(a) (1994)).
[107] *Id.* at 1303.
[108] *See id.* at 1317.

of the statute that would also allow the government to hold title to permanent improvements: "[the] . . . provision can also equally be viewed as . . . operative only if the Secretary allows both construction and ownership."[109] The court further held that "[t]he language . . . is not rendered meaningless . . . because the provision will still apply to temporary improvements."[110] The court stated that "[t]he dissent's construction is, quite simply, not the only one the language supports,"[111] implying that the dissent did not consider the second step in *Chevron*.

In applying *Chevron* to the qualifications rule, the court decided that the regulation easily passed the first part of the test because Congress' intent was clear that the Secretary could grant permits to persons other than those engaged in the livestock business.[112] The court stated that the TGA did confer preference to issuance of grazing permits to "landowners engaged in the livestock business."[113] However, this ruling does not support PLC's argument that the Secretary can issue grazing permits to only those involved in the livestock business because "landowners engaged in the livestock business are not even the only group entitled to this preferential treatment."[114] The court then decided that it need not look at the legislative history in order to ascertain Congress' intent because Congress made its intent clear with the statutory language.[115]

The court applied a similar analysis to the conservation use rule and concluded that "Congress has spoken directly to this precise question and answered it in the negative."[116] As with the qualifications rule, the court found it did not need to engage in the second step of the *Chevron* analysis. The conservation rule was facially invalid because "there is no set of circumstances under which the Secretary could issue such a permit."[117]

Although *Hodel* is not controlling precedent, it illustrates the deference that must be conferred to the Secretary within the rangeland context. The Tenth Circuit cited *Hodel* in its permitted use analysis and followed *Hodel*'s idea that "the courts are not at liberty to break the tie choosing one theory of range management as superior to another"[118] in deferring to the Secretary's decisions to issue the challenged rules. The court also followed *McLean* in its analysis of

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[109] *Id.* at 1304.
[110] *Id.*
[111] *Id.*
[112] *See id.* at 1306.
[113] *Id.* (citing 43 U.S.C. § 3156 (1994)).
[114] *Id.*
[115] *See id.*
[116] *Id.* at 1307.
[117] *Id.* at 1308 (citations omitted).
[118] *Hodel*, 624 F. Supp. at 1058 (quoting *Perkins*, 608 F.2d at 807).

the permitted use rule, striking down the concept that grazing permits issued under the Federal Range Code must exist in perpetuity.[119] In all, the Tenth Circuit reinforced the principle that grazing permit preferences will no longer have as much weight as preferences did in the past.

V. CONCLUSION

The Tenth Circuit in *Public Lands Council v. Babbitt* reversed the district court's ruling that three of the Secretary of the Interior's 1995 regulations concerning grazing permits were invalid. It found that the Secretary had acted within his authority in issuing the permitted use, range improvements, and qualifications rules and, as such, deserved complete deference. However, the court found that Congress had specifically spoken concerning the conservation use rule, and, therefore, the court was obligated to affirm the district court and find the rule invalid.

The court recognized that the judiciary should defer to an agency's decisions concerning how the agency interprets statutory commands. A court is not to substitute its judgment for the policies and decisions effected by an agency. Also, the *Babbitt* court further reduced the importance of grazing permit preference "rights" under the TGA. Because the TGA authorizes the Secretary's discretion in issuing grazing permits, the Secretary's authority in making such decisions has been greatly increased by the Tenth Circuit's reading of both *Chevron* and the TGA.

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[119] *See McLean*, 133 IBLA at 233.

II

FEDERAL LEGISLATION AND THE FARMWORKER

A. Farmworkers: A Profile

America's hired[3] farmworkers are largely young (median age 22), white (78%) males (76%)[4] who do not reside on farms.[5] They performed an average of 80 days of farm wagework in 1971, and earned an average annual cash income of $882, or a little more than $11 a day.[6] In that year, the composite farm wage rate per hour was only $1.48; this figure includes the wage rates of many farmworkers who received additional remuneration in the form of perquisites such as board and room.[7] Those farmworkers who worked solely for cash wages in 1971 received an average hourly wage of $1.73.[8] Farmworkers are thus the lowest paid occupational group in the entire American work force.[9]

There are approximately 2.5 million farm wageworkers, at least 172,000 of whom are domestic migratory workers.[10] But in spite of a recent, drastic reduction in the number of hired farmworkers, the basic farm labor problem remains: a mass of largely uneducated, unskilled laborers compete for an insufficient and rapidly dwindling number of farm jobs.[11] Mechanization has made manual labor increasingly unnecessary for most crops except in short-term situations, thereby reducing general employment opportunities while intensifying peak seasonal labor demand.[12] Consequently, the average farmworker spends less than one-fourth of his year doing farm work,[13] and relatively few

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[3] Over 60% of the average annual farm work force are classified as "family labor", *i.e.*, individuals in the immediate family of the farm owner or manager. U.S. Dep't of Labor, Hired Farmworkers 66 (1972) [hereinafter Hired Farmworkers]. This article will discuss only hired farmworkers—those persons doing some farm labor for cash wages who are not in the immediate family of the farm owner or manager.

[4] U.S. Dep't of Agriculture, The Hired Farm Working Force of 1971, at 2 (Agricultural Economic Rep. No. 222, 1972) [hereinafter HFWF of 1971]. Note that for statistical purposes, "white" includes Mexican-Americans.

[5] Of the nation's hired farmworkers, 73% reside in nonfarm places. Id.

[6] Id. at 5.

[7] U.S. Dep't of Agriculture, Farm Labor, July 13, 1972, at 3.

[8] Id.

[9] Senate Comm. on Labor and Public Welfare, The Migratory Farm Labor Problem in the United States, S. Rep. No. 91-83, 91st Cong., 1st Sess. 51 (1969) [hereinafter S. Rep. No. 91-83].

[10] HFWF of 1971, supra note 4, at 10. This is, at best, a tenuous estimate which substantially undercounts the total number of migrants. For a discussion of the difficulties in determining the actual number of migrants, see Staff Memorandum, Hearings on H.R. 5010 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess. 151-53 (1971).

[11] Jones, Farm Labor and Public Policy, 91 Monthly Lab. Rev. 12 (Mar. 1968); S. Rep. No. 91-83, supra note 9, at 102. The number of hired farmworkers declined from 4,342,000 in 1950 to 2,488,000 in 1970. HFWF of 1971, supra note 4, at 8.

[12] Powerlessness Hearings, supra note 2, pt. 7A, at 4049.

[13] See text accompanying note 6 supra.

farmworkers can depend solely on agricultural labor as a source of income.[14]

For those who do rely on farm wagework as the main source of their income, agriculture has proved to be a cruel taskmaster. The poverty, despair and isolation of the migrant and seasonal worker have been well chronicled;[15] the economic and social conditions of year-round, nonmigratory workers are little better.[16] The problem has remained unchanged for decades; poor, underemployed and increasingly irrelevant, farmworkers are being left behind by their occupation and forgotten by the rest of America. It seems clear that the last, best hope of the farmworker is the federal government. How the agricultural laborer has been assisted by federal action, and how he can be better aided, is the central issue of the following discussion.

B. Farmworkers: Wages and Hours

The present average hourly wage paid to farmworkers is less than half that paid to workers in the manufacturing sector[17]—a disparity which is by no means a recent development. For decades, farmworkers have lagged far behind other occupational groups in comparative income,[18] largely because of a lack of legislative protection. Minimum wage and maximum hour guarantees have helped most workers to secure a higher income. Yet the Fair Labor Standards Act of 1938 (the Act or FLSA),[19] which established the first minimum wage requirement, specifically excluded agricultural employees from its coverage.[20] This total exclusion continued until 1966, when certain farmworkers were brought within the Act's protections.[21] While the initial extension of

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[14] Only 19% of the 1971 hired farm work force were engaged chiefly in farm wagework. HFWF of 1971, supra note 4, at 2. Thus, most of the farmworkers were either "causal" workers, working less than 25 days in agriculture, or were forced to rely on nonfarm activities for additional income. See also id. at 18-21.

[15] See generally Powerlessness Hearings, supra note 2; S. Rep. No. 91-83, supra note 9; Ass'n of the Bar of the City of N.Y., Report on Migratory Labor, 111 Cong. Rec. 13,328 (1965).

[16] There is information which would indicate that the migrant's earnings are substantially equal to, or in some cases greater than, the average hourly earnings of nonmigratory workers. Hired Farmworkers, supra note 3, at 42, 44. This is especially true on farms not subject to minimum wage and maximum hour standards.

[17] While the 1971 composite farm wage rate was $1.48 an hour, see text accompanying note 7 supra, the average wage rate in the manufacturing sector in 1971 was $3.77 an hour. S. Rep. No. 92-842, 92d Cong., 2d Sess. 6 (1972) [hereinafter S. Rep. No. 92-842].

[18] Farmworkers presently have the lowest annual income of all American occupational groups. See text accompanying note 9 supra. This was also true over 30 years ago. See Farm Labor Hearings, supra note 2, at 1016-18.

[19] Act of June 25, 1938, ch. 676, 52 Stat. 1060, as amended, 29 U.S.C. §§ 201-19 (1970).

[20] Act of June 25, 1938, ch. 676, § 13(a)(6), 52 Stat. 1067.

[21] The 1966 amendments were contained in Act of Sept. 23, 1966, Pub. L. No. 89-601, §§ 201-04(b), 205-12(a), 213-15(c), 80 Stat. 833, 834, 836-38.

FLSA provisions was an important first step, it has not significantly affected the wage rates of most farmworkers.

The key drawbacks of the 1966 amendments arise from several exceptions to and qualifications of the statutory protection they provide to farm employees. Perhaps most significant is the requirement that in order to be subject to the FLSA, the farm employer must have used more than 500 "man-days"[22] of agricultural labor during any quarter of the preceding calendar year.[23] This requires, in effect, that a farm employ seven full-time workers before FLSA guidelines will apply. As a result of this requirement, based solely on farm size, only three percent of the United States farms that hire farmworkers, and only about 35% of all hired farmworkers, are covered by the FLSA.[24]

The FLSA imposes other limitations that denote a double standard of treatment for farmworkers. Not only are almost two out of every three American farmworkers denied minimum wage protection, but those agricultural laborers are also denied overtime benefits.[25] Moreover, the present minimum wage for agriculture is $1.30 per hour, compared to $1.60 for other workers,[26] although Congress will probably provide covered agricultural laborers with minimum wage parity in the near future.[27] Indeed, given all the exceptions, exemptions and limitations to FLSA coverage of farmworkers, it is a fair comment on the Act that its "most striking feature . . . is the manner in which it appears to grant [farmworkers] benefits, but then . . . manages to withdraw [them]."[28]

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22 A "man-day" is defined as "any day during which an employee performs any agricultural labor for not less than one hour." 29 U.S.C. § 203(u) (1970).

23 Id. § 213(a)(6)(A). This is the only "employer" exemption; the other exemptions affect employees individually. Excluded from FLSA coverage are employees who are: (1) parents, spouses, children or other members of the employer's immediate family, id. § 213(a)(6)(B); (2) hand-harvest laborers paid by the piece-work method who commute daily to work from their permanent residence, and who were employed less than 13 weeks in agriculture during the preceding calendar year, id. § 213(a)(6)(C); (3) piece-workers under 17 years of age who are employed on the same farm as their parents and are paid the same rate as all other workers, id. § 213(a)(6)(D); and (4) employees principally engaged in range production of livestock, id. § 213(a)(6)(E). The second employee exception would not exempt migratory laborers, since in order to be so excluded, the worker must commute *daily* from his *permanent* residence. The third exception seems primarily aimed at excluding the children of migrant workers from FLSA coverage. The Senate version of the FLSA amendments for 1973 proposed extending minimum wage coverage to 75,000 to 150,000 adult, local, seasonal hand-harvest laborers. See S. 1861, 93d Cong., 1st Sess. (1973); S. Rep. No. 93-300, 93d Cong., 1st Sess. 29-30 (1973) [hereinafter S. Rep. No. 93-300]. This extension was rejected.

24 S. Rep. No. 92-842, supra note 17, at 2. Only about 907,000 of the three million farms in this country employ one or more hired farmworkers, and the FLSA requirements are applicable to about 28,000 of these farms. S. Rep. No. 93-300, supra note 23, at 29.

25 29 U.S.C. § 213(a)(6) (1970).

26 Id. §§ 206(a)(1), (5).

27 See note 31 infra.

28 Champion, Fair Labor Standards Coverage for Agricultural Employees, 41 Miss. L.J. 409, 421 (1970).

The FLSA coverage of farmworkers, however, should not be dismissed as totally meaningless, for it has had some beneficial effects. A Department of Labor study has shown, for example, that farmworkers on farms not covered by the FLSA earn approximately 15% less per hour than workers on farms subject to FLSA standards.[29] The same study shows, moreover, that in most areas of the country, and in the United States as a whole, workers on FLSA-covered farms perform more hours of work than workers on noncovered farms.[30]

Legislation proposing to amend the minimum wage provisions of the FLSA may remedy one of the major inequities of present legislative policy toward farmworkers. Congress has passed a bill which would raise the general minimum wage to $2.20 an hour and, over a three-year period, would bring the agricultural minimum wage to the same level.[31] The proposal is encouraging, not only because of this provision, but also because it may be an important first step toward equal legislative protection for agricultural laborers. Yet the legislation can hardly be cause for jubilation among all farmworkers. A Senate proposal to extend minimum wage coverage to some 75,000 to 150,000 adult, local, seasonal hand-harvest laborers was rejected,[32] and thus the increased wage will not be paid to any new class of farmworkers.[33] Neither does the bill extend any maximum hour or overtime protection to additional

[29] Hired Farmworkers, supra note 3, at 13.

[30] See id. at 59, 63.

[31] H.R. 7935, 93d Cong., 1st Sess. (1973), was passed by the House of Representatives on August 2, 1973, and by the Senate on the following day. The bill, however, was vetoed by President Nixon on Sept. 6, 1973. See The President's Message to the House of Representatives, 9 Weekly Compilation of Presidential Documents 1060-61 (1973).

President Nixon's objections to the bill centered around a contention that the proposal raised the minimum wage floor too far too rapidly—a 37.5% increase in less than a year. Id. at 1060. Such increases, claimed the President, would adversely affect the employment opportunities of certain groups of workers and create a "fresh surge of inflation." Id. Noting that he had proposed legislation increasing the minimum wage to $2.30, but over a longer period of time, the President urged Congress to provide for more gradual increases in the minimum wage bill. Moreover, the President objected to H.R. 7935's extension of minimum wage coverage to certain groups such as domestic household employees and state and local government employees, and to the failure to establish a youth-differential minimum wage rate. See id. at 1061.

The veto message contained no reference to the bill's increase in the minimum wage level for farmworkers, or the additional child labor protections proposed by the bill, and there is no reason to suppose the President would not have approved them. Thus, the veto notwithstanding, it is likely that subsequent FLSA amendments will contain the minimum wage increases and child labor protections contained in H.R. 7935. It is probable, however, that the minimum wage increases will be extended in more gradual increments.

[32] See S. Rep. No. 93-300, supra note 23, at 29; S. Rep. No. 93-358, 93d Cong., 1st Sess. 28 (1973) [hereinafter S. Rep. No. 93-358]. Seasonal hand-harvest laborers are exempted from minimum wage protection by 29 U.S.C. § 213(a)(6)(C) (1970).

[33] The amended version of the bill will include seasonal hand-harvest laborers as employees in determining if an employer uses the minimum number of man-days of labor which is required before the minimum wage must be paid by an

farmworkers,[34] and so limited, the proposal still denies farmworkers as a class equal treatment under the law.

C. *Child Labor in Agriculture*

One of the most unfortunate aspects of the farm labor problem is also among the most pervasive of agricultural practices: the employment of children.[35] A 1970 estimate placed the number of children under 16 employed as farmworkers at 800,000—between one-third and one-fourth of all hired farmworkers—of whom about 375,000 were between 10 and 13 years old.[36] Since most available data do not accurately reflect the problem, however, it is conceivable that up to one million children and youths work in the fields and orchards of the United States.[37] But however startling the scope of the practice may be, the problem it creates is even more disturbing.

1. *The Problem*

Since over one million farmworkers hired in 1971 considered their chief activity to be "attending school,"[38] it is apparent that for most young workers, farm work is only a summer or part-time job. The desirability of casual child labor in agriculture depends on one's view of the relative merits of agricultural work per se. Some observers view

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employer to covered employees. See S. Rep. No. 93-358, supra note 32, at 28. This compromise, however, will probably do little to expand total minimum wage coverage. Cf. S. Rep. No. 93-300, supra note 23, at 29.

[34] 29 U.S.C. § 213(a)(6) (1970) excludes agricultural laborers from the maximum hour and overtime pay protections of id. § 207.

[35] S. Rep. No. 91-83, supra note 9, at 77.

[36] S. Rep. No. 93-300, supra note 23, at 32. 838,000 of the 2,550,000 total farmworkers in 1971 were between the ages of 14 and 17; the next-largest group was the 18- to 24-year-olds (619,000). HFWF of 1971, supra note 4, at 10.

[37] The HFWF reports do not now tabulate individuals under 14 years of age for statistical purposes. The 1961 HFWF report did include a survey of the employment status of children between the ages of 10 and 13. The report found that 364,000 children aged 10 to 13 did farm wagework in 1961. U.S. Dep't of Agriculture, HFWF of 1961, at x (Agricultural Economic Rep. No. 36, 1962). In 1969, the Senate Subcommittee on Migratory Labor estimated that 375,000 10- to 13-year-olds performed some farm labor, S. Rep. No. 91-83, supra note 9, at 78, and that there were approximately 800,000 *paid* farmworkers under 16. Id. at 77. Surveys support the contention that many young children work in agriculture. A 1962 Department of Labor survey during Oregon's strawberry harvest found that 65% of the workers were under 14, and that 19% were under the age of 12; a 1970 survey in the Willamette Valley by the American Friends Committee found that 75% of the harvesters were children. S. Rep. No. 92-842, supra note 17, at 23. Even the very young are brought into the fields. In 1964, one-fifth of all agricultural child labor violations involved children between the ages of 5 and 9. S. Rep. No. 155, 89th Cong., 1st Sess. 35 (1965). Incorporating all this information involving those under 14 years with the HFWF data, see note 36 supra, a contention that one million children under 17 years of age labor in American agriculture would not seem unreasonable.

