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Labor Union Coalition Challenges to Governmental Action: Defending the Civil Rights of Low-Wage Workers

Maria L. Ontiveros[†]

Today, many threats to the civil rights of low-wage workers come not from their employers, but from the federal government. These incursions include prohibitions on the right to join unions and collectively bargain, restrictions on the ability to hold certain jobs, failure to protect occupational health and safety, regulations resulting in unjust discharge, discrimination based on status, the denial of legal protection and remedies given to others, and the lack of due process in administrative and criminal proceedings. In the past, these incursions went unremedied because the law did not provide an obvious legal theory or framework for protecting low-wage workers and because there was not an established, collective group to bring the challenges. During the last decade, however, labor coalitions have brought an increasing number of lawsuits directed against the federal government and challenging incursions into the civil rights of low-wage workers. These labor coalitions include traditional labor unions, immigrant rights groups, civil rights groups, and other nonunion worker organizations.

The lawsuits and the coalitions that bring them are critically important because they evidence progress in the relationship between traditional labor unions and workers of color. For much of their history, traditional labor unions have represented male workers, especially European immigrants. They refused to admit women or African American workers to their ranks and turned their backs on recent immigrants—especially those from Mexico

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and Central America.¹ Although some of the refusal to support African American, female, and immigrant workers likely resulted from a combination of racism and sexism, the unions also saw exclusion as a way to protect their members by limiting the number of workers competing for more highly paid jobs.²

On the other hand, the separation between the traditional labor movement and the civil rights movement has always been problematic for several reasons. First, collective action, a key distinguishing feature of traditional labor, was also a philosophy and process used by civil rights movements. The idea of community and the tool of collective power are central to these movements. Second, people of color, immigrants, and women need equality in the workplace to achieve equality in society. In this way, their interests coincide with the interests of traditional labor. A prime example of this intersection is the Memphis Sanitation Strike, where Martin Luther King, Jr. stood with African American workers asking for decent wages based on their slogan, "I Am A Man."³ Finally, as the workforce has changed, these workers have become a bigger percentage of workers overall. Traditional labor simply could no longer ignore them.

Over time, traditional unions have changed and have become more welcoming to women, minorities, and immigrants. As these groups have become a larger percentage of union members, unions have started to represent them in different ways. To a large extent, the lawsuits discussed in this Article have been brought on behalf of immigrant workers. The benefits of the lawsuits, however, affect all low-wage workers. The benefits include substantive protections in the workplace, the creation of important coalitions and innovative strategies, new doctrinal developments in civil rights litigation, and a potentially transformative shift in the view of what labor unions should and can be in the United States. This Article examines these legal challenges and the benefits they have created.

Section I of this Article examines two fundamental obstacles to the protection of the civil rights of low-wage workers: the lack of a coherent legal theory or framework for protecting low-wage

¹ See, for example, Michael Z. Green, *Finding Lawyers for Employees in Discrimination Disputes as a Critical Prescription for Unions to Embrace Racial Justice*, 7 U Pa J Labor & Empl L 55, 77–81 (2004) (discussing discriminatory history and gathering sources).

² See *id.*

³ James Gray Pope, Peter Kellman, and Ed Bruno, *Free Labor Today*, 16 New Labor F 9, 11–12 (Mar 1, 2007).

workers and the lack of an identifiable change agent. Section II examines legal challenges brought by labor coalitions to governmental action at the international and domestic levels. The discussion of these challenges focuses on the background (or civil rights incursion being addressed), the coalition that was formed to deal with the problem, the legal theory used to challenge the government, and the substantive outcome of each challenge. Section III of the Article argues that these challenges have started to address the fundamental obstacles developed in Section I. Legal theories to protect the civil rights of low-wage workers are developing through international standards, which establish fundamental labor rights and consider labor rights as human rights, and domestic standards originating in the United States Constitution. Additionally, an identifiable change agent is developing in the coalitions that have been formed by traditional labor unions taking a new role in United States politics. These developments give hope that the civil rights of low-wage workers will be protected in the future.

I. FUNDAMENTAL OBSTACLES TO THE PROTECTION OF THE CIVIL RIGHTS OF LOW-WAGE WORKERS

To a large extent, the civil rights of low-wage workers have been left unprotected in American society. Theories of social change can help explain why this has occurred. When studying social movements, social scientists sometimes divide along the lines of "collective behavior" or "mass society theories" and "resource mobilization theories."⁴ The first group focuses on and defines a social movement by the ideas which emerge from social relationships or how "people, in interaction with each other, develop new conceptions of justice and injustice, or morality and immorality, or the real and the fictitious. So conceived, the subject matter of social movements is the appearance of new constructions of rights, of procedures, of norms, of beliefs."⁵ Resource mobilization theorists focus on the organizational behavior or gathering and utilization of resources as key to social change movements.⁶ They focus on the people coming together, rather than the ideas they generate or pursue. This distinction, howev-

⁴ Joseph R. Gusfield, *The Reflexivity of Social Movements: Collective Behavior and Mass Society Theory Revisited*, in Enrique Larana, Hank Johnston, and Joseph R. Gusfield, eds, *New Social Movements: From Ideology to Identity* 58, 60 (Temple 1994).

⁵ *Id.* at 61.

⁶ *Id.*

er, is insufficient to understand new social movements, which often incorporate both approaches.⁷

Successful social change movements, such as the civil rights or women's movement are successful because they operate in both ways. As sociologist Joseph Gusfield described:

The civil rights movement, while emphasizing collective action of organizations, was also a movement that changed both white and black conceptions of what is just and what rights are legitimate and possible. Its major thrust was toward the reform of institutions, but it has significantly affected racial identities and self-conceptions. The women's movement has its organization side but is even more saliently a movement toward a change in conceptions of women and female rights relative to men.⁸

New social movements also include both a linear purpose, such as changing governmental rules or policies, and fluid purposes, such as changing how values are perceived.⁹

Thus, in order to be successful, a social movement must have both a coherent set of ideas or values and a workable organization. Low-wage workers lack both of these. Within the legal sphere, these two fundamental obstacles to the protection of the civil rights of low-wage workers can be described as the lack of a coherent legal theory to protect them and the lack of an identifiable change agent to work on that protection.

A. Lack of a Coherent Legal Theory

When looking for a coherent legal theory to protect the civil rights of low-wage workers as a group, two potential sources of rights need to be examined: the laws established to protect certain groups from discrimination because of their group status, and the laws that have been passed to protect the civil rights of workers. Unfortunately, neither of these has functioned to protect low-wage workers.

Laws in the first category include the Fourteenth Amendment to the United States Constitution and Title VII of the Civil

⁷ Id.

⁸ Gusfield, *The Reflexivity of Social Movements* at 62 (cited in note 4).

⁹ Id at 64–66.