[38] HFWF of 1971, supra note 4, at 10.

farm labor as dangerous[39] or physically harmful,[40] and desire to keep children out of agriculture altogether or to allow employment only in carefully controlled and limited circumstances. Others view the opportunity for children to engage in farmwork as healthy, desirable and beneficial, and strongly oppose such attempts to limit child labor.[41] On the whole, it would seem that the detriments of allowing the common use of children on America's farms far outweigh all benefits.[42] But we need not resolve this dispute in order to recognize that the widespread use of young children in agriculture creates serious and substantial problems for a particular group of children—the offspring of migrant and seasonal farmworkers.

Migrant workers tend to have large families (6.5 members),[43] so that many children are caught up in the migrant streams. Since migrant children are subject not only to the obvious physical dangers of agriculture, but also to the psychological and emotional problems brought on by what Dr. Robert Coles has termed the "chaos of movement," their plight is especially distressing.[44] Robbed of their youth and their pride, deprived of all but the rudiments of education,[45] migrant children benefit little from the "privilege" of working, which

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[39] Agriculture is the third most dangerous occupation, following only the extractive and construction industries. S. Rep. No. 93-300, supra note 23, at 32.

[40] See, e.g., S. Rep. No. 91-83, supra note 9, at 78-79; American Friends Service Comm., Child Labor in Agriculture (1970); Powerlessness Hearings, supra note 2, pts. 6A-C. Generally, the arguments are that agricultural work can impair normal body development and growth in children due to excessive bending, stooping or lifting; that the chronic fatigue due to hard work subjects children to greatly increased risks of infection or disease; and that the increasing use of complex, dangerous machinery and poisonous chemicals poses unpreventable risks to children. There is also evidence that farm labor interrupts and interferes with the educational process of many young farmworkers. S. Rep. No. 91-83, supra note 9, at 78-79.

[41] See, e.g., Hearings on H.R. 10,499 and H.R. 1597 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 92d Cong., 1st Sess. 57 (1971) [hereinafter Hearings on Agricultural Labor] (remarks of Matt Triggs, Assistant Legislative Director of the American Farm Bureau Federation):

> Work experience is an essential part of the educational process. It helps develop self-reliance, self-respect and a realistic attitude towards others and it is our conviction that the net effects of a prohibition of their [children under 14] employment . . . would be individually and socially undesirable.

[42] Cf. S. Rep. No. 93-300, supra note 23, at 31-33.

[43] Powerlessness Hearings, supra note 2, pt. 7A, at 4093.

[44] See S. Rep. No. 91-83, supra note 9, at 14-16.

[45] "Children of migratory workers have fewer educational opportunities and a lower educational attainment than any other group of American children." Id. at 79. As a result of decreased educational opportunities, the average male migrant worker attends school for only 6.2 years. E. Kleinert, Migrant Children in Florida, The Phase II Report of the Florida Migratory Child Survey Center, 1968-69, at 164, cited in Note, Florida's Forgotten People: The Migrant Farmworkers, 23 U. Fla. L. Rev. 756, 770 n.122 (1971).

for them is not a "privilege" but a necessity. "Children work in agriculture today primarily for the same reason they formerly worked in industry—because of poverty in the family."[46]

Nor is the solution to this problem the tantalizing one of forbidding child labor in agriculture, for in spite of the misfortunes they now suffer, these children might fare even worse if their families were deprived of their desperately needed income. Migrant and seasonal workers rely heavily on their children's wages to support the family and therefore funnel the children into field work at an early age.[47] Their need creates one of the many tragic ironies in the lives of farmworkers. Children work because the parents' wages alone cannot sustain the family, but their working increases the labor supply, intensifying job competition and keeping the general wage level depressed, so that families are forced to send other children into the fields.[48]

2. Present Legislation

The FLSA[49] contains the existing protections against oppressive child labor practices. The Act broadly prohibits the employment of children under 16,[50] and the employment of youths between the ages of 16 and 18 in "particularly hazardous" occupations or jobs.[51] Different and far less restrictive standards, however, apply to agriculture. Children of any age may work in agriculture outside school hours,[52] and youths of 16 or older may perform farmwork even if it is found by the Secretary of Labor to be "particularly hazardous."[53] Enforcement of these minimally protective laws, and of the few state laws establishing minimum age restrictions for agricultural labor, provide the only present hope for limiting the use of children in agriculture.

Federal enforcement of the ban on using children during school

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[46] President's Comm'n on Migratory Labor, Migratory Labor In American Agriculture 161 (1951), reprinted in Powerlessness Hearings, supra note 2, pt. 8C, at 6054-6246 [hereinafter President's Comm'n Rep.].

[47] The average age at which migrant children start work is approximately 11.9 years for females, and 12.0 for males. E. Kleinert, Migrant Children in Florida, The Phase II Report of the Florida Migratory Child Survey Center, 1968-69, at 197, cited in Note, Florida's Forgotten People: The Migrant Farmworkers, 23 U. Fla. L. Rev. 756, 770 n.114 (1971).

[48] See Hearings on Agricultural Labor, supra note 41, at 4. See also S. Rep. No. 93-300, supra note 23, at 33.

[49] 29 U.S.C. §§ 201-19 (1970).

[50] Id. §§ 203(*l*)(1), 212.

[51] Id. § 203(*l*)(2).

[52] Id. § 212 prohibits the use of "oppressive child labor." Section 203(*l*) generally defines oppressive child labor as meaning "a condition of employment under which any employee under the age of sixteen years is employed by an employer . . . in any occupation." Section 213(c)(1) provides that § 212 "shall not apply with respect to any employee engaged in agriculture outside of school hours."

[53] Id. § 213(c)(2).

hours has been ineffective and the proscription, therefore, almost meaningless. In 1970, investigators from the Wage and Hour Division of the Labor Department inspected fewer than 1000 of the more than 2,800,000 farms in the United States for child labor violations.[54] Over one-half of these farms had violated child labor laws, and more than 90% of these violations involved children employed while school was in session.[55] Thus, not only are present federal restrictions on the use of children totally inadequate, but enforcement has been lackadaisical and haphazard.[56] State measures provide little encouragement either. Only 11 states have established a minimum age for child employment in agriculture.[57] Where state minimum age requirements and mandatory school attendance laws do exist, they are often ignored, especially as to migrant children.[58]

3. Proposed Legislation

The Senate and the House of Representatives have agreed to revise present child labor laws.[59] The revisions, however, are neither very encouraging nor far-reaching. The Senate had proposed amending the FLSA to prohibit all children under 12 from working in agriculture at any time except on farms owned or operated by their parents.[60] Further, the proposal would have allowed children aged 12 and 13 to be employed only with the written permission of their parents or guardian, or where a parent or guardian was employed on the same farm.[61] The final version of the bill, however, was far less meaningful. It prohibited the employment of children under 12 only on that small percentage of farms presently "covered" by the FLSA;[62] children under 12 may work on noncovered farms so long as they have parental permission.[63] Children aged 12 and 13 will be allowed to work on any farm either with parental consent or when their parent or guardian is employed on the same farm.[64]

This proposal is unsatisfactory in two major respects. Enforce-

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[54] Hearings on Agricultural Labor, supra note 41, at 93.

[55] Id.

[56] Id. at 80 (remarks of Representative James O'Hara, Chairman, House Subcommittee on Agricultural Labor).

[57] S. Rep. No. 91-83, supra note 9, at 80-81.

[58] See, e.g., id. at 79; S. Rep. No. 93-300, supra note 23, at 33.

[59] The revisions are contained in H.R. 7935, 93d Cong., 1st Sess. (1973). See note 31 supra.

[60] See S. Rep. No. 93-300, supra note 23, at 31 (report accompanying S. 1861, 93d Cong., 1st Sess. (1973)).

[61] Id.

[62] See S. Rep. No. 93-358, supra note 32, at 17-18, 33.

[63] Id.

[64] Id. at 17-18. This latter proviso would allow, if not encourage, all migrant children aged 12 or over to work alongside their parents in the fields.

ment of the Act's provisions, already a subject of open concern,[65] will be made quite difficult. Whether a violation of this proposal has occurred will depend not on the age of children but on the vagaries of farm size, parents' or guardians' consent, and whether or not parent and child are employed on the same farm. The proposal is perhaps most objectionable because of its continued support of a double standard of protection which fails to give to farmworkers the same concern shown to others. Present statutory protections for young farmworkers are so inadequate that far-reaching revisions in the law are necessary. While the most recent FLSA amendments provide some impetus for further change, substantial statutory revisions remain necessary to protect the thousands of children laboring in America's fields.

D. The "Crew Leader" and the Farmworker

1. The Crew Leader as an Institution

The crew leader, or farm labor contractor, plays a major role in the farm labor system. The seasonal, irregular patterns of farm employment and the large number of small-scale employers create a lack of readily available and reliable job information. The crew leader will usually provide food, transportation and housing for farmworkers en route to areas where he either knows workers are needed, or has made prior agreements with farmers to supply a supervised crew of workers.[66] Because they lack money, transportation and job information—precisely those things which a crew leader offers—many farmworkers turn to farm labor contractors as a source of steady employment.[67] Since its inception in the 1930's,[68] the system has grown to the point where there are now an estimated 12,000 to 14,000 crew leaders,[69] serving

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[65] The Committee [on Labor and Public Welfare] is concerned that the Employment Standards Administration of the Department of Labor which now has responsibility for administering the Fair Labor Standards Act appears to be considering reordering its priorities in such a way as to downgrade enforcement of this Act. . . .

S. Rep. No. 93-300, supra note 23, at 57.

[66] For a good general discussion of the crew leader system, its practices and problems, see A. Ross & S. Liss, The Labor Contractor System in Agriculture (1951), in Hearings on Migratory Labor Before the Subcomm. on Labor and Labor-Management Relations of the Senate Comm. on Labor and Public Welfare, 82d Cong., 2d Sess., pt. 2, at 1017-38 (1952) [hereinafter Hearings on Migratory Labor].

[67] There are two general types of farm labor contractors: contractors transporting migrant workers long distances within the migrant streams, and the so-called "day-haulers"—crew leaders who pick up crews from urban areas, take them to farms in nearby areas, and return with the workers at night. While certain abuses may be more prevalent in one system than in the other, the same abuses generally exist in both. The crew leader system as a whole will therefore be discussed without differentiating between the two types.

[68] See Hearings on S. 1778 Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess. 16 (1959).

[69] S. Rep. No. 91-83, supra note 9, at 82; Powerlessness Hearings, supra note 2, pt. 7A, at 4109.

an important—and perhaps essential[70]—function in the agricultural labor market.

The farmworker's reliance on the crew leader for jobs, pay, sustenance and more gives the crew leader a tremendous amount of control over his crew members,[71] power that is often seriously abused. The most common abuses documented in congressional hearings were: overcharging for transportation and advances, withholding pay,[72] abandoning workers without pay, overcharging for meals and expenses, and using and exploiting illegal aliens.[73] Recognizing that irresponsible contractors were exploiting producers, farmworkers and the general public, Congress acted to curb the evils caused by the crew leader system.

2. Present Legislation

The result of congressional concern was the Farm Labor Contractor Registration Act of 1963 (FLCRA).[74] The FLCRA mandates that all crew leaders transporting 10 or more workers across state lines obtain a certificate of registration from the Department of Labor.[75] With his application for this certificate, the contractor must submit information on the "conduct and method" of his operations,[76] proof of adequate liability insurance,[77] and a set of fingerprints.[78] The

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[70] "The combination of irregular labor demand, casual labor supply, and general lack of inclusive organization on either side of the market creates a context in which the contractor, or some similar agent such as the crew leader, is well nigh indispensable." Hearings on Migratory Labor, supra note 66, pt. 2, at 1023.

[71] S. Rep. No. 155, 89th Cong., 1st Sess. 16 (1965).

[72] In Salazar v. Hardin, 314 F. Supp. 1257 (D. Colo. 1970), workers employed under crew leaders brought a class action against the Secretary of Agriculture. Under the Sugar Act of 1948, as amended, 7 U.S.C. § 1100 (1970), sugar growers are required to pay workers a "fair and reasonable" wage, which is determined by the Secretary of Agriculture. A regulation adopted by the Secretary pursuant to the Act allowed growers to satisfy this requirement by paying that "fair and reasonable" amount to the workers' crew leaders. 7 C.F.R. § 862.15 (1970). Finding that "diminished worker compensation" is not to be tolerated, and that "[w]hen sugar beet producers pay their workers through crew leaders, the crew leaders may pay and have paid some farm workers less than the statutory minimum wage," the court invalidated the regulations, and permanently enjoined the Secretary from paying subsidies to producers who paid their workers through crew leaders or labor contractors. 314 F. Supp. at 1259-60.

[73] See generally Hearings on Bills Relating to Migratory Labor Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 87th Cong., 1st Sess., vol. 1, at 427-40 (1961).

[74] 7 U.S.C. §§ 2041-53 (1970).

[75] Id. §§ 2042(a), (b), 2043(a).

[76] Id. § 2044(a)(1). Using this information, the Secretary may deny, revoke or suspend registration if the contractor: (1) knowingly makes deceptive promises or statements to crew members, id. § 2044(b)(2); (2) fails to comply with his contracts, id. §§ 2044(b)(3), (4); (3) recruits persons illegally working in the country, id. § 2044(b)(6); or (4) commits certain crimes, id. § 2044(b)(7).

[77] Id. § 2044(a)(2).

[78] Id. § 2044(a)(3).

FLCRA further requires that the contractor inform the workers where they will be going, how much they will be paid, what type of work will be performed, and so on.[79]

Although this legislation is well conceived and could be the source of beneficial control of the crew leader, its promise has not been realized. Between 8000 and 12,000 contractors have never registered under the FLCRA.[80] Nor have reasonable steps for enforcement been taken; a total of five officials have been entrusted with the full responsibility for tracking down, investigating and reviewing the applications of over 12,000 difficult-to-trace individuals.[81] Ample evidence of their inability to cope with this enforcement problem is provided by the fact that in a two-year period (1967-1968), only three applications for registration were denied. This obvious failure to enforce an otherwise adequate statute is such that there is "little inducement to comply voluntarily with the provisions of the act."[82] Despite a recognition of the problem, then, the abuses of the crew leader system have been curbed only slightly, if at all.

E. The Wagner-Peyser Act of 1933

1. Importance of the Act

The Wagner-Peyser Act,[83] a product of the Great Depression of the 1930's, established the United States Employment Service, which has since been renamed the United States Training and Employment Service (USTES). Created to ameliorate the widespread employment problems of millions of people, the Act contains provisions and regulations of potential specific benefit to farmworkers.

As noted above, a lack of reliable, accurate job information forces farmworkers to turn to crew leaders as a source of employment. Under the Wagner-Peyser Act, the USTES is required to establish a "farm placement service,"[84] furnishing information nationally as to the avail-

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[79] Id. § 2045(b) requires the contractor to inform, to the best of his knowledge and belief, each worker of the following:

> (1) the area of employment, (2) the crops and operations on which he may be employed, (3) the transportation, housing and insurance to be provided him, (4) the wage rates to be paid him, and (5) the charges to be made by the contractor for his services.

[80] S. Rep. No. 91-83, supra note 9, at 82.

[81] Id.

[82] Id. at 85.

[83] 29 U.S.C. § 49 (1970).

[84] Id. § 49(b); see 20 C.F.R. § 604.5 (1973). The Department of Labor also administers an Annual Worker Plan through the Farm Labor and Rural Manpower Service, using data from state employment agencies. The Annual Worker Plan involves combining information received from crews and workers in labor supply states (chiefly Texas and Florida) with job orders from labor demand states. The result is a worker schedule, giving employers' names and addresses for which the crew will be working for the length of the season. Nearly 90,000 farmworkers were contacted under the plan in 1970. See The Annual Worker Plan in 1970, Rural Manpower Developments 26-27 (Sept./Oct. 1971).

ability of jobs, and maintaining an employment clearinghouse between the states in conjunction with state employment agencies. The availability of such information would be of obvious benefit to the farmworker.[85]

Certain conditions are wisely imposed before information will be disseminated. For example, migrant and seasonal workers must not be recruited unless and until it has been established that a need for such workers exists,[86] lest there be created an artificial surplus of workers which would drive wages down. Furthermore, terms and conditions of employment for workers who are recruited to an area must be substantially similar to those prevailing in the locality.[87]

A second extremely important aspect of the Wagner-Peyser Act relates to the blight of shoddy and substandard housing afflicting farmworkers in all areas of the country.[88] Under the Wagner-Peyser Act, all farm employers must provide housing which complies with regulations issued by the Department of Labor as a prerequisite to using USTES recruiting services.[89] Strict housing standards have been issued by the Secretary of Labor and are quite satisfactory.[90] They establish minimum standards of habitability, among which are an adequate water supply,[91] electricity in all units,[92] and sanitary toilet and washing facilities.[93] The Wagner-Peyser Act thus has the potential to diminish farmworker reliance on the crew leader for two of the major services he provides—job information and housing. If the Act were well enforced, farmworkers might be expected to abandon the crew leader system or, at the least, the abuses of the system might be reduced. Unfortunately, enforcement has not been effective.

2. *Enforcement of the Act*

The central problem with the Act is that all information regarding wages, housing, and other conditions of employment is subject to investigation and verification by state rather than federal officials.[94]

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[85] See Chase, The Migrant Farm Worker in Colorado—The Life and the Law, 40 Colo. L. Rev. 45, 71-72 (1967).

[86] 20 C.F.R. § 602.9(a) (1973).

[87] Id. § 604.1(k).

[88] For an overview of the serious inadequacies and deplorable conditions prevalent in farmworker housing and for possible solutions to the situation, see L.P. Reno, Pieces and Scraps: Farm Labor Housing in the United States (1970), in Powerlessness Hearings, supra note 2, pt. 8B, at 5652-5798.

[89] 20 C.F.R. § 602.9(d) (1973).

[90] These standards are set forth in id. §§ 620.4-.17.

[91] Id. § 620.5.

[92] Id. § 620.10.

[93] Id. §§ 620.11-.12.

[94] In 1970, there was only one full-time employee in the Department of Labor responsible for the enforcement of farmworker housing standards. Powerlessness Hearings, supra note 2, pt. 8B, at 5834. All complaints received by the Department involving violation of sanitary or housing codes "are referred to the appropriate State agency." Id. Even if state enforcement is shown to be completely unsatis-

The only sanction the Department of Labor retains is the denial of the use of the interstate recruiting facilities;[95] its only power is that of persuasion.[96] Further, there is evidence that many states, especially those with a great need for seasonal workers, are less than zealous in investigating the users of USTES facilities and in enforcing the Wagner-Peyser standards and regulations.[97] The failing of the Act, then, is that it has standards but no sanctions, regulations but no remedy. A recent, precedent-setting case, however, may go far toward solving this dilemma.

In *Gomez v. Florida State Employment Service*,[98] the Court of Appeals for the Fifth Circuit held that the Wagner-Peyser Act and its regulations created federal rights for farmworkers which federal courts were empowered to protect.[99] The court implied the existence of a private civil remedy[100] against state agencies which fail to adequately investigate and verify information given to them and against individuals, such as employers using USTES facilities, who purposely mislead state officials.[101] This threat of civil liability for lack of diligence may conceivably provide the sanction necessary to force compliance with the Act. A private right of action is, in actuality, the best means by which the Act may be enforced; hopefully, the *Gomez* case will provide the necessary impetus for realizing its potential benefits.[102]

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factory, the federal government will not or cannot step in officially to supersede the state agency. "In order to secure upgrading and effective administration of State or local standards we [the Department of Labor] have had recourse only to our powers of persuasion." Id. at 5833. See also id. at 5838.

[95] Id. at 5830.

[96] See note 94 supra.

[97] For description of the enforcement of farmworker housing regulations in New York, see Note, Migrant Farm Labor in Upstate New York, 4 Colum. J. Law & Soc. Problems 1, 34-36 (1968).

[98] 417 F.2d 569 (5th Cir. 1969). Pete Gomez and other plaintiffs had come from Texas to Florida to work at Naples Farms in response to the farm's request for workers through the USTES. When planitiffs arrived at Naples Farms, they found that the wages were lower than the level required by the regulations, and that the housing provided was "woefully inadequate." Id. at 573-74. It was alleged, and not contested, that the state employment service had made no attempt to see if Naples Farms was complying with Wagner-Peyser regulations. Id. at 575.

[99] Id. at 581.

[100] In the court's words, "[t]his Act, its setting and the regulations call imperatively for implied remedies here if the purpose of the regulations—the protection of migratory farm workers—is to be achieved. . . . Absent an implied remedy, the workers have no protection." Id. at 576.

[101] Id. at 576-77. Other private rights of action against employers, which would help give "teeth" to otherwise ineffective and unenforced legislation, were denied in Chavez v. Freshpict Foods, Inc., 456 F.2d 890, 894-95 (10th Cir.), cert. denied, 409 U.S. 1042 (1972) (denying private right of action under the Farm Labor Contractor Registration Act and refusing to imply a private civil remedy against employers knowingly employing illegal aliens), and in Breitweiser v. KMS Indus., Inc., 467 F.2d 1391, 1394 (5th Cir. 1972), cert. denied, 410 U.S. 969 (1973) (holding that the child labor prohibitions of the FLSA, and regulations promulgated thereunder, do not create a private cause of action for damages for wrongful death of a youth illegally employed).

[102] It should be noted that concerted enforcement of the Wagner-Peyser

F. *Unionism in Agriculture*

The recent strikes by farmworkers against growers of grapes and iceburg lettuce, with the accompanying boycott campaigns, have focused public attention on farmworker unionization. Other American workers determined long ago that the most effective way to achieve favorable conditions of employment was through collective strength and organization. Because the federal government has not seen fit to ensure satisfactory wage and hour standards, child labor protections, decent housing and similar guarantees to agricultural laborers, domestic farmworkers have attempted to improve their situation through organizational self-help. The possibility of securing these protections, which are available to other citizens, has made unionization a source of great hope to American farmworkers.

1. *Obstacles to Farmworker Organization*

The protection provided American labor by the original National Labor Relations Act of 1935 (NLRA)[103] was crucial to the orderly unionization of industry. Farmworkers, however, were excluded from the NLRA's provisions and remain excluded today.[104] Furthermore, even if coverage were extended to them or if favorable farm labor legislation were passed, agricultural unionism would still face significant obstacles both because of the general nature of the farm working force and because of the presence of large numbers of commuters and illegal aliens from Mexico.

Numerous factors inherent in the present farm labor force seriously inhibit effective organization on a national level. The general oversupply of labor in agriculture presents one major problem; unionization is difficult when available workers greatly exceed the number

regulations may create a paradoxical situation. The potential of the Wagner-Peyser Act is both to reduce the need for the crew leader as well as to upgrade farmworker housing. The zealous enforcement of housing and wage standards under the Act, however, would undoubtedly result in the denial of the use of USTES recruiting facilities to many employers and workers. While this may be an impetus to better housing, it also forces farmworkers to turn to crew leaders for job information and employment.

[103] Ch. 372, 49 Stat. 449, as amended, 29 U.S.C. §§ 151-68 (1970).

[104] 29 U.S.C. § 152(3) (1970) reads in part: "The term 'employee' . . . shall not include any individual employed as an agricultural laborer." For a very good discussion and analysis of the agricultural labor exclusion from the NLRA, see Morris, Agricultural Labor and National Labor Legislation, 54 Calif. L. Rev. 1939 (1966). The author points out that among the possible bases for the agricultural exemption, the most likely were that "neither Congress nor virtually anyone else was concerned with the problems of agricultural labor," id. at 1951, and that the political strength of farm organizations and rural blocs in the Senate and the House dictated the exclusion in order to pass the Act. Id. at 1954-56. See also Kovarsky, Congress and Migrant Labor, 9 St. Louis U.L.J. 293, 344 (1965). Although S. Rep. No. 573, 74th Cong., 1st Sess. 7 (1935), stated that "administrative reasons" were responsible for the exclusion, most evidence indicates that "the exclusion of farm workers from the NLRA results from political rather than administrative considerations." Koziara, Collective Bargaining on the Farm, 91 Monthly Lab. Rev. 3, 9 (June 1968).

of available jobs.[105] Further, it is important to remember that only a small percentage of farmworkers rely on farm-related work as their sole source of income. Because of their casual relationship with agriculture, most workers have no permanent commitment to farm work and tend to have little interest in joining a union.[106] A related obstacle to organization is the seasonal nature of most farmwork, because, in many cases, the working season is shorter than the time necessary to effectuate even the most rudimentary unionization techniques. Many workers who do rely on farmwork for their sustenance are migratory or transient; bound for other places in the near future, they have little enthusiasm for organization. Furthermore, employer-employee relationships in agriculture are unstable and ill-defined, a problem which is exacerbated by the ubiquity of the crew leader system. Since many workers regard the farm labor contractor rather than the farmer as their employer, the farm labor contractor hampers union organization.[107]

The obstacles to effective farm labor organization presented by "commuters" and illegal aliens are equally serious and much more dramatic.[108] Those who enter this country legally or illegally from other countries, particularly Mexico, have been estimated to comprise over 20% of the domestic agricultural labor force,[109] indicating that the basic problem of labor oversupply may be largely due to commuters and illegal aliens. Mexican aliens are continually and effectively used as strike-breakers,[110] and farmworkers are well aware that their employers can easily replace them.[111] The problem is thus twofold: not only may strikes be broken by commuters or illegals, but the very knowledge of this fact by workers discourages organization and pre-

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105 Koziara, supra note 104, at 5.

106 Id. at 9.

107 Id. at 8. It is clear, however, that, at least under the FLSA, when farm owners hire crew leaders who in turn hire field laborers, the farm owners are considered the employers of the field laborers. See Hodgson v. Okada, 472 F.2d 965 (10th Cir. 1973). See also Mitchell v. Hertzke, 234 F.2d 183 (10th Cir. 1956).

108 Commuters or "green-carders" are aliens who have been admitted as immigrants into the United States for permanent residence, but who choose to keep homes in Canada or Mexico and to cross legally on a daily or seasonal basis into this country to work. A discussion of the commuter problem in general is contained in text accompanying notes 136-272 infra; the impact of commuters on farmworker unionization is discussed more specifically in text accompanying notes 187-92 infra.

Illegal aliens are those who enter the United States illegally to obtain work or who, after a legal entrance, illegally accept work. For an analysis of the illegals' impact on domestic farm laborers, see text accompanying notes 287-91 infra.

109 Powerlessness Hearings, supra note 2, pt. 4B, at 1698.

110 See text accompanying notes 187-92 infra.

111 Hearings on S. 8 and S. 1808 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 91st Cong., 1st Sess. 44 (1969) [hereinafter Hearings on S. 8 and S. 1808] (remarks of Cesar Chavez).

vents unionization.[112] Such alien job competition, moreover, is a major cause of domestic farmworker migration,[113] which brings with it the concomitant obstacles to organization of transience, impermanence and the crew leader system. In sum, the problems are such that legislative protection of farmworker unionism alone will probably not prove sufficient to allow the development of strong, cohesive farm labor organizations:

> So long as there exists a residual pool of workers from which growers can continue to draw "scab" or substitute labor, it is going to be difficult for a farm labor union, even with NLRA help, to approach the degree of bargaining power enjoyed by unions in urbanized industry.[114]

2. *Farmworkers, Unions and the Law*

The difficulties confronted by farm labor organizers in attempting to establish an effective farm union movement have led to reconsideration of the exemption of farmworkers from the protections of the National Labor Relations Act.

Since farm employers are not subject to the NLRA, they are not bound by Section 8(a)[115] of the Act, which prohibits unfair labor practices by employers. Agricultural employers are thus free to discharge or discriminate against employees on the basis of union membership,[116] to restrain or interfere with any attempt to unionize their farm operations,[117] and to refuse to recognize or bargain collectively with a union even upon a valid showing of representational strength.[118]

The lack of legal machinery to force farm employers to recognize and bargain with agricultural unions presents an important obstacle to farmworker organization. Paradoxically, however, the key element in many recent farm union gains has been the fact that their exclusion from the NLRA frees farmworkers from the Act's constraints on union activities. Thus farmworker unions may legally undertake secondary boycotts, consumer picketing and recognition and organization picketing—activities which are either prohibited or restricted under the NLRA.[119] Such techniques have proved to be indispensable organizing

[112] See D. North, The Border Crossers: People Who Live in Mexico and Work in the United States 130 (1970), reprinted in Powerlessness Hearings, supra note 2, pt. 5A, at 2194-2527 [hereinafter The Border Crossers].

[113] See text accompanying notes 193-98 infra.

[114] Note, The Unionization of Farm Labor, 2 U. Cal. Davis L. Rev. 1, 31 (1970).

[115] 29 U.S.C. § 158(a) (1970).

[116] Such action would violate Sections 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1), (5) (1970).

[117] Such action would violate Section 8(a)(1) of the NLRA, 29 U.S.C. § 158(a)(1) (1970).

[118] Such action would violate Sections 8(a)(1) and 8(a)(5) of the NLRA, 29 U.S.C. §§ 158(a)(1), (5) (1970).

[119] See DiGiorgio Fruit Corp. v. NLRB, 191 F.2d 642, 644 (D.C. Cir.), cert. denied, 342 U.S. 869 (1951) (organizations "composed exclusively of agricultural laborers" cannot be prosecuted for acts termed unfair labor practices by the NLRA).

tools in the agricultural context. Not only has the organized boycott been the key to the most important farm union successes, but it has provided the most important source of strength for the United Farm Workers Organizing Committee (UFWOC) headed by Cesar Chavez.[120] Because of the transiency and poverty of many farmworkers, the boycott often furnishes the only effective means for bringing real economic pressure to bear on large agricultural employers.[121] As Chavez has observed, "the boycott . . . is the *only* way we can organize."[122]

In light of this situation, it is clear that while legislation bringing farmworker unions within the NLRA would help to protect them from employer pressure, such action would deprive farmworkers of the only major source of strength they possess. Such a trade-off does not seem to be in the best interests of agricultural labor unions, and Cesar Chavez and the UFWOC have opposed efforts to bring their union within the full ambit of the NLRA. Thus, while union representatives have expressed a desire to be ensured some of the safeguards against employer actions contained in the NLRA, they have opposed the restrictions on union activity added by the Taft-Hartley[123] and Landrum-Griffin[124] Acts.[125] The continued exclusion of farmworkers from the constraints of these acts has been termed by the union to be of utmost importance,[126] since subjecting agricultural workers to the restrictions of the NLRA, whatever the Act's benefits, would be "truly disastrous" to the cause of farmworker unionism.[127]

It is not surprising, then, that during the last Congress, proposed farm labor legislation bringing agricultural unions within the coverage of the NLRA[128] failed to pass largely due to the opposition of farm-

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Section 8(b)(4) of the NLRA, 29 U.S.C. § 158(b)(4) (1970), prohibits labor organizations governed by the Act from engaging in secondary boycotts and subjects consumer picketing by unions to narrow constraints. See NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760, 377 U.S. 58 (1964). Recognition and organizational picketing are regulated and limited by § 8(b)(7), 29 U.S.C. § 158(b)(7) (1970).

120 Most notable, of course, are the wine- and table-grape boycotts and the present iceburg lettuce boycott, all organized by the UFWOC.

121 See Hearings on S. 8 and S. 1808, supra note 111, at 32.

122 N.Y. Times, Mar. 26, 1972, at 25, col. 3 (emphasis added).

123 Act of June 23, 1947, ch. 120, 61 Stat. 161.

124 Act of Sept. 14, 1959, Pub. L. No. 86-257, 73 Stat. 537.

125 Hearings on S. 8 and S. 1808, supra note 111, at 16. A bill recently introduced in Congress would allow farmworkers the benefits of the NLRA protections for organization and recognition, but would exempt them from the organizational and recognition picketing restrictions, as well as from the limitations on secondary boycotts. See H.R. 881, 93d Cong., 1st Sess. (1973).

126 Hearings on S. 8 and S. 1808, supra note 111, at 12.

127 Id. The UFWOC has also expressed a special need to be exempted from the "right-to-work" clause, Section 14(b) of the NLRA, 29 U.S.C. § 164(b) (1970). Hearings on S. 8 and S. 1808, supra note 111, at 13. H.R. 881, 93d Cong., 1st Sess. (1973), would provide such an exemption.

128 A proposal favored by many observers was embodied in S. 8, 91st Cong., 1st Sess. (1969); the bill is reprinted in Hearings on S. 8 and S. 1808, supra note 111.

workers. On the other hand, opponents of strong farmworker unions have recently become the major proponents of some federal labor legislation affecting farmworkers.[129] These anti-farm-labor forces have met with some success. Some state legislation has been adopted which restricts agricultural union power,[130] and a bill was introduced in the 92d Congress which would enable employers to seek a 40-day strike injunction or cooling-off period (quite convenient for strikes during harvest) or to resort to compulsory arbitration before a separate Agricultural Labor Relations Board.[131] If any legislation affecting farmworker unions is passed in the near future, hopefully it will protect rather than curb the strength of emerging agricultural labor unions.

3. Farmworker Unionism—Prospects and Evaluation

Recent successes in certain areas of the country have given agricultural unionism new vigor. Yet, these successes have been largely dependent on special factors that have enabled unions to bring strong economic pressure to bear on employers.[132] In more typical situations too many factors disrupt farmworker organization to allow realistic hope for the quick emergence of a broad-based and powerful farm labor union. Mechanization, transiency, labor surpluses, alien workers and powerful agribusiness corporations on the one hand, and small private farms on the other, all present great obstacles to organization, and condemn farmworker unionism to an uncertain future.

Whatever the immediate prospects, the potential long-run benefits of unionism to many farmworkers are manifest. Collective bargaining rights have enabled unions to secure contract provisions guaranteeing

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The bill would have given certain limited preferential treatment to farmworkers within the context of the NLRA. Pending bills which would include farmworkers under the NLRA include H.R. 4304 and H.R. 4408, 93d Cong., 1st Sess. (1973).

[129] N.Y. Times, Mar. 26, 1972, at 25, col. 3.

[130] See, e.g., Idaho Code §§ 22-4101 to -4413 (Supp. 1972); Kan. Stat. Ann. §§ 44-818 to -830 (Supp. 1972). An initiative proposal similar to these statutes was before the California voters in the form of Proposition 22, but was rejected on November 7, 1972. For an account of Oregon's attempt to pass a bill controlling agricultural labor union activity and permitting compulsory arbitration of farm labor union disputes, see Martinez, Oregon's Chicanos' Fight for Equality, 5 Civ. Rights Digest 17, 18-21 (Winter 1972).

[131] H.R. 13,981, 92d Cong., 2d Sess. (1972); see N.Y. Times, Mar. 26, 1972, at 25, col. 3. A similar proposal was submitted by the traditionally conservative American Farm Bureau. Hearings on S. 8 and S. 1808, supra note 111, at 62-64.