Rights Act of 1964.¹⁰ Under constitutional equal protection analysis, courts give differing levels of scrutiny to governmental actions, depending upon the group affected by the government action and the right being affected by the action. Low-wage workers have not been considered a suspect class deserving heightened scrutiny under the Fourteenth Amendment. In fact, in the area of poverty, the Supreme Court appears to give the most deferential rational review to social or economic legislation affecting poor people.¹¹

Title VII of the Civil Rights Act protects workers against discrimination based on the protected categories of race, color, sex, religion, and national origin.¹² Other workplace civil rights laws prohibit discrimination based on age¹³ and disability.¹⁴ Federal courts have consistently construed these categories in very narrow ways. For example, courts have not allowed gays and lesbians to redress discrimination based on sexual orientation under the prohibition against sex discrimination,¹⁵ and have not found the national origin category to encompass discrimination based on citizenship.¹⁶

When low-wage workers are also disadvantaged because of their membership in an established protected class, such as race, they may be able to proceed with a separate claim, such as racial discrimination. These claims may lead to outcomes that substan-

¹⁰ Although Title VII could also be categorized as a law protecting the civil rights of workers, it is discussed here because its protected category analysis parallels the protected category approach of the Fourteenth Amendment. Coverage for low-wage workers under Title VII, however, also suffers from the same problems described below. Neither agricultural nor domestic workers are covered by Title VII's protections. Employees who work for small employers (fewer than fifteen employees) and those who are considered "independent contractors" are also not covered by Title VII's nondiscrimination provisions. Finally, immigration restrictions, language barriers, and cultural barriers also hamper the ability of low-wage workers to use Title VII. See Maria L. Ontiveros, *Female Immigrant Workers and the Law: Limits and Opportunities*, in Dorothy Sue Cobble, ed., *The Sex of Class: Women Transforming American Labor* 235, 236 (Cornell 2007).

¹¹ For a general discussion, see Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 Fordham Urban L J 629 (2008).

¹² Title VII of the Civil Rights Act of 1964, 42 USC § 2000e et seq (2006 & Supp 2009).

¹³ Age Discrimination in Employment Act of 1967, 29 USC §§ 621–634 (2006 & Supp 2009).

¹⁴ Americans with Disabilities Act of 1990, 42 USC § 12101 et seq (2006 & Supp 2008).

¹⁵ See *Bibby v Philadelphia Coca Cola Bottling Co*, 260 F3d 257, 261 (3d Cir 2001); *Simonton v Runyon*, 232 F3d 33, 35 (2d Cir 2000).

¹⁶ See *Espinoza v Farah Manufacturing Co, Inc*, 414 US 86, 88 (1973) (overruled in part by 8 USC § 1324b prohibiting employment discrimination against legal aliens).

tively improve the lives of low-wage workers, but they do not establish a legal claim for low-wage workers as a protected class of their own. Courts do not find that salary level is a suspect class, when it is analytically distinct and independent of the protected class.¹⁷

A second group of laws protects the civil rights of workers, in general. In particular, the National Labor Relations Act (“NLRA”) protects the rights of workers to join unions and engage in collective bargaining.¹⁸ The Fair Labor Standards Act (“FLSA”) assures a minimum wage and premium pay for overtime.¹⁹ The Occupational Safety and Health Act protects bodily integrity at work.²⁰

Unfortunately, many low-wage workers are systematically excluded from these laws in myriad ways. Two key industries that employ low-wage workers—agriculture and domestic services—are excluded from protection under both the NLRA and the antidiscrimination laws.²¹ Although these industries are covered by the FLSA, that statute provides an alternative, less-guaranteed wage structure in these industries.²² Further, small employers and those employers that hire workers as “independent contractors” are not subject to these labor regulations.²³ Low-wage immigrant workers are also excluded from protection because of immigration restrictions.²⁴ Since low-wage workers fall outside these traditional types of civil rights protection, there has not been a coherent legal theory or legal framework for protecting the civil rights of low-wage workers, specifically.

¹⁷ See, for example, *Kouba v Allstate Insurance Co*, 691 F2d 873, 877–78 (9th Cir 1982) (holding that prior or market rate salary is a “factor other than sex” even though women earn lower salaries than men if business reasons reasonably explain why it is a legitimate consideration); *Sperling v Hoffmann-La Roche, Inc*, 924 F Supp 1396, 1404–05 (D NJ 1996) (stating that high salary level is analytically distinct from age and not protected).

¹⁸ National Labor Relations Act, 29 USC §§ 151–169 (2006).

¹⁹ Fair Labor Standards Act, 29 USC §§ 201–219 (2006 & Supp 2007).

²⁰ Occupational Safety and Health Act, 29 USC §§ 651–678 (2006).

²¹ Maria L. Ontiveros, *Lessons from the Fields: Female Farmworkers and the Law*, 55 Me L Rev 158, 172–73, 176–80 (2003) (describing exclusions for agricultural workers); Ontiveros, *Female Immigrant Workers and the Law* at 237–45 (cited in note 10) (describing exclusions for low-wage, immigrant workers).

²² Ontiveros, 55 Me L Rev at 167 (cited in note 21) (describing the piece-rate payment system permitted by the FLSA).

²³ Ontiveros, *Female Immigrant Workers and the Law* at 239–40 (cited in note 10) (describing how other, non-legal barriers, such as language and cultural barriers, also decrease the effectiveness of these laws for immigrants).

²⁴ *Id* at 240–44.

B. Lack of an Identifiable Change Agent

The lack of a national, collectively-based, institutional change agent devoted to protecting the civil rights of low-wage workers is another obstacle operating in parallel to the lack of an institutionalized set of rights for low-wage workers. Since low-wage workers are employed in industries without union representation or other institutions for voice, they have been unable to organize for self-protection and promotion.²⁵ In recent years, localized change agents have begun to develop in the form of "worker centers."²⁶ These worker centers are often based in immigrant or ethnic communities, rather than workplaces, because the high-turnover, transient nature of low-wage work means that workers may not develop an identity tied to a specific occupation, such as being an auto worker or steel worker. Instead, as Professor Janice Fine of Rutgers University describes, "[i]n community unionism, ethnic, racial, gender, geographic, and even religious ties of low-wage workers stand in for craft and industrial identities."²⁷ Worker centers have had local success in devising innovative strategies for protecting low-wage workers. They clearly provide a model and potential avenue for protecting the civil rights of low-wage workers. However, their reach is limited because of the relatively small size and geographic impact of such worker centers.

II. CHALLENGING FEDERAL GOVERNMENTAL INCURSIONS INTO THE CIVIL RIGHTS OF LOW-WAGE WORKERS

Despite the obstacles to protecting the civil rights of low-wage workers, some progress is being made. In most instances, the progress has been made by a coalition of different groups. This Section focuses on a number of different case studies to describe the incursions into the civil rights of low-wage workers, the types of coalitions being developed in response, the legal theories that have been developed, and the concrete victories that have resulted. The first group of case studies involves domestic labor groups that have turned to international law to

²⁵ Janice Fine, *Worker Centers and Immigrant Women*, in Cobble, ed., *The Sex of Class* 211, 212 (cited in note 10).

²⁶ Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream* 226–31 (Cornell 2006) (including research drawn from forty surveys and nine in-depth case studies).