[132] The success of the union movement in California is largely attributable to the coincidence of a number of factors: large "agribusiness" farms with "high concentrations of workers;" a large local labor supply with few migrants; a crop (grapes) that requires workers for a large part of the year rather than seasonally; and workers who are more sympathetic to unionization. Note, The Unionization of Farm Labor, 2 U. Cal. Davis L. Rev. 1, 7-9 (1970). A number of unique factors also were crucial to the unionization of agricultural workers in Hawaii by the International Longshoremen's and Warehousemen's Union. Libbin, Developments in Farm Labor Unionization, Rural Manpower Developments 22-23 (U.S. Dep't of Labor, Sept./Oct. 1971).

such benefits as higher wages, overtime pay and greater safety assurances.[133] And despite claims that better terms and conditions of employment for farmworkers would be disastrous to farm employers,[134] it has been possible, even under generous union contracts, to achieve higher profits for employers as well as better conditions for workers.[135] Unionism is by no means a panacea for the plight of the farm laborer; its effectiveness is limited. But where organization has been successful, farmworkers have obtained for themselves what the federal government has not yet been willing to provide—realistic improvement from second-class status.

G. Summary and Conclusions: The Effectiveness of Present Federal Legislation

This general survey of major federal farmworker legislation makes it difficult to reach other than one conclusion: not only has the domestic farmworker been granted fewer protections and benefits than other American workers, but there has also been a dismal failure to adequately preserve and enforce the limited benefits that have been bestowed. But even if improved wage and hour legislation and child labor restrictions were in effect and all existing legislation were adequately enforced, major problems would still plague the farmworkers.

The difficulties confronting domestic farmworkers cannot be solved by efforts confined to the agricultural sector alone. Mechanization and the growth of corporate farming, together with the fragmented nature of the farm work force, make it highly unlikely that farmworkers can rely on unionization to resolve their problems in the near future. Furthermore, a basic oversupply of labor, caused in large part by an influx of Mexican commuters and illegal aliens, seriously jeopardizes federal legislative efforts to bring wages and working conditions of farmworkers to levels comparable to those of other workers. To offer

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133 For example, some of the UFWOC contracts in California provide for better working conditions, more safety requirements, decent sanitary facilities and assistance for covering medical expenses as well as higher wages and overtime pay. In addition, economic development funds were established to help elderly migrants without pensions, and to help retrain workers displaced by automation. Powerlessness Hearings, supra note 2, pt. 8B, at 5391. Similar benefits were derived from a UFWOC contract by Florida orange grove workers of the Minute Maid Division of the Coca-Cola Company. Among the benefits were minimum weekly incomes for year-round workers, adequate housing, substantial wage increases, sick pay, paid holidays and more rights for black workers. N.Y. Times, Mar. 19, 1973, at 53, col. 1.

134 "To extend the coverage of the NLRA to agriculture . . . would be a huge and deadly error—both for agricultural employers and for the country." Petro, Agriculture and Labor Policy, 24 Lab. L.J. 24, 41 (1973).

135 After signing a contract with the UFWOC providing for increased benefits and pay to its workers, see note 133 supra, the Minute Maid Division of the Coca-Cola Company found that the workers' productivity "had gone up sharply," and that the work force was much more stable. In addition, total revenues and net profits have increased. N.Y. Times, Mar. 19, 1973, at 53, col. 1.

realistic solutions to the farmworkers' plight, legislative proposals must acknowledge and remedy some of the broader causes and aggravations of the problems of agricultural laborers.

The next sections of this Note will examine in detail the impact of alien farmworkers on domestic agriculture. By focusing on the interrelationship between alien farmworkers and some of the important concerns of domestic farm laborers, it may be possible to develop a broader framework for analysis of farmworker problems and thus to address them more effectively.

III

THE ALIEN COMMUTER AND THE AMERICAN FARMWORKER

A. Alien Commuters: An Introduction

Every major problem confronting domestic farmworkers is aggravated by the presence in this country of a large group of alien laborers known as "commuters" or "green-carders."[136] Of the approximately 55,000 daily and seasonal commuters who regularly enter this country from Mexico,[137] it is likely that at least 39,000 are employed as farmworkers in the border areas adjacent to the Republic of Mexico.[138] These "green-carders" are quite willing to accept jobs at wages

[136] As used hereinafter, an alien commuter or "green-carder" is an alien who has been admitted as an immigrant into the United States for permanent residence, but who chooses to keep a home in Canada or Mexico and to cross daily or seasonally into this country to work. The Immigration and Naturalization Service classifies a commuter as "an immigrant, lawfully admitted for permanent residence, who is returning from a temporary visit abroad." 8 U.S.C. § 1101(a)(27)(B) (1970). So classified, commuters are "special immigrants" and may be admitted under the informal documentation requirements authorized by id. § 1181(b) upon displaying their Alien Registration Receipt Card. 8 C.F.R. § 211.1(b)(1) (1973). Mexican commuters are often called "green-carders" because of the former color of this card.

This Note will be limited to a discussion of Mexican commuters, since research indicates that the relatively few Canadians who commute for farm work have little or no adverse effect on domestic farmworkers. Furthermore, alien commuters should be distinguished from citizen commuters—American citizens residing in a foreign country, almost always Mexico, who also commute across the border to work in the United States. There were over 18,000 citizen commuters as of January 1966, and they are the fastest growing, most difficult to control group of border crossers. Hearings on H.R. 9112, H.R. 15,092 and H.R. 17,370 Before Subcomm. No. 1 of the House Comm. on the Judiciary, 91st Cong., 2d Sess. 127 (1970) [hereinafter Hearings on H.R. 9112]. Although citizen commuters aggravate farmworker problems in much the same manner as the green-carders do, they will not be discussed in this Note because of the peculiar problems presented by their status as citizens. Cf. Worthy v. United States, 328 F.2d 386, 394 (5th Cir. 1964) (a person who establishes his citizenship cannot be barred from entering the United States).

[137] Powerlessness Hearings, supra note 2, pt. 7A, at 4233.

[138] See S. Rep. No. 91-83, supra note 9, at 63. The accuracy of this and other data on commuters is questionable, for statistics on the number of commuters are not regularly kept by the INS. Powerlessness Hearings, supra note 2, pt. 5A, at 2033; see The Border Crossers, supra note 112, at viii, 21. The figures cited should be considered more as minima than as true reflections of the number of commuters. See id. at 29.

that are low by American standards, because they return nightly to the low-cost Mexican economy where the money will support them well.[139] Agriculture is the most common source of employment for commuters,[140] largely because it does not demand particular skills or training and because of the numerous job opportunities on farms along the border. The economy of the Mexican border towns depends for stability on the availability of American jobs, without which the area's already high unemployment rates would rise even further. A recent survey showed that 40% to 45% of the workers in Mexico's border cities either were holding or had held jobs in the United States, and that agriculture was the largest source of such employment.[141]

On the other hand, the high level of alien employment in an already delicate farm labor situation has a tremendous impact on American workers' job opportunities. Even if viewed merely in terms of worker displacement, the 39,000 commuter-farmworkers cause potentially critical problems for American farmworkers. Adding to this factor the commuters' tendency to depress wages, lower working conditions and impede unionization and collective bargaining, it becomes evident that the Mexican commuter poses one of the most basic and fundamental problems facing the American farmworker,[142] especially in the western and southwestern United States where green-carders are most numerous.

B. Legal Status of the Commuter

The present legal status of commuters rests on a fiction devised by administrative officials to reconcile congressional policy with the contravening effects of existing laws and regulations. While the concept was realistic when it was originally developed over 40 years ago, the situation has changed so that the administrative policy is no longer justified. Nevertheless, the fiction has persisted.

The borders of the United States were open to nationals of all countries until 1924,[143] when Congress undertook to protect domestic employment opportunities by limiting the influx of alien laborers. Under

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139 S. Rep. No. 91-83, supra note 9, at 64. See Hearings on Illegal Aliens Before Subcomm. No. 1 of the House Comm. on the Judiciary, 92d Cong., 1st Sess., pt. 2, at 528 (1971) [hereinafter Hearings on Illegal Aliens], on the importance of the cost differential to Mexican citizens.

140 Tabulations of commuters have shown that, depending on the point of entry into the United States, in excess of 80% of incoming commuters may give "farm laborer" as their occupation. Even at points where the proportion is not so high, farm work is the most common occupation of green-carders. See Ericson, The Impact of Commuters on the Mexican-American Border Area, 93 Monthly Lab. Rev. 18, 19-20 (Aug. 1970).

141 Ericson, Mexico's Border Industrialization Program, 93 Monthly Lab. Rev. 18, 22 (May 1970).

142 See Hearings on S. 8 and S. 1808, supra note 111, at 160 (remarks of Senator Edward Kennedy).

143 See Karnuth v. United States ex rel. Albro, 279 U.S. 231, 242 (1929).

the Immigration Act of 1924,[144] designated groups of temporary alien visitors were classified as nonimmigrants, while all other entering aliens were classified as immigrants.[145] Most immigrants were subject to national quotas and other restrictions. However, in order to encourage trans-American business and to maintain friendly relations with its neighbors, the United States imposed no quota restrictions on the natives of Western Hemisphere countries.[146] Nationals of these countries had to obtain immigrant visas only if they wished to reside permanently in the United States. Otherwise, they passed freely across the border as members of various nonimmigrant classes.

One of these nonimmigrant classes was composed of temporary visitors "for business or pleasure."[147] Under this rubric, residents of Mexico, Canada and other countries were initially allowed to enter the United States from Mexico or Canada for work and return home without visas.[148] Unfortunately, the classification created a large loophole in American immigration laws, for aliens barred from the United States under quota restrictions could immigrate to Canada or Mexico (during this period, most went to Canada), settle in border towns and commute to the United States to work.[149]

The resulting situation, which was neither satisfactory to many American workers nor consistent with the intent of the 1924 Act, led the Department of Labor in 1927 to promulgate General Order 86, which stated that aliens entering the United States for employment were not to be considered "temporary visitors for business." Rather, they would be classified as immigrants, and quota restrictions would apply based on their native countries irrespective of where they crossed the border.[150] This new application of the 1924 Act was upheld by the Supreme Court in *Karnuth v. United States ex rel. Albro*,[151] in which the Court found that temporary business visits did not include "temporary visits for the purpose of performing labor for hire."[152]

As intended, General Order 86 reduced commuting by quota-country aliens by subjecting them to quota restrictions. If applied literally, however, the order would have upset established employment patterns of citizens of Mexico and Canada, many of whom had regularly crossed the border to hold jobs in the United States without

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144 Act of May 26, 1924, ch. 190, 43 Stat. 153 [hereinafter 1924 Act].

145 The immigrant/nonimmigrant classification is still used. See 8 U.S.C. § 1101(a)(15) (1970).

146 Residents of Western Hemisphere nations were deemed "nonquota immigrants" under Section 4(c) of the 1924 Act.

147 1924 Act § 3(2).

148 See Note, Aliens in the Fields: The "Green-Card Commuter" Under the Immigration and Naturalization Laws, 21 Stan. L. Rev. 1750, 1752 (1969) [hereinafter Commuter Note].

149 Id.

150 Id. at 1752-53.

151 279 U.S. 231, 242-44 (1929).

152 Id. at 244.

protest from the American government or organized labor. Mexican and Canadian nationals could, almost without exception, obtain immigrant visas under the 1924 Act to reside permanently in the United States. Nonetheless, if the General Order had meant that Mexican and Canadian nationals would have been forced either to take up permanent residence in the United States or to seek a new visa for each daily reentry in order to work here, the 1924 Act would have had implications not intended by Congress.[153]

To prevent this result, immigration officials contrived an "amiable fiction,"[154] a "device of convenience,"[155] whereby these foreign commuter workers were considered to be immigrants even though they did not establish permanent residence in the United States. Under the plan, Canadian and Mexican nationals had to apply for entrance to the United States as nonquota immigrants. Upon satisfying all the ordinary entrance requirements, these aliens were granted visas allowing them to live permanently in the United States, but not requiring them to do so.[156] Canadian and Mexican commuters thus possessed, as they still do, the status of bona fide immigrants and could live here permanently at any time, or, if they preferred, live in one nation and work in the other.[157] Thus the commuter practice was established, not by statute or congressional mandate, but by administrative interpretation and practice,[158] and was fashioned to avoid upsetting both established work patterns and traditional, friendly relations with bordering nations.[159]

The commuter practice has continued relatively unchanged. Congress has made two significant revisions of immigration law since the 1924 Act, but both have been construed to constitute either approval of or accession to the established practice.[160] Committee reports on the

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153 Just as the 1924 Act made no attempt to curb immigration by Mexican or Canadian nationals, nothing in the legislative history of the Act indicates that Congress was in any way concerned with the free flow of American, Mexican and Canadian workers across the historically free and open borders between the countries. See Bustos v. Mitchell, 481 F.2d 479, 485-86 (D.C. Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3101 (U.S. Aug. 14, 1973) (No. 73-300) (discussed in text accompanying notes 213-18 infra).

154 See Gordon, The Amiable Fiction—Alien Commuters Under Our Immigration Laws, 1 Case W. Res. J. Int'l L. 124 (1969).

155 Id. at 124.

156 See Commuter Note, supra note 148, at 1754.

157 To facilitate the commuter practice, immigration officials devised a border-crossing identification card to allow frequent crossings without the use of visas. See Powerlessness Hearings, supra note 2, pt. 5A, at 2018.

158 Gordon, supra note 154, at 125.

159 The commuter situation manifestly does not fit into any precise category found in the immigration statutes. The status is an artificial one, predicated upon good international relations maintained and cherished between friendly neighbors.

In re M.D.S., 8 I. & N. Dec. 209, 213 (1958).

160 See Gordon, supra note 154, at 125-26; Commuter Note, supra note 148, at 1755, 1758.

Immigration and Nationality Act of 1952[161] acknowledged the existence of the commuter practice,[162] yet the 1952 Act included no provisions designed to terminate or restrict it. The Immigration and Naturalization Service (INS) therefore interpreted the 1952 Act as impliedly approving the practice.[163] Amendments to the 1952 Act in 1965[164] also have not been viewed as affecting the commuter practice, in that the fiction has since been given presumptive validity.[165]

This is not to say that the commuter practice has been universally accepted as proper. On the contrary, it has been bitterly attacked as being an unjustified, absurd[166] and nonsensical[167] distortion of immigration law which serves to inflict serious burdens on American workers in general and farm laborers in particular. Nevertheless, despite its detractions and its somewhat questionable derivation, the commuter fiction survives and prospers, as commuters continue to cross into the United States in increasing numbers.

Given all the circumstances at the time the "amiable fiction" was formulated, establishing such a policy was probably the only realistic way for the INS to adhere to Congress' policy of restricting immigration through the quota system without totally disrupting established employment practices and good-neighbor policies. But the situation has changed since 1927 and new difficulties have developed in the Mexican border area. The question of whether old policy considerations should still be controlling after 45 years can best be answered by considering the effects of the commuting practice on American laborers, especially farmworkers.

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[161] Act of June 27, 1952, ch. 477, 66 Stat. 166, as amended, 8 U.S.C. §§ 1101-1557 (1970).

[162] S. Rep. No. 1515, 81st Cong., 2d Sess. 535-36 (1950). See also S. Rep. No. 1137, 82d Cong., 2d Sess. 4 (1952); H.R. Rep. No. 1365, 82d Cong., 2d Sess. 32 (1952).

[163] The Board of Immigration Appeals reviewed the 1952 Act and found as follows:

> It is therefore concluded that the practice of considering commuters as permanent residents has not been disturbed by the act of 1952, but rather it has impliedly received congressional approval, since the legislative history of the act reveals a discussion without dissent. Without clear statutory language requiring a mandatory change in the commuter scheme, the law cannot be construed as prohibiting this procedure.

In re H. O., 5 I. & N. Dec. 716, 718-19 (1954). See also In re M.D.S., 8 I. & N. Dec. 209, 211 (1958).

[164] Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

[165] See Gooch v. Clark, 433 F.2d 74, 80 (9th Cir. 1970), cert. denied, 402 U.S. 995 (1971); Commuter Note, supra note 148, at 1758. But see Greene, Public Agency Distortion of Congressional Will: Federal Policy Toward Non-Resident Alien Labor, 40 Geo. Wash. L. Rev. 440, 441-51 (1972) [hereinafter Greene, Federal Policy Toward Non-Resident Alien Labor].

[166] Greene, Federal Policy Toward Non-Resident Alien Labor, supra note 165, at 441-51; Greene, Immigration Law and Rural Poverty—The Problems of the Illegal Entrant, 1969 Duke L.J. 475, 487.

[167] Gooch v. Clark, 433 F.2d 74, 83 (9th Cir. 1970) (dissenting opinion), cert. denied, 402 U.S. 995 (1971).

C. *Impact of Commuters on Domestic Farmworkers*

Because agriculture is the leading source of employment for commuters,[168] and since it is plagued by so many other current problems, the farmworker feels the impact of the commuter practice with more immediacy and severity than other workers. Thus, if the commuter practice has the general effect of depriving Americans of jobs, it must be recognized that much of the unemployment will be created in the agricultural sector; if the general effect of commutation is to depress wages and discourage labor organization, farmworker earnings and agricultural unionization will suffer the most. The problems caused by commuters have been dealt with in more detail by other commentators,[169] but perhaps a brief summary of the effects of the commuter traffic will serve to emphasize the fact that the "amiable fiction" has become an undesirable indulgence.

1. *Commuter Aliens Induce Lower Wage Rates*

Common sense dictates that the mere presence of an additional 39,000 laborers in a work force characterized by a labor surplus will, without more, exert a depressing influence on wages. The facts bear out this prediction. Ninety percent of all Mexican commuters are employed in eight border areas in Texas, Arizona and California.[170] In the border areas of Texas, for example, wages for seasonal farmwork are over 30% lower than in the rest of the state.[171] Although California's farm wage rates are the highest in the nation, they are lowest in border areas, such as Imperial Valley, where commuters comprise the bulk of the labor force.[172] Furthermore, when commuters are concentrated in an area, the statutory minimum wage tends to be the prevailing rather than the base wage rate;[173] in fact, studies have shown that the wage rates for almost all occupations are substantially lower in border areas (where most commuters work) than in other locales.[174] This has been labelled the "further-higher" phenomenon[175]—a worker will earn more for performing the same work away from the border than he will earn by working near it.