²⁷ Janice Fine, *Community Unions and the Revival of the American Labor Movement*, 33 *Polit & Socy* 153, 169 (2005).

challenge United States government action. The second group of case studies involves coalitions that have begun to question governmental action under domestic laws, especially constitutional provisions. The final Section examines a case study where international and domestic challenges have worked in tandem.

A. International Challenges: The North American Agreement on Labor Cooperation

The United States has signed a number of treaties that require it to respect the rights of workers.²⁸ Labor coalitions have been particularly active in using two treaties: the North American Agreement on Labor Cooperation ("NAALC") and the conventions of the International Labor Organization ("ILO"). This Section focuses on the NAALC,²⁹ the labor side agreement negotiated at the same time as the North American Free Trade Agreement ("NAFTA").³⁰ The NAALC provides a mechanism for workers in the United States, Canada, and Mexico to challenge the nonenforcement of certain enumerated labor rights by these three governments. If workers believe that a country is not adequately enforcing its laws relating to the labor rights or principles covered by the NAALC, workers may file a complaint, called a "submission," in another NAALC country to seek enforcement of the nation's laws. The National Administrative Office (NAO) of that country will investigate the submission and issue an opinion on how the dispute should be resolved. Potential resolutions include hearings, intergovernmental meetings, and, in some cases, trade sanctions. The enumerated principles include: (1) freedom of association and protection of the right to organize, (2) the right to bargain collectively, (3) the right to strike, (4) prohibition of forced labor, (5) labor protections for

²⁸ Some of the treaties that protect workers include the conventions of the International Labor Organization ("ILO") discussed in Section II, Section C of the Charter of the Organization of American States, the International Covenant on Civil and Political Rights, and the International Convention on the Protection of the Right of All Migrant Workers. For a general discussion, see Connie de la Vega and Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, in Anne F. Bayefsky, ed., *Human Rights and Refugees, Internally Displaced Persons and Migrant Workers* 517 (Martinus Nijhoff 2006).

²⁹ For a general discussion, see Secretariat of the Commission for Labor Cooperation, available at <<http://www.naalc.org/>> (last visited Apr 2, 2009). See also *Canada-Mexico-United States: North American Agreement on Labor Cooperation*, 32 Intl Legal Mat 1499 (1993).

³⁰ The ILO is discussed in Section II, Section C.

children and young persons, (6) minimum employment standards, (7) elimination of employment discrimination, (8) equal pay for women and men, (9) prevention of occupational injuries and illnesses, (10) compensation in cases of occupational injuries and illnesses, and (11) protection of migrant workers.³¹

Many of the early submissions brought under the NAALC focused on the principles of freedom of association, the right to organize, and collective bargaining. These early submissions sought to protect these important civil rights and helped to establish cross-border relationships between established unions.³² Over time, the nature of the submissions has changed. The strength of the more recent submissions is that they cover a wider variety of labor principles. These submissions recognize that, in a global market, freedom of association rights are interrelated with discrimination against migrant or immigrant workers and also implicate other civil rights, such as the right to work in a safe environment and the provision of minimum labor standards. Submissions focusing on the interrelationship of the various principles have helped coalitions form between traditional unions, workers rights groups, and immigrant rights groups. In fact, most of the recent submissions have been filed by such labor coalitions. Four recent submissions illustrate these ideas in various ways.

The "Apple Growers" submission was filed in May of 1998 by several Mexican labor unions, including the National Union of Workers; the Authentic Workers' Front; the Metal, Steel, Iron and Allied Industrial Workers Union; and the Domestic Farm Workers Front.³³ They were joined by the International Brotherhood of Teamsters, the United Farm Workers,³⁴ and the International Labor Rights Fund.³⁵ The submission encompassed seven

³¹ Secretariat of the Commission for Labor Cooperation, *Annex 1: Labor Principles*, available at <<http://new.naalc.org/index.cfm?page=219>> (last visited Mar 27, 2009).

³² See, for example, Lance Compa, *NAFTA's Labor Side Accord: A Three-Year Accounting*, 3 NAFTA: L & Bus Rev Am 6, 12–22 (Summer 1997).

³³ US Department of Labor, *Status of Submissions under the North American Agreement on Labor Cooperation (NAALC)*, Mexico National Administration Office ("NAO") Submission Number 9802 (Apple Growers) (Sept 2007), available at <<http://www.dol.gov/ilab/programs/nao/status.htm>> (last visited Mar 27, 2009).

³⁴ American Center for International Labor Solidarity ("ACILS"), *Justice for All: A Guide to Worker Rights in the Global Economy*, Ch 4 at 121 (May 2003), available at <<http://solidarity.timberlakepublishing.com/content.asp?contentid=481>> (last visited Apr 2, 2009).

³⁵ Secretariat of the Commission for Labor Cooperation, *Public Communications Submitted to the Mexican National*, Mexican NAO 9802, available at <<http://new.naalc.org/index.cfm?page=228>> (last visited Apr 2, 2009).

of the NAALC's labor principles: freedom of association; safety and health; employment discrimination; minimum employment standards; protection of migrant workers; and compensation in cases of occupational injuries and illnesses.³⁶ Specifically, the group alleged that employers threatened and intimidated union supporters;³⁷ that workers were sent into orchards recently sprayed with pesticides and experienced other health, safety, and sanitation violations;³⁸ that agricultural workers are excluded from protection under the NLRA;³⁹ that budget cuts to administrative agencies prevent the enforcement of safety, health, and freedom of association laws;⁴⁰ and that migrant workers were discriminated against in compensation, housing, health care, family unification, and other matters.⁴¹

Throughout the submission process, the coalition of Mexican unions, United States unions, farm worker advocacy groups, and human rights organizations thought strategically and cooperatively about how best to empower workers and affect the outcome.⁴² As a result of the submission, the Mexican governmental

³⁶ US Department of Labor, *Status of Submissions under the North American Agreement on Labor Cooperation (NAALC)*, Mexico NAO Submission Number 2001-01 (New York State), available at <<http://www.dol.gov/ilab/programs/nao/status.htm>> (last visited Apr 2, 2009). In August 1998, the Mexican Confederation of Labor brought a similarly wide-ranging submission. The submission raised the principles of freedom of association, protection for migrant workers, employment discrimination, safety and health, and workers compensation. Although not brought by a labor coalition, the submission did help establish the NAALC as a coherent legal theory to help immigrant workers. The United States courts made this clear in *Estados Unidos Mexicanos v Decoster*, 229 F3d 332, 342-43 (1st Cir 2000), when it held that the Mexican government could not sue on behalf of Mexican workers in federal court. Instead, the court referred to the NAALC as the appropriate remedy.

³⁷ Lance Compa, *Free Trade, Fair Trade, and the Battle for Labor Rights*, in Lowell Turner, Harry C. Katz, and Richard W. Hurd, eds, *Rekindling the Movement: Labor's Quest for Relevance in the 21st Century* 314, 326-27 (Cornell 2001).

³⁸ See National Union of Workers, et al, *Violations of NAALC Labor Principles and Obligations in the Washington State Apple Industry*, available at <<http://laboris.uqam.ca/anact/applecomplaint.htm>> (last visited Apr 2, 2009) ("Apple Complaint").

³⁹ Paul D. Lall, *Immigrant Farmworkers and the North American Agreement on Labor Cooperation*, 31 Colum Hum Rts L Rev 597, 597-600 (2000) (noting that warehouse workers, as opposed to field workers, are covered by the NLRA and describing how field and other excluded agricultural workers have argued that the statutory exclusion violated the basic principles and purposes of the NAALC, specifically the obligation to promote the principles "to the maximum extent possible").

⁴⁰ Apple Complaint (cited in note 38). See also Karina Bull, *The NAALC Boomerang: Another Backfired Attempt to Advance US Migrant Workers' Human Right of Freedom of Association*, 14 Intl Legal Perspectives 6, 12-13 (2004) (speaking specifically about freedom of association).

⁴¹ Apple Complaint (cited in note 38).

⁴² Lance Compa, *NAFTA's Labor Side Agreement and International Labor Solidarity*, in Peter Waterman and Jane Wills, eds, *Place, Space and the New Labour International-*

agency held a hearing where workers were able to testify about pesticide poisoning, discharge for union activity, minimum wage violations, discrimination in the workers' compensation system, discrimination against migrant workers, and other violations.⁴³ In addition, the United States and Mexican governments agreed to hold a public outreach session to educate workers and employers about the workers' legal protections and the employers' obligations with regard to minimum employment standards, occupational safety and health protection, and the elimination of gender and ethnic discrimination.⁴⁴ Government-to-government meetings were also held to clarify the applications of United States law in the areas of union organizing and bargaining rights; elimination of employment discrimination; minimum conditions of employment, including inspection programs and systems for determining violations of employment conditions for migrant workers; and occupational safety and health, including inspection of migrant worker camps.⁴⁵ Thus, the NAALC led to a commitment to a wide range of rights for low-wage workers.

In September of 1998, a coalition of twenty local and national immigrants' rights organizations, civil rights organizations and labor unions, led by the Yale Law School Workers' Rights Project, filed a submission challenging a memorandum of understanding between the United States Department of Labor ("DOL") and the United States Immigration and Naturalization Service ("INS").⁴⁶ The memorandum would have required the DOL to share immigration information with the INS, which would have dissuaded workers with questionable immigration status from filing claims challenging violations of labor rights. The memorandum was reversed, and the DOL pledged not to check or report immigration status.⁴⁷ The coalition was successful in using international law to change domestic policy that would have had a devastating impact on low-wage workers.

isms 147, 158–60 (Blackwell 2001).

⁴³ ACILS, *Justice for All* at 121 (cited in note 34).

⁴⁴ Department of Labor, *Status of Submissions*, Mexico NAO Submission Number 9802 (Apple Growers) (cited in note 33).

⁴⁵ *Id.*

⁴⁶ Secretariat of the Commission for Labor Cooperation, *Public Communications Submitted to the Mexican National*, Mexican NAO 9802 (cited in note 35).

⁴⁷ Michael J. Wishnie, *Immigrant Workers and the Domestic Enforcement of International Labor Rights*, 4 U Pa J Labor & Empl L 529, 550–51 (2002). The reversal occurred at the same time as a change in the DOL administrator. Although administration turnover certainly played a role in the reversal of the policy, the submission is also credited in bringing about the policy change.

In October of 2001, a group of United States and Mexican organizations, including the Chinese Staff and Workers' Association, National Mobilization Against Sweat Shops, Workers' Awaaz, and Asociación Tepeyac filed a submission challenging the administration of the workers compensation system in New York State as it related to immigrant workers.⁴⁸ The submission focused on how poor administration resulted in delays of four to twenty years in processing claims, failed to provide translation services, and facilitated abuse of the process by employers and private workers' compensation insurance carriers.⁴⁹ In addition to citing deficiencies with respect to the NAALC principles on preventing occupational injuries and compensation for occupational injuries and illnesses, the submission also argued that the United States and New York State were violating the NAALC Article 5 obligation to ensure timely, transparent adjudication of labor and employment matters.⁵⁰ In conjunction with the petition, the coalition engaged in an aggressive public campaign aimed at affecting governmental change, which both generated a great deal of publicity and also reinvigorated their campaign.⁵¹

In response to the submission, the Mexican National Administrative Office ("NAO") issued two Public Reports of Review and officially requested ministerial consultations between the United States and Mexican Secretaries of Labor.⁵² As a result of the submission, New York State undertook a variety of initiatives relating to the issues covered in the petition, and ministerial level consultations were put on hold.⁵³ The submission is remarkable for the coalition using not just the treaty's labor principles, but also Article 5, to improve the administration of a system of workers' compensation that was disadvantaging so many low-wage workers in New York State. This case demonstrates how a coalition was able to use an international treaty to challenge and change policy at the state level.

⁴⁸ US Department of Labor, *Petition on Labor Law Matters Arising in the United States Submitted to the National Administrative Office (NAO) of Mexico under the North American Agreement on Labor Cooperation (NAALC)*, (Oct 24, 2001), available at <<http://www.dol.gov/ilab/media/reports/nao/mxsub2001-1.htm>> (last visited Apr 2, 2009).

⁴⁹ ACILS, *Justice for All* at 126 (cited in note 34).

⁵⁰ *Id.*

⁵¹ Wishnie, 4 U Pa J Labor & Empl L at 553 (cited in note 47).

⁵² US Department of Labor, *Status of Submissions at Mexico NAO Submission Number 2001-01 (New York State)* (cited in note 36).

⁵³ *Id.* The DOL recommended that consultations could take place at the Council Designee or NAO level on any remaining issues or concerns.

Finally, in February of 2003, two farmworker advocacy groups filed a submission alleging unfair treatment of agricultural workers in North Carolina, working in the United States under H-2A ("guest worker") visas. The submission filed by the Farmworker Justice Fund and the Central Independiente de Obreros Agrícolas y Campesinos raised issues including freedom of association; the right to organize and bargain collectively; the right to strike; the right to minimum employment standards; freedom from employment discrimination on the basis of age, sex, and other improper factors; freedom from and compensation in case of occupational injuries and illnesses; and the protection of migrant workers.⁵⁴ The submission was filed in support of ongoing organizing efforts of the Farm Labor Organizing Committee ("FLOC") of the American Federation of Labor and Congress of Industrial Organizations ("AFL-CIO"), which had been working for years to improve the lives of North Carolina H-2A agricultural workers.

In 2004, after the Mexican government accepted the submission and began investigation, FLOC signed labor agreements with the major growers associations in North Carolina.⁵⁵ The agreements were the first union contracts ever signed by North Carolina growers and the first union contracts to explicitly cover H-2A guest workers. The labor contracts provided substantive and procedural protections for the North Carolina migrant workers, including improved wages, inspection of field conditions, a contractual right not to be fired except for just cause and a grievance procedure.⁵⁶ Perhaps most importantly, they provided for core labor rights, such as freedom of association, the right to organize, and the right to bargain collectively for all workers—migrant and domestic, alike. In 2007, the contract was renewed and amended to include the ability to bid for jobs in other locations, assistance in filing compensation claims for occupational injuries, and improved processes for recruitment and hiring of visa holders.⁵⁷

⁵⁴ US Department of Labor, *Status of Submissions under the North American Agreement on Labor Cooperation (NAALC)*, Mexico NAO Submission Number 2003–01 (North Carolina), available at <<http://www.dol.gov/ilab/programs/nao/status.htm>> (last visited Apr 2, 2009).