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168 See text accompanying notes 138-41 supra.

169 See generally S. Rep. No. 91-83, supra note 9, at 61-65; Powerlessness Hearings, supra note 2, pts. 5A-B; 116 Cong. Rec. 5954-5963 (1970); The Border Crossers, supra note 112, at 143-84; Ericson, supra note 141, at 18; Miller & Glasgow, Job Crisis Along the Rio Grande, 91 Monthly Lab. Rev. 18 (Dec. 1968).

170 S. Rep. No. 91-83, supra note 9, at 65.

171 Id.

172 116 Cong. Rec. 5963 (1970).

173 Ericson, supra note 141, at 20.

174 The Border Crossers, supra note 112, at 157-66; 116 Cong. Rec. 5957-62 (1970).

175 The term was first used by Michael Peevey, Research Director of the California A.F.L.-C.I.O. See Hearings on H.R. 9112, supra note 136, at 123.

2. Minimum Wage Violations Are More Common Where Commuters Are Numerous

This tendency, while it relates to the general lower wage problem, has not been sufficiently documented to establish a direct cause-and-effect relationship. Nonetheless, the temptation to pay less than the minimum wage where workers willing to work for less are plentiful appears difficult to overcome. The border counties of Texas contain only eight percent of that state's population,[176] but almost all of the state's commuters. Those counties accounted for 25% of all reported violations of minimum wage standards in Texas in fiscal 1968.[177] A 1968 Department of Labor survey revealed, moreover, that 28% of the Texas commuters received less than the required minimum wage, and that an additional 48% received precisely that amount.[178] On a regional basis, almost one-fourth of the workers living in the border states (California, Arizona, New Mexico and Texas) who were paid less than the statutory minimum wage in 1969 lived in the border counties of those states.[179] While it is not impossible that other factors peculiar to the border areas may explain these statistics, the recurring juxtaposition of commuter concentrations and minimum wage violations certainly suggests that the presence of commuters is in large part responsible for violations of state and federal minimum wage laws.

3. Commuters Cause Higher Rates of Domestic Unemployment

Daily border crossers comprise a significant proportion of those employed along the border; estimates of their numbers range from 7.7% to 11% of the entire border-area working force, with far higher concentrations in some areas.[180] In California's Imperial Valley, for example, commuters constitute 85% of the farm labor force.[181] It is not surprising that the availability of large pools of cheaper foreign labor should diminish employment opportunities for American workers. In the Imperial Valley—where the employment of commuters is so widespread—the unemployment rate in 1966 was 10%, twice the average for the state as a whole.[182] The same is true in border areas of Texas, where in 1968 the unemployment rate was "significantly higher than in the state as a whole."[183] This is, if anything, an understatement, for border-area unemployment in that year was 95% higher than in the interior cities of the state.[184]

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176 The Border Crossers, supra note 112, at 161.
177 Id.
178 Ericson, supra note 141, at 20.
179 Id. at 20-21.
180 The Border Crossers, supra note 112, at 144.
181 S. Rep. No. 91-83, supra note 9, at 65.
182 Id.
183 Miller & Glasgow, supra note 169, at 18.
184 S. Rep. No. 91-83, supra note 9, at 65.

Yet the unemployment rate is not the best index of commuter impact; the "underemployment" or "subemployment" concept is probably better.[185] Underemployment results when poor job prospects lead workers either to fail to seek employment, to work only part time, or to accept full-time work at a less than adequate wage level. The close interrelationship of commuters, unemployment and underemployment is amply illustrated by a 1969 study of seven Texas border counties with large numbers of commuters in their working populations. These counties, with unemployment rates of from 3.6% to 8.5%, had combined unemployment and underemployment rates of up to 48.7%.[186] Whether the result be gauged in terms of unemployment or underemployment, the only reasonable conclusion is that where substantial numbers of commuters are present, domestic workers have fewer employment opportunities.

4. Commuters Hamper Unionization And Collective Bargaining, Especially Among Farmworkers

The most dramatic and direct manner in which commuters impede labor organization is by serving as strike-breakers. When Starr County (Texas) melon pickers working in fields within sight of the Mexican border went on strike in 1966, the workers were immediately replaced with a fresh supply of commuters, and the strike was destined to fail from the first.[187] Approximately 40% of the nonstriking workers at 24 vineyards struck during the 1968 wine-grape strike in California were Mexican commuters.[188] One employer whose farm was struck frankly admitted in a congressional hearing that green-carders comprised 95% of his work force during the strike.[189] Although the United Farm Workers Organizing Committee was eventually successful in its strike and boycott in the table-grape industry in 1970, a union spokesman estimated that if the union had not had to cope with the activities of commuters and illegals, the effort could have been successful in 1969.[190] This well-documented strike-breaking practice poses a tremendous problem for would-be organizers, because workers who know that they can be quickly and easily replaced are very reluctant either to join a union or to leave their jobs to strike. Agriculture is especially susceptible to strike-breaking tactics because most farm work requires few, if any, specialized skills. "[S]trikes involving workers with few skills can be broken by the use of commuters, but disputes involving skilled workers are not broken."[191] Thus, until some reasonable but strong restraints

[185] The Border Crossers, supra note 112, at 147.

[186] Ericson, supra note 141, at 21, table 3.

[187] The Border Crossers, supra note 112, at 167-68.

[188] S. Rep. No. 91-83, supra note 9, at 65.

[189] Hearings on Illegal Aliens, supra note 139, pt. 1, at 237.

[190] Hearings on S. 8 and S. 1808, supra note 111, at 43. A survey of workers in the Guimarra vineyards during the time the farm was being struck by the UFWOC showed 65% of the workers to be "green-carders." Id. at 29.

[191] The Border Crossers, supra note 112, at 170.

are imposed on the commuter practice to prevent direct competition between domestic workers and cheaper alien labor, it is unlikely that effective organization or collective bargaining will be common. This fact is not lost on farmworkers, to whom the problem is simple: "[E]ither the green carders are controlled or we starve."[192]

5. Commuters Induce the Seasonal Migration of Domestic Farmworkers

Migrant farmworkers do not migrate by choice but rather from economic necessity. Available information indicates that the presence of commuters often stimulates domestic migration by forcing domestic workers to look further afield in order to find work providing sufficient income to support their families. For example, the Rio Grande Valley in Texas provides agricultural jobs for a large number of green-carders and also serves as "home base" for many migrant workers. The green-carders pose a serious economic threat to these domestic workers since commuters are generally willing to work in the Valley at substantially lower wage rates.[193] The result is that many American workers leave the Valley to seek higher wages elsewhere,[194] a pattern followed in other areas where commuters are numerous. It is thus not surprising that when approximately 11,000 commuters came into California's Imperial Valley to find work in 1969, almost the same number of domestic workers left as migrants to seek other employment.[195] Such statistics led David North, a Labor Department consultant, to conclude that the influx of alien commuters and other border crossers into American border areas is closely related to the departure of some 100,000 domestic farmworkers and their dependents from the same areas.[196] While the evidence on this subject is not definitive,[197] the fact that most of America's migrant workers come from areas where commuter employment is concentrated[198] creates a strong inference that there is a *propter hoc* relationship between the two conditions.

6. Summary of Problems

There are, of course, other, less noticeable effects of the commuter practice, but the basic problems are those outlined above. The commuter is not to be blamed personally; he too has a need for work and a responsibility to support his family. This aspect of the dilemma, however, is lost on the domestic worker who has lost or cannot find a job,

192 Hearings on S. 8 and S. 1808, supra note 111, at 49.

193 Miller & Glasgow, supra note 169, at 18.

194 Id. at 19. See also Powerlessness Hearings, supra note 2, pt. 5B, at 2532.

195 See The Border Crossers, supra note 112, at 176.

196 Id. at 177.

197 See id. at 178.

198 The 100,000 domestic workers who, according to one authority, annually migrate from border areas would constitute approximately 59% of the total 1971 domestic migratory labor force of 172,000. See HFWF of 1971, supra note 4, Abstract.

or who must accept work at low wages. The conclusion is inescapable: "So long as Mexican aliens are allowed indiscriminately to work in the American economy, and take their wages back to the low-cost Mexican economy, the growth of the American [labor] standards will continue to be stultified."[199]

D. Attempts to Regulate the Commuter

The problems engendered by the commuter practice have been recognized by government agencies and the courts as well as by the private parties most directly affected. But efforts to correct aspects of the problems through these particular government channels have not always been successful and, when successful, have not been sufficient. The "amiable fiction" appears to be as strongly entrenched as ever.

The first court challenge to the commuter fiction was raised in 1960 in the context of the federal "adverse effect" statute.[200] At that time, the statute provided that certain aliens who wished to enter the United States to work could be excluded if the Secretary of Labor certified that domestic workers were available to perform the work or that the aliens' presence would adversely affect the wages and working conditions of American workers at the immigrants' destination.[201] Commuters, however, because they were defined by the INS as "immigrants lawfully admitted for permanent residence," were exempted from the section's ambit.[202] Thus, when employers at the Peyton Packing Company in El Paso, Texas, used commuters and other aliens as strikebreakers, the INS did not prevent green-carders from crossing the border to work at the plant even though the Secretary of Labor had issued a certification under the statute preventing other aliens from

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199 S. Rep. No. 91-83, supra note 9, at 64.

200 8 U.S.C. § 1182(a)(14) (1964), as amended, 8 U.S.C. § 1182(a)(14) (1970).

201 The section read, in part, as follows:

> (a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:
>
> . . . .
>
> (14) Aliens seeking to enter the United States for the purpose of performing skilled or unskilled labor, if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (A) sufficient workers in the United States who are able, willing, and qualified are available at the time (of application for a visa and for admission to the United States) and place (to which the alien is destined) to perform such skilled or unskilled labor, or (B) the employment of such aliens will adversely affect the wages and working conditions of the workers in the United States similarly employed.

8 U.S.C. § 1182(a)(14) (1964).

202 The statute applied only to specific classes of aliens, not including those classified by the INS as "immigrants lawfully admitted for permanent residence, . . . returning from a temporary visit abroad," under 8 U.S.C. § 1101(a)(27)(B) (1964). See id. § 1182(a)(14). Aliens so classified could be admitted into the United States, at the discretion of the Attorney General, using informal documentation procedures—presentation of the Form I-151 green card. See note 136 supra.

doing so. The striking union filed suit and its claim was found valid by the court in *Amalgamated Meat Cutters v. Rogers*,[203] which held that the issuance of a labor certification under the adverse effect statute served to exclude commuters because they had not in fact established permanent residence within the United States.[204] The INS, however, objected to the holding and has not used the adverse effect statute to limit commuter entry.[205] The case has thus had no real impact on the commuter practice.[206]

A similar challenge to the commuter practice was raised in *Gooch v. Clark*.[207] Basing their arguments on 1965 amendments to the Immigration and Nationality Act,[208] plaintiffs contended that unless com-

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[203] 186 F. Supp. 114 (D.D.C. 1960).

[204] Id. at 118-19.

[205] In In re J.P., 9 I. & N. Dec. 591 (1962), the Board of Immigration Appeals allowed a commuter barred from working at the Peyton plant to continue commuting, but only so long as he was destined for work at places other than the Peyton Packing Company. This was decided in deference to *Amalgamated Meat Cutters*, but a comment by the Board indicated their intention to strictly limit the court's interpretation of § 1182(a)(14):

> This [decision] is *not to be considered as a general rule*, but is to apply only to the employees of the Peyton Packing Company, because the status of *their* commuter employees has been determined by a Federal decision which we consider to be binding upon us.

9 I. & N. Dec. at 594 (emphasis added).

[206] In Gooch v. Clark, 433 F.2d 74, 81-82 (9th Cir. 1970), cert. denied, 402 U.S. 995 (1971), the court found *Amalgamated Meat Cutters* to have been "wrongly decided," and went on to point out that the decision had had little impact because the case had been quickly mooted and the decision not appealed. The *Amalgamated Meat Cutters* case is also discussed and criticized in Commuter Note, supra note 148, at 1755-57.

[207] 433 F.2d 74 (9th Cir. 1970), cert. denied, 402 U.S. 995 (1971). A class action similar to that in *Gooch* was initiated in Texas State AFL-CIO v. Kennedy, 330 F.2d 217 (D.C. Cir.), cert. denied, 379 U.S. 826 (1964), but the suit was dismissed for lack of standing. 330 F.2d at 219-20. In *Gooch*, the plaintiffs' standing, based upon the adverse impact of alien commuters on domestic farmworkers' wages and working conditions, was conceded by the Government in light of the new "injury in fact" or important-interest-affected standing test of Association of Data Processing Serv. Organizations, Inc. v. Camp, 397 U.S. 150 (1970). See 433 F.2d at 76.

[208] The plaintiffs in *Gooch* centered their contentions around two changes made by the 1965 amendments, one altering the adverse effect test of 8 U.S.C. § 1182(a)(14) (1964), the other changing the language of id. § 1181(b), which allowed entry by certain categories of aliens (including commuters) under informal documentation procedures. Act of Oct. 3, 1965, Pub. L. No. 89-236, 79 Stat. 911.

The provisions of the amended version of § 1182(a)(14) are similar to those of the former section. See note 201 supra. But instead of allowing aliens to be admitted unless the Secretary of Labor has certified that their entry would be harmful to American workers, the 1965 amendments provide that aliens be *excluded* unless and until the Secretary certifies that their admission will *not* adversely affect domestic workers. Aliens classified under § 1101(a)(27)(B), however, remain exempt from the certification provisions. Act of Oct. 3, 1965, Pub. L. No. 89-236, § 10, 79 Stat. 917.

The 1952 version of § 1181(b) had allowed the use of informal documentation by "aliens lawfully admitted for permanent residence who depart from the United

muters had established actual residence in the United States or had permanent employment here, the INS could not classify them as returning immigrants and allow them to enter the United States without being subject to the adverse effect test of the Immigration and Nationality Act. *Amalgamated Meat Cutters* had dealt with the application of the adverse effect statute to those aliens classified as "returning immigrants," and not with the validity of the classification itself. The plaintiffs in *Gooch*, however, attacked the entire practice by which commuters are classified in a category which exempts them from the adverse effect test and allows them to enter the United States upon presentation of their "green cards." Plaintiffs argued that commuters are not "immigrants," are not "lawfully admitted for permanent residence," and are not "returning from a temporary visit abroad."[209] Plaintiffs contended that commuters should therefore be excludible under the amended provisions of the Immigration and Nationality Act.

The Ninth Circuit rejected these contentions. While admitting that the government interpretation and classification of commuters severely strains immigration law, the court noted that the commuter practice was well known to Congress but that Congress had not directly addressed the practice in either the 1952 or 1965 revisions of immigration law. Congress' "eloquent silence," concluded the court, could hardly be construed as disapproval of the practice.[210] The court held that the INS could properly classify commuters as immigrants;[211] noting bills to control the practice which were before Congress, the court rejected the contention that Congress had already acted to control commuters by its 1965 amendments.[212]

States temporarily." The 1965 amendment deleted this language from § 1181(b), and replaced it with a provision allowing informal entry procedures by those classified under § 1101(a)(27)(B). Act of Oct. 3, 1965, Pub. L. No. 89-236, § 9, 79 Stat. 917. The 1965 amendments had the effect of replacing the phrase "*depart[ing]* from the United States temporarily" (which more accurately reflected the commuter traffic) with "*returning* from a temporary visit abroad," and the plaintiffs in *Gooch* contended that this indicated Congress' intention to terminate the admission of commuters. See 433 F.2d at 80. The court concluded that this "technical revision" was not intended to close American borders to commuters. Id. at 81.

209 433 F.2d at 76.

210 Id. at 80.

211 Id. at 78. The court went on to ask and answer an important question:

> Are commuters "lawfully admitted for permanent residence"? The phrase is itself a term of art, defined in the Act as "the status of having been lawfully accorded the privilege of residing permanently in the United States as an immigrant in accordance with the immigration laws, such status not having changed" (8 U.S.C. § 1101(a) (20)). We agree with the Government that the definition refers not to the actuality of one's residence but to one's *status* under the immigration laws. Commuters have been accorded the privilege of residing permanently in the United States, for each of them at one time received a valid immigration visa. Their disinclination to exercise that privilege is of no moment.

433 F.2d at 78-79 (emphasis in original).

212 433 F.2d at 81.

In *Bustos v. Mitchell*,[213] the most recent decision relating to the commuter fiction, the court reaffirmed the validity of allowing commuters to enter the United States on a daily basis, but limited the commuter practice somewhat by distinguishing the statuses of daily and seasonal commuters. Seasonal commuters "who come to the United States for extended periods to perform seasonal work"[214] were held to be nonimmigrants[215] and thus not entitled to be admitted under the commuter fiction. This holding will have limited impact on the commuter practice since seasonal commuters apparently comprise only a small part of the total commuter population.[216] Furthermore, the court gave no guidance to the INS as to how it should differentiate between seasonal and daily green-carders at points of entry into the United States; nor did it recognize that seasonal commuters could continue entering into the United States by crossing the border daily, *i.e.*, becoming daily commuters. The court, however, pointed out that daily commuters have a legitimate right to enter the country freely,[217] and emphasized that "efforts to change or eliminate [this] practice should be addressed to the Congress, not to the Courts."[218]

Court challenges have thus had little impact on the commuter practice, yet their legal conclusions are probably correct. While the court in *Gooch v. Clark*[219] may have deferred more than was necessary to the Government's position, it was nonetheless correct in concluding that Congress had not acted definitively to change or eliminate that practice, and that, as a result, any decision to prohibit commuting ought not be a judicial one. *Bustos v. Mitchell*,[220] despite its disapproval of seasonal commuting, will probably do little to lessen the total impact of the commuter practice on domestic workers. It may even force present seasonal commuters to become daily commuters, and so create an even greater concentration of commuters in the United States-Mexico border area—the area where problems are most severe. The commuter practice is totally undesirable, but a reluctance to end the system by

213 481 F.2d 479 (D.C. Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3101 (U.S. Aug. 14, 1973) (No. 73-300).