⁵⁵ Ontiveros, *Female Immigrant Workers and the Law* at 251 (cited in note 10).

⁵⁶ Farm Labor Organization Committee ("FLOC"), *FLOC and NCGA Renew Labor Contract*, available at <<http://www.floc.com/documents/FLOC%20Renews%20Contract.pdf>> (last visited May 12, 2009).

⁵⁷ *Id.* As a result of working transnationally on improving recruitment and hiring procedures for H-2A visas, FLOC has also started to organize extensively in Mexico. See

B. The Battle on the Home Front

Beginning in 2001, coalitions have come together to challenge governmental action in domestic courts. These coalitions involve traditional unions and immigrant rights groups. Their challenges have been based on a patchwork of constitutional claims, including the Equal Protection Clause, the Due Process Clause, and the First, Fourth, Fifth, and Seventh Amendments to the Constitution. They have challenged governmental actions such as the requirement of citizenship to hold certain jobs, a ban on collective bargaining in certain industries, changes to governmental social security and immigration regulations without due process, and abusive conduct in workplace immigration raids. These lawsuits demonstrate the growth of coalition work at the domestic level and how constitutional theories can be used to help low-wage workers.

1. Airport security screeners and 9/11.

One of the first times that unions and civil rights groups formed a coalition to protest governmental incursions into workers' civil rights on the domestic front involved airport security screeners. The coalition responded to two different assaults on their civil rights: requiring citizenship as a job qualification and limiting their ability to participate in labor unions. Prior to the September 11, 2001 terrorist attacks on the United States, most airport screeners in the United States were employed by private companies.⁵⁸ Some were represented by the Service Employees International Union ("SEIU") and received decent wage and job protection, but most were unrepresented.⁵⁹ At many airports, the screeners were legal residents, but not United States citizens. Falling into this category were 80 percent of the screeners at San Francisco, 80 percent of the screeners at Dulles, 70 percent of the screeners at Miami, and 40 percent of the screeners at Los An-

FLOC, *FLOC in Mexico*, available at <<http://www.floc.com/Mexico.htm>> (last visited Apr 3, 2009).

⁵⁸ See Greg Fulton, *An Airport Screener's Complaint*, Time (Aug 17, 2006), available at <<http://www.time.com/time/nation/article/0,8599,1228247,00.html>> (last visited May 12, 2009).

⁵⁹ ACLU of Southern California, *ACLU, SEIU Challenge New Citizenship Requirement for Airport Screeners* (Jan 17, 2002), available at <<http://www.aclu-sc.org/releases/view/100037>> (last visited Mar 28, 2009).

geles.⁶⁰ Nationwide, approximately 25 percent of screeners were noncitizens.⁶¹

Not surprisingly, many airport screeners were also people of color. According to both the Federal Aviation Administration and the SEIU, the workforce was overwhelmingly made up of minorities.⁶² At Los Angeles International Airport, the SEIU reported that approximately 98 percent of the security screeners belonged to a minority (50 percent African-American, 20 percent Latino, 14 percent Asian and 14 percent African).⁶³ At certain airports, the racial makeup is much more concentrated. In the San Francisco Bay Area, for instance, the noncitizen/minority screeners tend to be Filipinos. At San Francisco International Airport, 80 percent of the screeners were noncitizens (mainly Filipino)⁶⁴ and 90 percent of the airport screeners at the San Jose airport were Asian.⁶⁵ Half of the 1.8 million Filipinos in the United States live in California, and the Filipino population in the San Francisco Bay Area, at 321,000 strong, has grown into a vibrant, close-knit community.⁶⁶ Many of the Filipinos became screeners through word-of-mouth advertising and notices in Filipino newspapers.⁶⁷ The Filipino screeners, with an average age of forty, provided an experienced, stable workforce of screeners.

In the wake of the terror attacks, Congress passed the Aviation and Transportation Security Act ("ATSA"),⁶⁸ which required that all airport screening personnel be United States citizens.⁶⁹

⁶⁰ Complaint for Declaratory and Injunctive Relief, *Gebin v Mineta*, No CV02-0493RMTEX, *14 (C D Cal filed Jan 17, 2002), available at <http://www.aclunc.org/cases/closed_cases/asset_upload_file449_3450.pdf> (last visited Mar 28, 2009).

⁶¹ Henry Weinstein, *Airport Screener Curb is Rejected*, LA Times B1 (Nov 16, 2002), available at <<http://articles.latimes.com/2002/nov/16/local/me-screeners16>> (last visited Mar 28, 2009).

⁶² Ricardo Alonso-Zaldivar and Jennifer Oldham, *New Airport Screener Jobs Going Mostly to Whites*, LA Times A18 (Sept 24, 2002), available at <<http://articles.latimes.com/2002/sep/24/nation/na-airports24>> (last visited Mar 28, 2009).

⁶³ *Id.*

⁶⁴ Annie Nakao, *Airport Job Insecurity*, San Fran Chron B1 (Mar 18, 2002), available at <<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2002/03/18/MN25342.DTL&hw=Airport+Job+Insecurity&sn=002&sc=508>> (last visited Mar 28, 2009).

⁶⁵ *U.S. Filipino Airport Screeners & the Post-9/11 Impacts* (Aug 1, 2004), available at <http://web.archive.org/web/20070609065436rn_1/www.sjsu.edu/depts/sociology/living/gm-a-pawis.html> (last visited May 12, 2009) (hereinafter referred to as "PAWIS website").

⁶⁶ Nakao, *Airport Job Insecurity*, San Fran Chron at B1 (cited in note 64).

⁶⁷ *Id.*

⁶⁸ Pub L No 107-71, 115 Stat 597 (2001).

⁶⁹ The TSA also imposed a variety of pre-employment tests, including an English test, which union representatives contend led to discrimination against qualified minorities, especially immigrants. Alonso-Zaldivar, *New Airport Screener Jobs Going Mostly to Whites*, LA Times at A18 (cited in note 62).

This requirement deprived thousands of noncitizen, permanent resident workers of their jobs. The restriction fell most heavily on certain communities, such as the San Francisco Bay Area Filipino community. The San Jose Filipino community responded by forming the People's Association of Workers and Immigrants ("PAWIS"), which in Tagalog (Filipino) means "sweat."⁷⁰ PAWIS organized rallies, press conferences, demonstrations, pickets, and marches in support of the airport screeners.⁷¹ This citizenship requirement, as well as other new hiring practices, also shifted the racial makeup of the screener jobs, so that post 9/11, 61 percent of the screeners were white.⁷² The change also concerned the SEIU because of the adverse impact on its members and because a large shift in the workforce could result in the replacement of union supporters by anti-union workers who could then petition for union decertification. A coalition was formed between the American Civil Liberties Union and the SEIU to challenge the citizenship requirement.

The lawsuit proceeded on an equal protection theory.⁷³ The plaintiffs argued that the citizenship requirement served no rational purpose because thousands of other employees with access to secure areas, such as pilots, flight attendants, baggage handlers, and mechanics were not required to be citizens. The plaintiffs also pointed out that noncitizens serving in the National Guard were performing armed security at screening stations. Furthermore, they argued that the requirement was irrational because the best qualified and most experienced screeners would be fired and replaced by inexperienced screeners. Finally, they asserted that no governmental report had ever connected the

⁷⁰ PAWIS website (cited in note 65).

⁷¹ *Id.* In coalition with other groups, PAWIS appears to have moved into support of other issues affecting the Filipino community, such as dual citizenship, racial profiling, budget allocation, and health care provision.

⁷² Alonso-Zaldivar, *New Airport Screener Jobs Going Mostly to Whites*, LA Times at A18 (cited in note 62). Former airport screeners, including citizens with extensive experience and passing scores on employment tests, claimed that racial bias prevented them from being reemployed. Associated Press, *Former Airport Screeners Claim Hiring Bias*, Seattle Post Intelligencer (Mar 24, 2003), available at <http://seattlepi.nwsourc.com/local/113917_screener24.shtml> (last visited Mar 28, 2009). The CEO of one of the world's largest private airport security screening companies argued that "people wanted white, West Point-looking cadets, and from a PR standpoint that worked, but college-age or college grads are the worst screeners." Fulton, *An Airport Screener's Complaint*, Time (cited in note 58).

⁷³ Complaint, *Gebin v Mineta* No 0493RMTEX at *17 (cited in note 60).

citizenship or nationality of screeners with any ongoing security problems.⁷⁴

The government filed a motion to dismiss, arguing that the plaintiffs failed to state a claim because the government could require citizenship where screeners serve a governmental function or, alternately, because the federal government's decisions receive special deference in the area of immigration and naturalization.⁷⁵ The court rejected both of these arguments and denied the motion.⁷⁶ It found that the categorical exclusion of noncitizens could only be upheld if the government could prove that the exclusion was narrowly tailored to further a compelling governmental interest.⁷⁷ Since the plaintiffs had convinced the court of their substantive claim and implementation of the citizenship requirement could cause a constitutional deprivation to plaintiffs, the court also granted a preliminary injunction to stop implementation of the requirement.⁷⁸

The result of the coalition challenge to the governmental action was to reinforce the strand of the equal protection doctrine that requires a compelling governmental interest for exclusions based on citizenship. This legal theory will continue to be an important part of the effort to protect the civil rights of low-wage workers.

A second challenge to government action regarding airport screeners centered on the freedom of association and collective bargaining rights of the screeners. The ATSA established the Transportation Security Administration ("TSA") as part of the Department of Homeland Security ("DHS") to oversee many employees, including airport screeners.⁷⁹ The ATSA required that, by November 19, 2002, all passenger screening be conducted by federal employees.⁸⁰ The ATSA also gave the head of the TSA discretion to decide whether any employee group in

⁷⁴ Id at *12–16.

⁷⁵ *Gebin v Mineta*, 231 F Supp 2d 971, 973 (C D Cal 2002).

⁷⁶ Id at 976.

⁷⁷ Id.

⁷⁸ Id at 968–69. The preliminary injunction remained in place until 2003, when Congress amended Section III of the ATSA to allow nationals to serve as airport screeners. *Gebin v Mineta*, 328 F3d 1211, 1212 (9th Cir 2003) (vacating the preliminary injunction).

⁷⁹ 49 USC § 114 (2006 & Supp 2007).

⁸⁰ 49 USC § 44901 (2006 & Supp 2007). Five national airports were excluded from this requirement as part of a pilot program. In addition, the TSA was allowed to establish an opt-out program, allowing airports to contract with private screening companies. 49 USC §§ 44919–20 (2006). These legislative developments are described in *Firstline Transp Sec, Inc and International Union, Security, Police and Fire Professionals of America (SPFPA)*, 347 NLRB 40, 447–48 (2006).

the TSA would be allowed to collectively bargain.⁸¹ On January 9, 2003, TSA Administrator Loy took the position that “mandatory collective bargaining is not compatible with the flexibility required to wage war against terrorism”⁸² and ruled that airport screeners were not allowed to collectively bargain.⁸³ The Federal Labor Relations Authority upheld this ban.⁸⁴

While the government was acting in this manner, the American Federation of Government Employees (“AFGE”), AFL-CIO was working to organize and represent the airport screeners.⁸⁵ The organization drive began immediately after the events of September 11, 2001 and was borne out of the necessity of finding more members.⁸⁶ Although the organizing drive sprung from this highly instrumental purpose, the union activity soon transformed into an innovative model and began to establish important legal theories for low-wage workers in industries hamstrung by governmental restrictions. Even after being prohibited from engaging in collective bargaining, AFGE continued to recruit members and sought to protect workers in other ways.⁸⁷ In particular, AFGE decided to pursue a model of open source unionism.⁸⁸ Under this model, AFGE pursued methods, aside from collective bargaining, to protect employees. It engaged in an intensive education and mobilization campaign, encouraging workers to write to President Bush demanding the right to unionize. It also encouraged workers to use an online

⁸¹ Sharon Pinnock, *Campaign to Organize Federal Transportation Security Officers: A Model of Open Source Unionism*, 10 WorkingUSA: J Labor & Socy 301, 304 (2007).

⁸² Id.

⁸³ For a comprehensive overview of these events, as well as a historical analysis of this decision in light of public sector bargaining history, see Joseph Slater, *Homeland Security vs. Workers' Rights? What the Federal Government Should Learn from History and Experience, and Why*, 6 U Pa J Labor & Empl L 295 (2004). See also Alex C. Hallett, *An Argument for the Denial of Collective-Bargaining Rights of Federal Airport Security Screeners* 72 Geo Wash L Rev 834 (2004) (supporting the ruling); Mark D. Roth, Gony Frieder, and Anne Wagner, *Job Security and Bargaining Rights of Federal Government Employees*, 8 DC L Rev 153 (2004) (critiquing the ruling).

⁸⁴ United States DHS, Border & Transp Sec Directorate, TSA, and AFL-CIO, 59 FLRA 423, 433 (2003). See also *American Federation of Government Employees v Loy*, 281 F Supp 2d 59, 66 (D DC Sept 5, 2003), affd, 367 F3d 932, 937 (DC Cir 2004) (finding that the district court lacked jurisdiction to review this finding).

⁸⁵ The organization drive appears not to be done as part of a coalition. The case study, however, provides some interesting insight on different ways in which unions can operate and on the legal claims which low-wage workers and unions can make, even when they are severely hamstrung by government action. In addition, Section III B 2, suggests a coalition model for this union to be used in the future.

⁸⁶ Pinnock, 10 WorkingUSA: J Labor & Socy at 301–03 (cited in note 81).

⁸⁷ Slater, 6 U Pa J Labor & Empl L at 345–50 (cited in note 83).