214 481 F.2d at 482 n.3.

215 Id. at 483-84.

216 As of January 31, 1970, INS statistics for the southwest region showed a total of 50,202 daily commuters, but only 4662 "seasonal workers." Powerlessness Hearings, supra note 2, pt. 5A, at 2033. While studies have begun to examine the effect on the United States of Mexican nationals crossing the border daily to work in the border area, little is known of the impact of the seasonal commuter.

217 See Bustos v. Mitchell, 481 F.2d 479, 485-86 (D.C. Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3101 (U.S. Aug. 14, 1973) (No. 73-300). The court found the daily commuter practice permissible on two bases—the long-term acceptance of the practice by Congress, as well as the possibility of concluding that a commuter is a resident of the United States within the language of the Immigration and Nationality Act.

218 481 F.2d at 486 (citation omitted).

219 433 F.2d 74 (9th Cir. 1970), cert. denied, 402 U.S. 995 (1971).

220 481 F.2d 479 (D.C. Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3101 (U.S. Aug. 14, 1973) (No. 73-300).

judicial decree is defensible. Whatever the merits of the controversy, the fiction has continued too long in an area where changes in the law are traditionally left to Congress[221] to permit an abrupt and possibly disruptive end to the practice by judicial fiat.

In addition to court challenges, one other nonlegislative attempt has been made to solve an aspect of the commuter problem. In 1967, the INS responded to pressure from organized labor by promulgating a regulation designed to prevent commuters from acting as strike-breakers. It provided that immigration officials could deny entry to the United States to green-carders who intended to work at a place of business where the Secretary of Labor had determined a labor dispute to exist. In addition, the officials could remove commuters from that business if it was ascertained that their employment had begun subsequent to the strike certification.[222] Even though the new regulation was ineffectively enforced and insufficiently utilized,[223] it was nonetheless soon attacked in court by growers and commuters potentially within its ambit.[224] The district court held that additional restrictions could be placed on commuter traffic because commuters, unlike other immigrants who also held valid green cards, did not reside permanently in the United States.[225] The Ninth Circuit, however, in *Sam Andrews' Sons v. Mitchell*,[226] reversed the lower court and struck down this attempt to regulate the commuter traffic. The court found that restricting the location of a commuter's employment after admission to this country was not rationally related to the purposes of the Immigration and Nationality Act, *i.e.*, determining who shall or shall not enter the United States in the first place.[227]

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221 See text accompanying notes 228-32 infra.

222 8 C.F.R. § 211.1(b)(1) (1973) is the provision whereunder the green card (Form I-151, Alien Registration Receipt Card) is deemed sufficient documentation to enter the country. The 1967 amendment conditioned the validity of the green card by adding the following sentence:

> When the Secretary of Labor determines and announces that a labor dispute involving a work stoppage or layoff of employees is in progress at a named place of employment, Form I-151 shall be invalid when presented in lieu of an immigrant visa or reentry permit by an alien who has departed for and seeks reentry from any foreign place and who, prior to his departure or during his temporary absence abroad has in any manner entered into an arrangement to return to the United States for the primary purpose, or seeks reentry with the intention, of accepting employment at the place where the Secretary of Labor has determined that a labor dispute exists, or of continuing employment which commenced at such place subsequent to the date of the Secretary of Labor's determination.

223 See, e.g., Powerlessness Hearings, supra note 2, pt. 5A, at 1956, 1966-70.

224 The initial court challenge to 8 C.F.R. § 211.1(b)(1) was litigated in Cermeno-Cerna v. Farrell, 291 F. Supp. 521 (C.D. Cal. 1968), vacated sub nom. Giumarra Vineyards Corp. v. Farrell, 431 F.2d 923 (9th Cir. 1970).

225 Sam Andrews' Sons v. Mitchell, 326 F. Supp. 35, 39 (S.D. Cal. 1971), rev'd, 457 F.2d 745 (9th Cir. 1972).

226 457 F.2d 745 (9th Cir. 1972), rev'g 326 F. Supp. 35 (S.D. Cal. 1971).

227 Id. at 749.

Thus, efforts to control, terminate or regulate the commuter practice have proved unsuccessful. It has become apparent that any effective change must come from Congress. The need for congressional action does not reflect judicial impotence but rather is compelled by a proper understanding of the legislative role in the immigration field.

There is probably no area of policy over which Congress possesses more complete control than that of the admission or exclusion of aliens from the United States.[228] Courts have long recognized that decision-making authority in this sphere is intimately related to the power "to control the foreign affairs of the nation."[229] As Justice Frankfurter observed:

> [T]hat the formulation of these policies [pertaining to the entry of aliens and their right to remain here] is entrusted *exclusively* to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government.[230]

The Court has recently reiterated this principle,[231] emphasizing that "the power to exclude aliens is 'to be exercised exclusively by the political branches of the government.' "[232] But more than legalistic notions of proper judicial power mandate that courts refrain from ending the commuter practice; the practical, long-term effects of termination mandate that the fate of the commuter be left exclusively with Congress.

E. Implications of Terminating the Commuter Practice

It would be simplistic to contend that the problems of American farmworkers could be solved by abolishing or regulating the commuter practice. Yet, the adverse effects of the practice on farmworkers are so pervasive that no attempt to solve them can be wholly successful if the practice is left to continue as it is today. In arriving at any valid solution, it must be recognized that the potentially beneficial aspects of terminating commuter traffic, *e.g.*, increasing farmworker wages, encouraging farmworker organization, and reducing domestic migration, must be balanced against the problems which could result from such action.

One frequently mentioned obstacle to terminating the commuter practice is the effect it would have on relations with Canada and Mexico.[233] The Mexican government would be most concerned, be-

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228 Oceanic Navigation Co. v. Stranahan, 214 U.S. 320, 339 (1909).

229 United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 542 (1950); see Galvan v. Press, 347 U.S. 522, 530 (1954).

230 Galvan v. Press, 347 U.S. 522, 531 (1954) (emphasis added). See also Lem Moon Sing v. United States, 158 U.S. 538, 547 (1895).

231 Kleindienst v. Mandel, 408 U.S. 753 (1972).

232 Id. at 765. See also id. at 765-67.

233 See, e.g., Bustos v. Mitchell, 481 F.2d 479, 487 n.26 (D.C. Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3101 (U.S. Aug. 14, 1973) (No. 73-300); Hearings on H.R. 9112, supra note 136, at 169 (remarks of Barbara M. Watson, Administrator of the Bureau of Security and Consular Affairs).

cause many of its citizens in the border area depend on United States employment. The Mexican government, however, apparently would not object to a refusal by the United States to permit new commuters[234] and to a gradual elimination of the commuter practice.[235] The bracero program, which brought over four million Mexicans into this country as contract laborers from 1951 through 1964,[236] was terminated without repercussions from Mexico;[237] the elimination of 50,000 commuters' jobs would presumably be acceptable if accomplished carefully and gradually.

Although international political considerations alone present no significant obstacles to terminating the commuter practice, the potential economic impact of such action on both the United States and the Republic of Mexico cannot be so lightly dismissed. An abrupt end to commutation would mean a loss for Mexicans of between 30,000 and 50,000 jobs and 50 million dollars in annual income[238]—25% to 30% of total income in some Mexican border communities.[239]

The action would also exacerbate already critical unemployment problems in the Mexican border area. In Juarez, for example, the overall unemployment rate in July 1971 was between 20% and 30%; 50% of the heads of households were unemployed.[240] Such employment as could be found would have paid less than the Mexican minimum wage of $2.89 per day.[241] Moreover, a Labor Department analyst, who found unemployment rates in six Mexican border cities in 1970 ranging from 11.6% to 42.1%, noted that "without the U.S. jobs [held by commuters], the Mexican figures on unemployment and underemployment would be *significantly* higher."[242] Despite the problems caused by the commuters, the United States surely has some obligation to these people who have relied in good faith on a policy established for over 45 years, and who have developed strong ties to and dependence on the American economy. Further, it would be grossly unfair in terms of international relations to force the Republic of Mexico to bear alone the burden of replacing jobs and income lost through a sudden shift in American policy. Even if termination becomes necessary to solve some important domestic problems, the United States should link proposals for ameliorating Mexico's adjustment problems to plans for termination.

But the undesirable repercussions of termination would not be

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234 The Border Crossers, supra note 112, at 233.

235 Hearings on Illegal Aliens, supra note 139, pt. 2, at 527.

236 See note 276 infra.

237 Hearings on Migratory Farm Labor Problems Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 89th Cong., 1st & 2d Sess. 1 (1965-66).

238 U.S. Comm'n on Civil Rights, Stranger in One's Land 12 (1970), reprinted in Powerlessness Hearings, supra note 2, pt. 4B, at 1829-84.

239 See Commuter Note, supra note 148, at 1762 & n.70.

240 Hearings on Illegal Aliens, supra note 139, pt. 2, at 525.

241 Id.

242 Ericson, supra note 141, at 22 (emphasis added).

confined to areas south of the Rio Grande River; the United States, and particularly the border states, would also encounter considerable difficulties. If for no other reason, then, American self-interest demands that the commuter problem and proposed solutions be approached with extreme caution. It is important to remember that green-carders have been lawfully admitted for permanent residence; the only thing preventing commuters from establishing domicile in the United States is a disinclination to do so.[243] Thus, the United States could not force green-carders to remain in Mexico if they wanted to reside in the United States. In a study of Mexican green-carders, commuters were asked the following question: if commutation were discontinued, and you had to choose between living and working in Mexico, or living and working in the United States, what would you do? In response, 87.4% said they would move to the United States[244] and of that group, virtually all (93.4%) would live in the border areas.[245]

The implications of a mass migration to American border areas of people who are poor, relatively unskilled, and generally unable to speak English are quite disconcerting. Using 1969 commuter figures and other statistics, it was estimated that 42,000 commuter families, or approximately 225,000 people, would immigrate to the United States if commuting were abruptly ended.[246] These immigrant families would bring with them approximately 71,400 school-age children needing education, and 8820 people over the age of 55.[247] The housing and school facilities on the border are totally unable to absorb such an influx; in those fields alone, incredible disruptions would occur.[248]

These problems may, moreover, constitute only the tip of the iceberg if the potential ramifications of a recent Supreme Court decision are realized. In *Graham v. Richardson*,[249] the Court held that state statutes which deny welfare benefits to lawfully admitted resident aliens who are not naturalized citizens, or who have not resided in the United States for a specified number of years, violate the equal protection clause of the fourteenth amendment.[250] After determining that these aliens were entitled to the same constitutional protections as citizens, the Court held that "aliens lawfully within this country have a right to enter and abide in any State in the Union 'on an equality of legal privileges with all citizens under non-discriminatory laws.' "[251]

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243 See text accompanying notes 154-57 supra; note 211 supra.

244 The Border Crossers, supra note 112, at 127. It has been generally agreed that the percentage of those green-carders who would migrate to the United States if forced to do so in order to work would be in the 80% to 90% range. See, e.g., Powerlessness Hearings, supra note 2, pt. 7A, at 4092.

245 The Border Crossers, supra note 112, at 127.

246 Id. at 238, 241.

247 Id. at 240-41.

248 Id. at 241.

249 403 U.S. 365 (1971).

250 Id. at 376.

251 Id. at 378 (citations omitted).

In effect, the *Graham* decision means that all Mexican commuters who move to the United States would be constitutionally entitled to every state and federal social welfare benefit available to citizens. Welfare payments, old age assistance, public education and disability payments, among other benefits, would have to be provided to any and all new immigrants taking up residence in this country—a mandate with staggering fiscal implications. The State of Texas, for example, requires citizenship as a prerequisite to obtaining various forms of social assistance.[252] Under *Graham*, approximately 250,000 resident aliens *presently* in Texas are now eligible for these various programs,[253] a figure which could be doubled by an influx of green-card immigrants. Texas' additional annual cost for social welfare programs for its present resident aliens, who have previously been excluded from receiving such benefits, includes $3.3 million in aid to families with dependent children, $3 million to $4 million in medical assistance, $1.2 million for old-age assistance, and $375,000 for aid to the disabled.[254] Costs of mass transmigration could match these amounts for the border area alone, and create other heavy burdens. For example, the cost of educating the children of 42,000 commuter families is estimated to be over $34 million.[255]

These statistics complicate the decision to regulate or terminate the commuter practice. If the process is handled in such a way as to force thousands of Mexican nationals to enter the United States, the eventual cost of supporting them may well be greater than the costs of the problems "solved," *i.e.*, the cost of unemployment, low wages and worker displacement, which, ironically, will not be solved at all should massive transmigration occur.[256]

It is evident, then, that any plan to terminate the commuter practice must be carefully drawn to minimize its detrimental effects on both Mexico and the United States. The potential ramifications discussed above should be kept in mind during the following consideration of present proposals to regulate the green-carders.

F. Proposals to Regulate or Terminate the Commuter Practice

Three major proposals have been advanced to ameliorate the important problems attributable to commuters. One suggestion is

252 See, e.g., Texas Rev. Civ. Stat. art. 695c, §§ 12 (citizenship required for aid to blind), 16-B (citizenship required for aid to permanently and totally disabled), 17 (citizenship required for AFDC) (1964).

253 Hearings on Illegal Aliens, supra note 139, pt. 2, at 538.

254 Id. at 538-39. The total additional state and federal cost for such programs in Texas is estimated at $8 million to $9 million annually.

255 The Border Crossers, supra note 112, at 240.

256 It is clear that most commuters are farmworkers, see note 140 supra, and that if the green-carders were forced to move to the United States, more than 90% of them would reside and work in the border area where their present impact is the greatest. See text accompanying note 245 supra. American farmworkers would find little solace and even less benefit in knowing that their competition resides in the United States.

contained in a letter written to President Lyndon Johnson in 1968 by Richard M. Scammon and Stanley H. Ruttenberg, who were the chairman and a member, respectively, of the Select Commission on Western Hemisphere Immigration.[257] A second possible remedy is contained in a bill introduced in Congress by Senator Edward Kennedy,[258] and a third in legislation proposed by Senator Edmund Muskie.[259]

The Scammon-Ruttenberg proposal is three-fold. Initially it recommends that all visas issued prospectively from a certain date require immigrants to maintain an actual, bona fide residence in the United States.[260] This would prevent the visa from becoming a work permit. Second, the plan would establish noncitizen, nonresident work permits for residents of contiguous countries, but subject the permits to adverse effect limitations similar to those under present statutes.[261] Third, after a "grace period,"[262] steps would be taken to terminate the commuter status of present green-card holders.[263]

Senator Kennedy's proposal would allow the commuter practice to continue, but subject to important limitations. It would require that each commuter obtain a certification every six months from the Secretary of Labor that his employment will have no adverse effect on the wages and working conditions of domestic workers.[264] Any worker lacking this certification could not be admitted into the United States to hold

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257 The text of the letter is reprinted in Powerlessness Hearings, supra note 2, pt. 5B, at 2614-15 [hereinafter Scammon-Ruttenberg Letter].

258 S. 1694, 91st Cong., 1st Sess. (1969).

259 S. 1488, 92d Cong., 1st Sess. (1971).

260 Scammon-Ruttenberg Letter, supra note 257, at 2614.

261 Id. The outlines of the noncitizen, nonresident work permit system suggested by Scammon and Ruttenberg exist under present law. Section 101(a)(15)(H)(ii) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(15)(H)(ii) (1970), presently provides for issuing temporary work permits to nonimmigrant aliens "to perform temporary services or labor, if unemployed persons capable of performing such service or labor cannot be found in this country." American employers who seek to have alien workers admitted must submit a petition to the Secretary of Labor. If the Secretary finds that "qualified persons in the United States are not available," *and* that the employment of such aliens "will not adversely affect the wages and working conditions of workers in the United States similarly employed," such aliens may be admitted for specific lengths of time. 8 C.F.R. § 214.2(h)(3)(i) (1972). While it would seem possible to devise and administer a work permit system within this established framework, more specific legislation to explicate and control such a system has been introduced. See, e.g., H.R. 980 and H.R. 3870, 93d Cong., 1st Sess. (1973).

262 Mr. Ruttenberg would limit the grace period to two years; Mr. Scammon would allow a 10-year adjustment period before terminating the status of present commuters. Scammon-Ruttenberg Letter, supra note 257, at 2615.

263 Id. at 2614. H.R. 3870, 93d Cong., 1st Sess. (1973), would define "lawfully admitted for permanent residence" to require actual residence in the United States for at least 10 months out of each year. The bill also would revise the nonimmigrant work permit system. The proposal makes no reference to or provision for present commuters who would be affected by the bill's implementation, nor does it provide for any type of "grace period."

264 115 Cong. Rec. 7731 (1969).

or seek employment.[265] In effect, the Kennedy proposal would accomplish what was attempted in *Amalgamated Meat Cutters v. Rogers*[266] and *Gooch v. Clark*[267]—subjecting commuters to a continuing adverse effect test.

Senator Muskie's bill borrows in large part from the Scammon-Ruttenberg plan. It would define "lawfully admitted for permanent residence" as requiring actual residence in the United States, thereby abolishing the commuter classification.[268] The bill provides for a non-resident work permit system, and would allow a two-year grace period in which to phase out the green-card practice. The Muskie proposal recognizes, moreover, that many present commuters might move to the United States, and includes a provision allowing the families of migrating commuters to come to the country without lengthy waiting periods. A further provision authorizes a one-time, $25 million grant to affected school districts, and a grant of the same amount to train and place in jobs commuters and their families.