⁸⁸ Pinnock, 10 WorkingUSA: J Labor & Socy at 305–07 (cited in note 81).

survey website to report any specific concern about workplace safety and discrimination, and followed up with training on health and safety and employment discrimination.⁸⁹ These efforts allowed workers to feel a part of the union and to feel as if their voices were being heard.⁹⁰

In addition, the union began to test the theory that it could act as a representative for workers in seeking to protect rights outside the NLRA, even if an employee had not yet decided to join the union.⁹¹ Specifically, AFGE has successfully represented itself and a worker in asserting First Amendment rights. In *American Federation of Government Employees Local 1 v Stone*,⁹² a probationary screener, John Gavello, at the Oakland International Airport was discharged for distributing union literature and consulting with a union attorney during a grievance procedure.⁹³ Gavello and AFGE sued, alleging a violation of their First Amendment right to free speech. The court found, first, that AFGE had standing to challenge governmental interference with its organizing activities.⁹⁴ The court found this to be true, even if Gavello was not a member of AFGE. It reasoned that TSA's actions could "have interfered with AFGE's ability to solicit membership and communicate its message . . . [thus impairing its] ability to carry out its mission [and imposing] a 'concrete and demonstrable' injury in fact."⁹⁵ The court emphasized that the union had a role to play and interests to assert, even if it could not represent employees in collective bargaining.⁹⁶ It stated, "the fact that the TSA has banned collective bargaining does not mean that a union representing TSA employees has no useful function; nor does it mean that the TSA has free rein to retaliate against screeners who speak in favor of collective bargaining rights."⁹⁷

The court also recognized that the employee retained First Amendment rights, even as a probationary employee. The court

⁸⁹ Id at 306.

⁹⁰ Id.

⁹¹ Id at 305–07.

⁹² 502 F3d 1027 (9th Cir 2007).

⁹³ Id at 1030.

⁹⁴ Id at 1033, citing *Allee v Medrano*, 416 US 802, 820 n 13 (1974) (recognizing that "First Amendment rights flow to unions as well as to their members and organizers").

⁹⁵ *Stone*, 502 F3d at 1032–33.

⁹⁶ Id at 1033–34, citing *American Federation of Government Employees v Loy*, 281 F Supp 2d 59 (D DC Sept 5, 2003) (noting that TSA's ban on collective bargaining does not prevent airport screeners from engaging in organizational activities or joining a union).

⁹⁷ Id at 1033.

found that, in the absence of a clear congressional mandate to prohibit judicial review of an employee's colorable constitutional law claim, the employee's claim could go forward.⁹⁸ Although the parties ultimately settled,⁹⁹ the court's opinion remains significant for its recognition of the ability of individual employees to seek redress for constitutional violations.¹⁰⁰

AFGE's "open source" unionism model may also bear fruit in those airports where the federal government has privatized screening jobs. In the Kansas City International Airport in Kansas City, Missouri, a different union (the International Union, Security, Police, and Fire Professionals of America) sought a NLRB election to become the exclusive representative for purposes of collective bargaining for a unit covering passenger and baggage screening. This work was being performed by the private company, Firstline Transportation Security ("Firstline"), pursuant to a contract between the TSA and Firstline. Relying on Administrator Loy's determination that airport security screeners could not engage in collective bargaining, the government argued that the NLRB did not have jurisdiction over the case and could not sanction collective bargaining between Firstline and the union.¹⁰¹ The NLRB disagreed and found that the mandates of the NLRA were compatible with the governmental purpose of improving national aviation security.¹⁰²

The NLRB made several arguments to support its conclusion. First, it reviewed TSA's interpretation of the ATSA and found that Administrator Loy only had authority to promulgate an order applying to federally employed, not privately employed, screeners.¹⁰³ Second, the legislative history revealed that the relevant portion of the ATSA only covered federal employees.¹⁰⁴ Third, based on an analysis of historical national security cases, the Board found that the interests of national security may ac-

⁹⁸ Id at 1036.

⁹⁹ Bob Egelko, *U.S. Settles Lawsuit Over Right to Unionize*, San Fran Chron B2 (Sept 11, 2008), available at <<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/09/11/BACS12RKOF.DTL>> (last visited Mar 29, 2009) (reporting that the federal government paid \$80 thousand to settle the claim).

¹⁰⁰ The import of this legal theory is discussed in more detail with regard to claims arising out of Immigration and Customs Enforcement ("ICE") raids and potential claims arising out of the Thirteenth Amendment. *Stone*, 502 F3d at 1036–39 (looking at *Bivens* as the basis for the damage claim).

¹⁰¹ *Firstline Transportation Security, Inc.*, Case 17-RC-12354, 347 NLRB No. 40, 449.

¹⁰² Id at 447.

¹⁰³ Id at 449–51.

¹⁰⁴ Id at 452–53.

tually be bolstered by the presence of collective bargaining and certainly are not incompatible with it.¹⁰⁵ Thus, screeners at airports where the function has been privatized are able to organize and collectively bargain. Although AFGE served only as an amicus in the case, its educational and mobilization efforts likely helped produce the outcome.

2. No-match letters.

A second coalition response to government action involved a change in the regulations about so-called “no-match” letters. Traditionally, when a new employee is hired, the Social Security Administration (“SSA”) checks whether the name and Social Security number (“SSN”) of the newly-hired employee matches with the SSA records. If there is a discrepancy, the SSA can send a no-match letter to the employee and the employer to alert the employer of the variance. According to the SSA:

When SSA processes wage reports, it notifies every worker whose name and SSN could not be matched to SSA’s records. This letter is sent to the address on the worker’s Form W-2. If there is no address or an address is not found in the Postal Service database of valid addresses, this letter is sent to the employer.¹⁰⁶

Approximately two weeks later, “SSA sends employer no-match letters . . . to any employer who reported more than 10 no-matches that represented more than 0.5 percent of the W-2s submitted by that employer.”¹⁰⁷ The SSA asks employers to file corrected W-2 forms for each of the SSNs listed in the employer notice that it is able to correct. Every year since 1994, the SSA sends thousands of these “Employer Correction Requests,” also known as no-match letters.¹⁰⁸ These letters were originally meant to help with SSA record keeping and had little or no relationship to immigration enforcement.¹⁰⁹

¹⁰⁵ *Firstline*, 347 NLRB No. 40 at 453–56.

¹⁰⁶ Social Security Administration, *Overview of Social Security Employer No-Match Letters Process*, (Dec 4, 2007), available at <<http://www.ssa.gov/legislation/nomatch2.htm>> (last visited Mar 29, 2009).

¹⁰⁷ *Id.*

¹⁰⁸ Social Security Administration, *SSA “No-Match” Letters*, (Aug 16, 2007), available at <<http://www.socialsecurity.gov/employer/noMatchNotices.htm>> (last visited Mar 29, 2009).