All three proposals essentially end the commuter practice. Although the Kennedy bill purports to allow the system to continue subject to periodic adverse effect certifications, almost no commuters would actually be admitted under the proposal. A survey of the probable impact on commuters of restrictive admission standards in 1968 showed that if commuters were denied admission when they are employed in the United States at a wage rate below $1.60 per hour, about 80% of all commuters would be denied entrance; if this standard, the "adverse effect wage rate," were $2.00 per hour, 96.2% would not be admitted.[269] The ultimate impact of requiring all aliens desiring to work in this country to satisfy present adverse effect requirements is revealed by the fact that in 1970 there were over 80,000 Mexican nationals registered for immigration with the American Consulate in Ciudad Juarez, but only 255 of them were able to satisfy the labor certification requirements of Section 182(a)(14) of the Immigration and Nationality Act.[270] In light of this, it is apparent that applying the adverse effect formula will result in an almost total exclusion of present commuters.

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[265] Id. at 7731, 7736.

[266] 186 F. Supp. 114 (D.D.C. 1960); see text accompanying notes 200-06 supra.

[267] 433 F.2d 74 (9th Cir. 1970), cert. denied, 402 U.S. 995 (1971); see text accompanying notes 207-12 supra.

[268] The text of S. 1488 is set forth in 116 Cong. Rec. 5955-56 (1970), under its previous bill number, S. 3545, 91st Cong., 2d Sess. (1970). The Scammon-Ruttenberg plan and the Kennedy bill are discussed and compared in Commuter Note, supra note 148, at 1770-74.

[269] 115 Cong. Rec. 7736, 7739 (1969). It should be emphasized that the exclusionary effect of strong adverse effect tests will be the same regardless of whether the tests are applied to commuters as commuters or as applicants for work permits. Compare statutory provisions in notes 201 & 208 supra with those in note 261 supra.

[270] 8 U.S.C. § 1182(a)(14) (1970); see Hearings on Illegal Aliens, supra note 139, pt. 2, at 535.

In reality, all three proposals require an individual to establish actual residence in this country in order to obtain regular employment. Thus, all three would probably induce a large-scale immigration of commuters into the United States. The Muskie bill, while admirable in that it alone honestly recognizes this prospect, does not allocate nearly enough money to cushion the effect this influx would have on American border states and communities. Perhaps most regrettably, none of the suggestions recognizes or attempts to alleviate the hardships which Mexico may endure as a result of the virtual termination of commuting.

It would seem that, despite the manifest problems created by commuters, the costs resulting from abrupt termination of the practice would be far greater than those incurred by allowing it to continue. It may be possible, however, to *reduce* greatly the impact of the commuter without stimulating large-scale immigration, if the United States works closely with the Mexican government. Not only might unilateral action by the United States adversely affect relations between this country and Mexico,[271] but it is doubtful that any efforts to keep Mexican workers south of the border can be successful if new and expanded job opportunities in Mexico are not provided.[272] Yet binational cooperation, in conjunction with certain legislative changes, may make it feasible to regulate and gradually reduce commuter traffic without inducing the disturbing side effects of termination; suggestions to this effect will be advanced later in this Note.

One cannot, however, be sanguine about the prospects for such reforms. No bill suggesting such approaches has even been given serious consideration by either house of Congress; in light of the disturbing implications of hasty and ill-conceived action outlined above, many lawmakers and administrative officials find doing nothing to be an expedient course of action. But without some meaningful curbs on the present commuter practice, American farmworkers in border areas and beyond will continue to be the victims of unnecessarily low wages, poor working conditions and an inability to organize. While controlling the commuters is not the only or the basic answer to farm labor problems, the commuter problem remains a major obstacle to effective legislation and to genuine economic and social improvement for America's farmworkers. Yet similar and perhaps greater obstacles to legislative and economic progress are posed by another and larger group of Mexican nationals—the illegal aliens.

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[271] See Bustos v. Mitchell, 481 F.2d 479, 487 n.26 (D.C. Cir. 1973), petition for cert. filed, 42 U.S.L.W. 3101 (U.S. Aug. 14, 1973) (No. 73-300) (discussed in text accompanying notes 213-18 supra).

[272] The United States' decision to end the bracero program because of its deleterious effect on domestic employment has not substantially reduced the number of Mexican laborers in the domestic work force. The lack of employment opportunity in Mexico has merely led many Mexicans to enter the United States illegally. See text accompanying notes 277-79 infra.

IV

THE ILLEGAL ALIEN AND THE AMERICAN FARMWORKER

A. Illegal Aliens: An Introduction

Illegal aliens, or illegals, are aliens who either enter this country illegally to work, or who, after legal entrance, illegally accept employment. They are also called *alambristas* ("fence jumpers") or "wetbacks," a name that refers to the practice of wading or swimming the Rio Grande River to cross the border. The illegal traffic of concern to domestic farmworkers originates in Mexico. While there has always been some illegal traffic from Mexico, it was not until the end of World War II that it reached epidemic proportions. The number of apprehended *alambristas* increased from 29,000 in 1944 to 565,000 in 1950.[273] The majority of these illegals were agricultural laborers; in 1949, for example, it was estimated that there were at least 400,000 wetbacks in the American migratory farm labor force.[274]

The need for workers to fill the labor shortage created by World War II and the Korean War, along with great pressure from farm employers, led the federal government to legitimate and control, rather than try to prevent, the "invasion" of Mexican laborers. Thus, in 1951 the federal government instituted the bracero program,[275] admitting up to 430,000 workers annually in some years and providing employers with a major source of cheap farm labor.[276] Until its termination on December 31, 1964, the program greatly reduced the number of illegal entrants by providing legal employment to Mexican farmworkers. Thus, from 1945 to 1965, citizens of Mexico comprised a significant component of the American farm labor force, both as illegals (1945-1952) and as braceros (1952-1964).

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[273] President's Comm'n Rep., supra note 46, at 69.

The Immigration Act of 1924, ch. 190, 43 Stat. 153, controlled the movement of Mexican nationals to the United States. While there were no quota restrictions on the immigration of Mexicans to this country, see id. § 4(c), it was necessary for those Mexicans wishing to work in the United States to become immigrants and obtain visas prior to entrance. Cf. Karnuth v. United States ex rel. Albro, 279 U.S. 231 (1929). Section 2 of the Act provided for the issuance of visas to all immigrants upon payment of a fee. Visa applications had to be accompanied, however, with immunization records, a birth certificate and other relevant documents; applicants also had to be screened to insure that they were not excludible from the country for other reasons, such as being an anarchist, a communist, or being mentally or morally defective. See id. § 7. It was the failure of the Mexican entrants to comply with such procedural obstacles which made their presence in the United States illegal.

[274] President's Comm'n Rep., supra note 46, at 69.

[275] Act of July 12, 1951, ch. 223, 65 Stat. 119, as amended, 7 U.S.C. §§ 1461-68 (1964).

[276] Over 4,200,000 Mexican nationals entered this country as contract workers under the bracero program. During the peak years of 1956 through 1959, more than 430,000 workers were admitted annually. For these and other statistics on the program, see U.S. Dep't of Labor, Rural Manpower Developments 17 (June 1972).

Since ending the bracero program, the United States has carefully restricted the employment of foreign workers.[277] Nevertheless, thousands of Mexicans continue to enter the United States for farm work, once again illegally. The number of illegal entrants from Mexico has once more reached invasion proportions—over 400,000 Mexican illegals were apprehended in fiscal 1972 alone.[278] As in the past, most illegals continue to seek and find work in agriculture; the most recent survey found that 72% of the apprehended illegals were involved in or seeking farm work.[279] Thus, illegal aliens provide a tremendous pool of cheap farm labor, particularly in the border areas.

The influx of Mexican illegals is likely to continue, for a number of economic forces "push" Mexican nationals northward within their own country, and, once they are near the border, other forces "pull" them into the United States. The "push" factors include not only industrial development in Mexico near the border, which draws workers to the area,[280] but also the natural expansion of Mexico's population.[281] The statistics show that many of the Mexican nationals coming to the border area cross into the United States illegally. An important "pull" factor in this illegal traffic is the willingness of many American farm employers to hire illegals, largely because they will work for less than their domestic counterparts, although some employers profess an inability

[277] See U.S. Dep't of Labor, Rural Manpower Developments 18 (May 1971).

[278] The following statistics portray the great increase in the number of Mexican illegals apprehended in the United States in the last 10 years, beginning with the last years of the bracero program.

Fiscal Year	Number of deportable Mexican aliens apprehended in the U.S.	Percentage change from previous year
1962	30,030	
1963	38,866	+29.4
1964	43,844	+29.2
1965	55,349	+26.2
1966	89,751	+62.1
1967	108,327	+20.7
1968	151,705	+40.0
1969	201,636	+32.8
1970	277,377	+37.6
1971	348,178	+26.1
1972	430,213	+23.6

SOURCE: 1962-1972 INS Ann. Reps.

Note that these statistics reflect only *apprehended* illegals; the total number of illegal entrants far exceeds the number apprehended. See note 286 infra.

[279] The Border Crossers, supra note 112, at 111, 132.

[280] See text accompanying note 320 infra.

[281] "[N]orthern Mexico is probably the fastest growing region of its size in the world today." Price, The Urbanization of Mexico's Northern States (unpublished), quoted in The Border Crossers, supra note 112, at 12. While the population of Mexico as a whole grew at the high rate of about 42% nationally between 1960 and 1970, in northern Mexico the growth rate in the same period was 57%. Id.

to obtain satisfactory domestic workers. The prospect of gainful employment in the United States is made even more attractive by the comparative lack of job opportunities in Mexico. Another significant "pull" factor is a clear result of former American policy. Many Mexicans who were employed as braceros brought their families with them to the border areas and relied on American employment as their sole source of income. When the bracero program was terminated, the only work available to the ex-bracero was illegal employment in the United States.[282] In short, the present influx of illegals reflects the operation of socioeconomic forces set in motion by the United States over two decades ago.[283]

B. Impact of Illegal Aliens on Domestic Farmworkers

The illegal and the commuter are personally very similar: both are usually unskilled Mexican nationals with agrarian backgrounds and thus a predisposition to farm labor, and both are impelled to cross the border by economic necessity. Both pose similar problems for domestic farmworkers, but, simply by virtue of their number, illegals pose them in a more aggravated form. There are about 39,000 commuters in the farm work force;[284] there are probably 300,000 illegals so employed,[285] although it is possible that the actual figure is even higher.[286]

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[282] The tightened adverse effect requirements of the 1965 amendments to the Immigration and Nationality Act have made it difficult for alien farmworkers to immigrate to the United States. There is already a large backlog of Mexicans who cannot satisfy United States immigration requirements. See text accompanying note 270 supra. This requirement hits doubly hard at alien farmworkers, not only because there is a surplus of domestic farmworkers, but also because alien farmworkers usually have no other marketable skills.

[283] Mr. Herman C. Moore, Chief Border Patrol Agent, El Paso, Texas, described the situation as follows:

> But I think one of the major factors that has contributed to the great influx of aliens . . . [is that] many, many thousands of these people came here to work under contract. They moved their families to the border so that they could be closer to them . . . .
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> As many as hundreds of thousands of these people raised their families on contracted work here in the United States . . . . This went on for an awful long time and we are now dealing with the children of those people. We are dealing with 20 and 30-year-old males that were raised on the American dollar that their father earned working under contract in the United States and he has told these people what a wonderful country we have. . . . They have had very little contact with the job opportunities in their own country.

Hearings on Illegal Aliens, supra note 139, pt. 2, at 505-06.

A farmworker union official expressed the problem this way: "The [bracero] program lives on in the annual parade of thousands of illegals and green-carders across the United States-Mexico border to work in our fields." Hearings on S. 8 and S. 1808, supra note 111, at 14.

[284] See text accompanying note 138 supra.

[285] 430,213 illegals were apprehended in the United States in 1972, see note 278 supra, and available information indicates that over 70% of them were farmworkers. See text accompanying note 279 supra.

[286] INS statistics show only the number of illegals actually apprehended, but the Service frankly admits that despite its best efforts, thousands of illegals evade

It cannot be doubted that "the impact of the illegal entrant on resident labor dwarfs the negative effect of the commuter worker."[287]

The commuter and the illegal pose problems of the same nature. The Senate Committee on Labor and Public Welfare, acknowledging estimates that there are between 1.5 and 10 million job-holding aliens in the United States, concluded in an understatement that the employment of illegals leads to "a serious diminution of job possibilities" for domestic workers.[288] Congressional hearings on the scope of the problem showed that in addition to taking jobs, illegal aliens: (1) depress the wages and impair the work conditions of American citizens; (2) increase the burden on American taxpayers through added welfare costs—not only by obtaining welfare assistance illegally, but also by taking jobs which could be filled by persons currently on welfare; (3) reduce the effectiveness of labor organizations; (4) secure jobs, services and resources directly and indirectly from many federal and state programs, thus diverting scarce resources from American citizens; and (5) "constitute for employers an unskilled group rich for exploitation—aggressive, enterprising workers with low-wage demands."[289] Since illegals primarily seek agricultural employment,[290] the chief victims of such a situation are farmworkers.[291]

C. Attempts to Curb the Problem

The best way—perhaps the only way—to limit the impact of illegals on American farmworkers is to control their entry into the United States. The 1600 officers of the Border Patrol of the INS are entrusted with the duty of policing the 2000-mile-long United States-Mexico border, locating surreptitious entries and thwarting attempts to smuggle illegal aliens across the border.[292] In addition, they must discharge other

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detection every year. One observer has estimated that only one out of six illegal entrants is apprehended. See Hearings on Illegal Aliens, supra note 139, pt. 2, at 559. Estimates of the total number of job-holding illegals now in the United States range from 1.5 to 10 million. See S. Rep. No. 92-842, supra note 17, at 43. It is possible that between two and three million Mexicans alone enter the United States illegally each year. See N.Y. Times, Apr. 15, 1973, § 1, at 1, col. 2.

[287] Greene, Federal Policy Toward Non-Resident Alien Labor, supra note 165, at 451.

[288] S. Rep. No. 92-842, supra note 17, at 43.

[289] Hearings on Illegal Aliens, supra note 139, pt. 1, at 101.

[290] See text accompanying note 279 supra.

[291] While it is true that most Mexican illegals presently seek agricultural employment, more and more of them are heading to major American cities and seeking employment in the nonagricultural sector. This is so not only because illegals are more easily apprehended in the agricultural areas near the border, but also because they too have found employment prospects in agriculture to be poor. Thus other sectors of the economy may be affected as illegals move to the cities, see Hearings on Illegal Aliens, supra note 139, pt. 1, at 13, and even join unions. See id., pt. 2, at 515. See also id., pt. 2, at 285.

[292] See Hearings on Illegal Aliens, supra note 139, pt. 1, at 12. For a discussion of some of the techniques employed to detect illegal entry, see id., pt. 2, at 497. During fiscal 1970, there were over 126 million border crossings from Canada and

duties as information officers, customs inspectors and narcotics agents. It is thus understandable that they have great difficulty in preventing illegal entry by determined individuals.

While lack of a sufficient force complicates the effective interception of illegals, a second major problem is that Mexican nationals are able to enter the United States legally with an easily obtained 72-hour visitor pass (Form I-186, often called a "white card") and subsequently to seek illegal employment.[293] The white card is so commonly used to obtain unlawful work, and so loosely controlled, that it has been called "a literal *carte blanche* of illegal employment."[294] In order to gain entry, many other border crossers present false documents showing United States citizenship, such as baptismal certificates and birth certificates. Still others are smuggled across the border, a practice carried on with greater frequency in recent years.[295]

Efforts to reduce the influx of illegals have not proved successful. While the number of apprehensions has gone up sharply in recent years, this probably reflects an increase in the number of illegal entrants rather than energetic enforcement of immigration laws.[296] In light of the failure of enforcement efforts, it seems clear that the only way to keep illegal aliens from entering the country is to remove the incentive for them to do so.

There are two important aspects to this problem. The major impetus to illegal entry and employment is the lack of employment opportunity in Mexico.[297] A closely related and equally important facet

Mexico. To handle such workloads, inspectors attempt to inspect efficiently up to 250 people an hour at border crossing points. Id., pt. 1, at 5.

293 There are presently about 2.25 million visitors' passes outstanding, and new ones are issued at a rate of 14,000 monthly. The issuance of white cards, which are good until revoked, is authorized by 8 C.F.R. § 212.6(a) (1973). While the passes are designed to expedite the crossing of visitors for business or pleasure, so many of the I-186 cards are used by Mexicans entering the U.S. to seek employment that the "white card" has been said to create a "back-door bracero program." See Hearings on Illegal Aliens, supra note 139, pt. 1, at 192-93. See also id., pt. 2, at 510, 573.

294 Greene, Federal Policy Toward Non-Resident Alien Labor, supra note 165, at 456.

295 The number of smuggled aliens located in the southwest region increased from 3624 in 1966 to 18,286 in 1970, an increase of over 500% in five years. 1970 INS Ann. Rep. 13.

296 Note, Illegal Entrants: The Wetback Problem in American Farm Labor, 2 U. Cal. Davis L. Rev. 55, 66 (1970). There have been charges that immigration officials are sometimes less than zealous in enforcing laws against illegals, often out of deference to growers or other users of illegal laborers. See President's Comm'n Rep., supra note 46, at 392; Hearings on H.R. 9112, supra note 136, at 136-37. See also N.Y. Times, Apr. 15, 1973, § 1, at 1, col. 2, revealing that some INS employees have accepted bribes from apprehended illegals who wish to avoid being returned to Mexico.

297 See Hearings on Illegal Aliens Before Subcomm. No. 1 of the House Comm. on the Judiciary, 93d Cong., 1st Sess. 74 (1973). See also 119 Cong. Rec. H3305 (daily ed. May 3, 1973).

is the willingness of American employers to hire illegals,[298] and a lack of effective sanctions to discourage this practice. It is a felony under present law to willfully conceal, harbor or shield an illegal alien from detection[299] or to encourage or induce his illegal entry.[300] A strong argument could obviously be made that knowingly employing or offering to employ an illegal alien would be punishable under these provisions. However, the Immigration and Nationality Act contains a proviso, known as the "South Texas clause," which states that: "for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring."[301] Although the proviso was designed to protect innocent employers, in practice it has made criminal sanctions against employers who knowingly hire illegal aliens almost meaningless, except with regard to the smuggler.[302] For this reason, employers are able to hire illegals with virtual impunity and INS efforts to curb illegal entrance have been severely inhibited.

Unless meaningful sanctions against hiring illegals are imposed or new methods of preventing entry are devised, Congress must accept much of the blame for the illegal alien problem.[303] Congress has recently recognized both the gravity of the crisis and the futility of trying to solve it without eliminating the employment proviso. A number of bills proposing to strike the proviso and crack down on the employers of illegals have been introduced, and passage of such a bill seems very likely in the 93d Congress.[304]

The real solution to this problem, however, lies not in apprehending those who enter illegally, but in removing the necessity for entry in the first place. Most of those Mexicans who cross the border illegally have no alternative but to seek work north of the Rio Grande. Immigration officials themselves admit that the only effective way to prevent illegals from coming to this country is to remove the incentive to do so.[305] Pro-

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298 See Hearings on Illegal Aliens, supra note 139, pt. 2, at 294-95; 119 Cong. Rec. H3309 (daily ed. May 3, 1973).

299 8 U.S.C. § 1324(a)(3) (1970).

300 Id. § 1324(a)(4).

301 Id. § 1324(a).

302 Hearings on Illegal Aliens, supra note 139, pt. 1, at 200.

303 Id.

304 S. 4309, 91st Cong., 2d Sess. (1970); H.R. 18,923, 91st Cong., 2d Sess. (1970); H.R. 2328, 92d Cong., 1st Sess. (1971); H.R. 16,188, 92d Cong., 2d Sess. (1972). H.R. 982, 93d Cong., 1st Sess. (1973), which would facilitate the prosecution of employers of illegals, was passed by the House of Representatives on May 3, 1973.

305 As Leonard Gilman, Regional Commissioner of the INS, said:

> Regardless of how much apprehending force or power we have . . . [i]t is not the ultimate answer to this problem. We must remove the incentive.
>
> When this is done—when we control the incentive for them to come—then we can meet this problem . . . with the present force that we have.

Hearings on Illegal Aliens, supra note 139, pt. 1, at 81. See also id., pt. 2, at 486; 119 Cong. Rec. H3330 (daily ed. May 3, 1973).

posed statutory changes will be important in discouraging the entrance and employment of illegals, but

> [a]s long as there is a great difference between the wealth of the United States and the poverty of Mexico, basic human needs will compel wetbacks to continue crossing the border no matter how harshly immigration laws are enforced and no matter what suffering they have to endure.[306]

The presence of increasing numbers of illegals in this country, then, is the product of a conditioned reliance on American jobs together with a lack of economic development in Mexico. The most effective way to reduce that reliance and to curb illegal entrance is to create employment opportunities in Mexico; unilateral punitive action by the United States will not significantly reduce the impact of the wetback on domestic farmworkers.[307] While such basic improvements in the condition of American farmworkers as increased employment, higher wages and farmworker unionization are jeopardized by the wetback invasion of American agriculture, it appears that, as in the case of the commuter, American efforts to curb the illegals' impact on American agriculture will require the cooperation and assistance of the Republic of Mexico.[308]

V

FARM LABOR PROBLEMS: THE NEED FOR A BROADER APPROACH

A. Effective Farmworker Legislation and Alien Laborers

Serious problems confront American farmworkers: they have the lowest occupational-group income in the nation, very high rates of unemployment and underemployment, and extremely poor job prospects, yet have been excluded, by statute or by actual practice, from most conventional employee benefits. In the past decade, Congress has hesitantly begun to correct some statutory discriminations and has acted in areas of particular concern to farmworkers. But it appears that little real change has resulted from much of this legislation: attempts to control crew leaders and to upgrade farmworker housing have proved ineffectual and even with minimum wage "protection," farmworkers have hourly earnings only half as great as those of workers in manufacturing. Children in agriculture remain largely unprotected and are often easy targets for exploitation. In the face of these and other problems which Congress has not resolved, farmworkers are powerless to help themselves significantly.

In this context, the problem presented by the commuter and the illegal alien attains particular importance. There is substantial evidence, some of which has been marshalled above, that the most serious difficulties of domestic farmworkers, especially those in the West and South-

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306 Ortega, Plight of the Mexican Wetback, 58 A.B.A.J. 251, 254 (1972).

307 See Hearings on Illegal Aliens, supra note 139, pt. 2, at 527 (remarks of William Hughes); 119 Cong. Rec. H3330 (daily ed. May 3, 1973).

308 See 119 Cong. Rec. H3330 (daily ed. May 3, 1973).

west, are inextricably intertwined with the presence in the United States of large numbers of alien farmworkers willing to work for low wages under poor working conditions. This is not to say that alien competition is the sole cause of domestic farm labor problems, nor that the elimination of this competition would provide a panacea for the American farmworker. Nevertheless, in order to improve the quality of life for domestic farmworkers, it will be necessary both to limit the influx of alien workers into the United States, and to diminish the impact of those who are permitted to enter this country.[309]

B. Suggestions for Change

The proposals outlined in this section will focus on three areas. The first set of suggestions will deal with existing legislation and will suggest specific statutory changes. Next, possibilities for an international, cooperative approach to the problems of the United States-Mexico border area will be explored. Finally, some proposals will be advanced for reducing the heavy impact of alien workers on domestic laborers, as well as for gradually eliminating the commuter practice.

1. Present Legislation and the Farmworker

The inadequacy of present legislation from the point of view of farmworkers is two-fold. First, there is a clear pattern of excluding agricultural employees from the statutory protections and benefits conferred on other workers. Second, there has been a general failure to enforce existing legislation beneficial to the farmworker. The dual premise of remedial proposals must be that farm laborers deserve a status equal to that of other workers and that the government bears an obligation to guarantee enacted protections through effective enforcement.

Congress took a promising step in this direction when it approved a bill which would not only increase the mandatory minimum wage for farmworkers but would also bring it to a level equal to that of other workers. But other important measures must be enacted, including extension of the FLSA to cover more farmworkers and to provide them with overtime benefits. Congress must also deal with the unconscionable

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[309] Another alternative is, of course, a massive federal program of assistance which would combine income maintenance with job training and relocation aid for farmworkers. This is in many ways more desirable than merely curbing the commuter and illegal traffic. Domestically, it would remove workers from an area of the economy with very poor job prospects and hopefully into positions with more future and job security. Internationally, such action would be acceptable to Mexico and Canada, and would not pose the problems associated with a massive trans-border migration. Other, more numerous, more concentrated and less mobile groups throughout the nation, however, are in need of similar assistance, especially in inner-city areas. If these groups, having far greater political clout than that possessed by 2.6 million scattered and disorganized hired farmworkers, cannot or have not achieved such attention, it seems unlikely that agricultural workers will receive massive federal assistance in the near future.

exemption of agricultural employers from most FLSA provisions prohibiting oppressive child labor practices; Congress' initial steps to correct this evil have been inadequate and are likely to be ineffective. It is abundantly clear that broad and dramatic measures are required to control the harmful abuses of child labor in agriculture.

Implicit in these suggestions is the need to devise realistic enforcement provisions and to prosecute both proposed and existing provisions with vigor. That inadequate enforcement can deprive well-conceived legislation of all beneficial effect is clear from the histories of the Farm Labor Contractor Registration Act and the Wagner-Peyser Act. The FLCRA already provides adequate federal standards, allegedly enforceable by federal action. It seems apparent that more rigorous enforcement could have a significant effect on the crew leader practice. The major problem with the Wagner-Peyser Act, however, is its unrealistic dependence on the states for enforcement of its standards, both as to the inspection of farmworker housing and the interstate exchange of job information. In order to ensure uniformly reliable and vigorous enforcement of the Wagner-Peyser Act, responsibility for its administration should be vested in an adequately staffed enforcement branch of the Department of Labor. Only then can its potential benefits be realized.

The possible extension of labor law restrictions to farmworkers, however, must be viewed differently. Farm labor organization is heavily reliant on methods that are illegal or limited under the NLRA, and thus it is important for farmworkers to be exempted from these prohibitions. Full coverage of agricultural laborers by the NLRA would curb rather than encourage the development of farmworker unionism. Since it seems inconceivable that Congress would give farmworkers the benefits of present labor legislation without its restrictions,[310] the immediate future of farmworker unionism will be best enhanced by retaining the present exclusion.

2. *A Binational Approach to the Problem of Alien Workers*

This Note has examined some of the major problem areas of domestic farmworkers, and how federal legislation has affected (or failed to affect) these problems. The pernicious impact of alien laborers, both illegals and commuters, on the central concerns of domestic farmworkers has also been analyzed. It is fair to conclude that commuters and illegals, who serve to depress the wage levels of American farmworkers, discourage farmworker unionization and induce domestic agricultural migration, also endanger realistic attempts to upgrade the standard of living of domestic farmworkers.[311] Proposals to ameliorate the problems of

[310] H.R. 881, 93d Cong., 1st Sess. (1973), however, proposes to do precisely this, giving farmworkers the protections of the NLRA, but exempting them from many of the Act's restrictions.

[311] The fact that the direct impact of commuters and illegals is most severe in the border states, the West and parts of the South does not make the situation less severe, for approximately two-thirds of all domestic farm laborers reside in

domestic farmworkers, then, must be accompanied by strong measures to limit and control the dramatic surge of alien employment in the United States. To be successful, the United States cannot act unilaterally to reduce the number of Mexican laborers in the farm work force. As long as the opportunities for employment in Mexico are minimal, and, as a consequence, a large number of people are unemployed, American attempts to reduce border crossing for employment will be only nominally effective.[312] It will thus be necessary to develop job opportunities and economic growth in Mexico in order to achieve significant benefit from programs designed to assist American farmworkers.

The linking of economic assistance to Mexico with domestic farmworker programs has been urged by those who have recognized that the harsh economic realities faced by Mexican workers are closely tied to their presence in the American working force. David S. North, author of *The Border Crossers*, and other experts have emphasized the importance of binational cooperation and assistance in reducing the impact of illegals and commuters. Mr. North told a congressional committee: "I am interested in a binational economic development program to get at the heart of this problem, to relieve poverty both on this side of the border and on the Mexican side."[313] North went on to state that "[t]here is no area in this world" where American economic assistance can have a more "direct, positive impact on the economic lives of American working men" than in northern Mexico.[314]

The prospects for international cooperation in resolving this aspect of the farm labor situation were enhanced by a recent meeting between the Presidents of Mexico and the United States. When Luis Eschevarra Alvarez and Richard Nixon met in June 1972, they discussed the interrelated problems of domestic American farmworkers and illegal Mexican

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these areas. See HFWF of 1971, supra note 4, at 14. Further, since aliens stimulate domestic migration, the implications of border crossing go far beyond the border area. Cf. Jones, Farm Labor and Public Policy, 91 Monthly Lab. Rev. 12 (Mar. 1968).

312 See text accompanying note 306 supra. See also Hearings on Illegal Aliens, supra note 139, pt. 2, at 527 (remarks of William Hughes, U.S. Consul General, Ciudad Juarez, Mexico):

> So the problem is that unless and until . . . there is some workable, effective program either to hold the people in the interior of the country . . . or to readily expand the job opportunities in the frontier zone, . . . the only thing they have here is hope, so the pressure continues to build to get into the United States one way or the other . . . .

313 Hearings on H.R. 9112, supra note 136, at 125.

314 Id. Sheldon L. Greene, General Counsel, California Rural Legal Assistance, after giving support to a bill that would punish the employers of illegals, went on to say:

> But perhaps providing additional foreign aid, specifically aimed at the type of person who is so locked in by his poverty that he finds he has to take the chances of coming to the United States is a more direct solution. . . .

Hearings on Illegal Aliens, supra note 139, pt. 1, at 186.

aliens.[315] The Presidents agreed to undertake immediately concurrent studies of the situation in order to reach a mutually satisfactory solution.[316] At the present time, moreover, the United States is engaged in an interagency study of the problem, involving the Departments of Labor, Agriculture, State (including the Agency for International Development), and Justice (including the INS).[317]

Despite these hopeful omens, however, the possibility of direct economic assistance to Mexico remains doubtful. The United States terminated its economic assistance to Mexico in 1966, and the new interagency study does not include any proposals for direct economic aid.[318] There have been suggestions, however, that trade concessions and privileges may be of great benefit to the border area.[319] The so-called "twin plant" concept, for example, in which Mexican plants employ Mexican workers to provide the manual labor to process American materials and components, has been quite successful in drawing new industry to the Mexican border area.[320]

While recognition of the international aspects of the domestic farm labor problem is important, it is not tantamount to a solution. The formulation of corrective measures will require time and cautious adjustment on the part of the United States and Mexico.[321] The present evidence of meaningful cooperation provides some basis, nonetheless, for cautious optimism about finding realistic solutions to the adverse impact of Mexican aliens on domestic farmworkers.

3. Commuters and American Farmworkers

A framework of binational cooperation will help to alleviate some of the problems which could result from termination of the commuter status; nonetheless, the consequences of such action might still prove to be enormous. In many ways, control or elimination of the commuter practice is more difficult than halting the illegal traffic, for it requires reversal of a long-standing practice with strong foreign policy overtones. Nonetheless, the Mexican commuter traffic has such undesirable effects on domestic farmworkers that it cannot be allowed to remain at or near its present level. The potential costs of abrupt termination, however, are

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315 Letter from Richard F. King, Chief, Economic Affairs, Office of Mexican Affairs, U.S. Dep't of State, to the New York University Law Review, Sept. 28, 1972, on file at N.Y.U.L. Rev. office [hereinafter King Letter].

316 Id.

317 Id. See also N.Y. Times, May 4, 1973, at 16, col. 3.

318 King Letter, supra note 315.

319 See Hearings on Illegal Aliens, supra note 139, pt. 2, at 532.

320 Ericson, Mexico's Border Industrialization Program, 93 Monthly Lab. Rev. 33 (May 1970); Miller & Glasgow, supra note 169, at 21.

321 Cf. King Letter, supra note 315, which points out that the Mexican government has recognized the problem of curbing illegal entrance as "essentially their own," and that the position of the United States must be to cooperate with Mexico rather than to take unilateral action.

such that it would seem better to enact legislation carefully regulating the commuter practice than to risk the costs of a mass migration by former green-carders. The following suggestions propose a gradual elimination of the green-card practice as the means of effectively regulating the commuter traffic.

As a first step, Congress should pass legislation which would prevent additional Mexican aliens from obtaining the commuter classification. Congress should make clear that the phrase "lawfully admitted for permanent residence,"[322] under which commuters are classified, shall, *in the future,* require permanent, bona fide residence within the United States. The situation of present commuters should not be affected. By preventing any increase in the number of alien commuters, this action will insure that the commuters' number and impact will gradually decline by attrition. The legislation must be only prospective in application, however, in order to avert the problems which would accompany abrupt termination.

Secondly, Congress should enact legislation similar to an earlier administrative regulation[323] which would have the effect of prohibiting commuters from acting as strike-breakers.[324] Such action should invalidate the green card's effectiveness as a work permit when a commuter either intends to work or is presently engaged in work at a place where a labor dispute is in progress.

The third major means for controlling commutation is predicated upon enactment of improved agricultural minimum wage and maximum hour protections for all hired farmworkers. If the great majority of agricultural employers are required to pay all their employees, including commuters, a reasonable minimum wage, one key advantage in hiring commuters rather than domestic workers will disappear. Thus, although commuters would still provide a pool of competition for American workers, their impact on wages, hours and working conditions would be reduced if employers were unable to obtain economic advantages by hiring them.

These suggestions may well provide a viable framework within which the adverse effect of commuters on domestic farmworkers can be immediately controlled and eventually eliminated. If these proposals are adopted, commuters would become merely a group of foreign workers, who in constantly declining numbers are allowed to enter this country to work, under the conditions that they may not act as strike-breakers nor accept employment at rates below those which must be paid to American workers. Such a situation would hold far more promise for American farmworkers than does the present one and would avoid the

322 See 8 U.S.C. § 1101(a)(27)(B) (1970).

323 See note 222 supra.

324 Congressional action, rather than administrative regulation, would remove the infirmities in the restriction found by the court in Sam Andrews' Sons v. Mitchell, 457 F.2d 745 (9th Cir. 1972).

cost and disruption attendant upon a mass migration of Mexican green-carders to the United States to live and to find work.[325]

VI

CONCLUSION

While the problems of American farmworkers are in large part due to their exclusion from the legislative protections given other workers, revision of such legislation alone is not enough. Commuters and illegal aliens give a dimension to farmworker problems that make them more than solely domestic concerns; unless great efforts are made to deal with alien farmworkers and American farm labor problems concomitantly, commuters and illegals will seriously dilute the statutory protections given domestic farmworkers. The need for a broader approach to domestic farm labor needs, then, is based on the inability of present approaches to provide meaningful, effective solutions. While hesitant steps have been made in the right direction, most attempts to rectify farm labor problems have failed to understand or deal with the broad parameters of the problem. Only when legislative reform is coupled with international efforts to deal with some of the basic causes and complications of farm labor problems will farmworkers be given most effectively the assistance they so desperately need.

[325] This Note has been careful to confine itself to a discussion of the impact of Mexican commuters on American laborers. There are numerous Canadian commuters as well, most of whom work in urbanized areas along the Canada-United States border. While the Mexican commuter traffic must be regulated, there is no need for the foregoing proposals to affect Canadian commuters. It is clear that Canadian commuters have no effect on American economic conditions—they live in an "identical cost-of-living economy, work in highly unionized occupations, and are highly unionized themselves. Being well assimilated into the labor force, they offer no undue competition to American labor." U.S. Comm'n on Civil Rights, Stranger in One's Land 14 (1970).