¹⁰⁹ Ellinor R. Coder, *The Homeland Security Safe-Harbor Procedure for Social Security No-Match Letters: A Mismatched Immigration Enforcement Tool*, 86 NC L Rev 493, 497

In August of 2007, DHS announced new “no-match” rules that had the potential to adversely affect the civil rights of low-wage and other workers. Under the new rules, the no-match letter would have immigration implications, not just Social Security implications. An employer who received a no-match letter would now be required to either fire the employee or to correct the records. If the employer did not do either of these things, DHS could find that the employer had “constructive knowledge” that the employee did not have the legal right to work in the United States and be subject to civil and criminal liability.¹¹⁰ Under the new rules, DHS and SSA planned to send no-match letters to 140 thousand employers, affecting some eight million employees, between September 4, 2007 and November 9, 2007.¹¹¹

A coalition of unions and immigrant rights groups challenged the regulation and sought a preliminary injunction to prevent the letters from being issued. Those joining the complaint included the National Immigration Law Center, the American Civil Liberties Union Foundation (Immigrants’ Rights Project), the AFL-CIO, the Alameda Central Labor Council, and the San Francisco Building and Trades Council. The plaintiffs’ argued that the new regulations interfered with their civil rights by using SSA files and information for immigration enforcement in contravention of congressional mandate and without due process.¹¹² As a practical matter, the plaintiffs argued that the new regulations would cause all workers, even legal residents, to be fired or to miss work time clearing up discrepancies unrelated to valid immigration status. They argued that there are more than 250 million unmatched records in the SSA Earnings Suspense File and that, when the SSA has been able to reconcile no-matches, most involved United States citizens.¹¹³ The AFL-CIO argued that it represents ten million working men and women

(2008).

¹¹⁰ *Id.* at 496–497.

¹¹¹ Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, *AFL-CIO v Chertoff*, Case No C 07-4472 CRB, *1 (N D Cal filed Aug 29, 2007).

¹¹² Complaint for Declaratory and Injunctive Relief, *AFL-CIO v Chertoff*, Case No C 07-4472 CRB, *11–14 (N D Cal filed Aug 28, 2007).

¹¹³ The SSA itself estimates that approximately 17.8 million of the 435 million entries in the database contain errors, including 3.3 million entries that misclassify United States citizens as aliens. Social Security Administration, *Congressional Response Report: Accuracy of the Social Security Administration’s Numident File*, (Dec 18, 2006), available at <<http://www.socialsecurity.gov/oig/ADOBEPDF/audittxt/A-08-06-26100.htm>> (last visited May 12, 2009), cited in *Aramark Facility Services v SEIU Local 1877*, 530 F3d 817, 826 (9th Cir 2008).

and that courts have recognized the standing of a labor organization to protect the interests and rights of its members.¹¹⁴ The AFL-CIO characterizes its mission “to serve as an advocate for workers, to improve the lives of working families, and to bring fairness and dignity to the workplace.” The San Francisco Labor Council says that its mission is to “improve the lives of workers, their families, and others by bringing economic justice to the workplace and social justice to the community.”¹¹⁵ Here, the unions were representing the interests and rights of their members vis-à-vis the government in challenging arbitrary action rather than simply representing their interests vis-à-vis employers in collective bargaining. Thus, this litigation allowed the unions to claim a new role.

The plaintiffs also argued that the regulations would disproportionately affect women and legal immigrants.¹¹⁶ They argued that no-matches typically occur because of “clerical errors by employers or SSA, employee name changes after marriage or divorce, foreign born employees who use a less ‘foreign’ name in the workplace, different naming conventions, such as multiple surnames, common in many parts of the world, and many other reasons.”¹¹⁷ According to the former commissioner of the SSA, “[f]oreign-born workers with lawful status are particularly likely to be subject to an SSA data discrepancy because of different naming conventions and inconsistent translations of foreign names, and ‘workers falsely accused of being unauthorized based on a no-match letter may be unfairly harmed.’”¹¹⁸

The Central Labor Council of Alameda County focused on this argument. They described themselves as representing “more than 76,000 diverse workers working in Alameda County . . . [that] together speak nearly 100 languages and hail from scores of countries.”¹¹⁹ They said their mission was to advocate for

¹¹⁴ Reply in Support of Ex Parte Application for Temporary Restraining Order and Order to Show Cause Why Preliminary Injunction Should Not Issue, *AFL-CIO v Chertoff*, Case No C 07-4472 CRB, *2–3 (N D Cal filed Aug 31, 2007), citing *California Rural Legal Assistance, Inc v Legal Services Corp*, 917 F2d 1171, 1175 (9th Cir 1990).

¹¹⁵ Complaint, *AFL-CIO v Chertoff*, Case No C 07-4472 CRB, at *2–3 (cited in note 112).

¹¹⁶ Coder, 86 NC L Rev at 503–08 (cited in note 109) (discussing the possibility of discrimination lawsuits resulting from discharges based on no-match letters).

¹¹⁷ Memorandum in Support of Motion for Temporary Restraining Order and Preliminary Injunction, *AFL-CIO v Chertoff*, at *1 (cited in note 111).

¹¹⁸ Reply in Support of Ex Parte Application, *AFL-CIO v Chertoff*, at *3 (cited in note 114).

¹¹⁹ Complaint, *AFL-CIO v Chertoff*, at *3 (cited in note 112).

workers and to fight workplace discrimination. They noted that their members, who are United States citizens or noncitizens with the legal right to work, had been adversely affected when they received no-match letters. Specifically, they alleged:

These letters have significantly impacted low-income workers of Latin American and Asian descent who use compound last names or inconsistently transliterate their names. . . . Employers have harassed and intimidated many of these workers, especially those who work in construction, manufacturing, healthcare and the expanding service and janitorial sector, because of “no-match” letters. The Alameda CLC is less able to organize and advocate for workers effectively when workers fear “no-match” abuse by employers.¹²⁰

In October of 2007, the district court granted the plaintiffs’ preliminary injunction, halting the implementation of the new regulation and any mailings under the new conditions.¹²¹ The court concluded that the plaintiffs had raised serious questions going to the merits on whether DHS had exceeded its authority by arguing that it could immunize employers from liability for discrimination under the Immigration Reform and Control Act; whether DHS had acted in an arbitrary and capricious manner by changing its stance on “constructive knowledge” without providing a reasoned analysis for the change; and whether DHS violated the Regulatory Flexibility Act.¹²² DHS asked for a stay in the proceedings and engaged in supplemental rulemaking, which resulted in a proposed final rule entitled “Safe-Harbor Procedures for Employers who Receive a No-match Letter: Clarification; Initial Flexibility Analysis.”¹²³ Based on its revised rule, DHS asked to have the injunction lifted so that it could implement the revised rule, but the court refused to lift the injunction

¹²⁰ Id at *3–4.

¹²¹ *AFL v Chertoff*, 552 F Supp 2d 999, 1001–02 (N D Cal Oct 10, 2007).

¹²² Id at 1006. The final reason looks to the effect of regulations on small businesses and is not relevant to this analysis.

¹²³ United States Department of Homeland Security, *Safe-Harbor Procedures for Employers Who Receive a No-Match Letter: Clarification; Initial Regulatory Flexibility Analysis*, 73 Fed Reg 15944 (2008) (made final 73 Fed Reg 63843). The new proposed rule purportedly responds to the court’s concern by providing a reasoned analysis for the change (Section II D of Proposed Rule), providing a basis for DHS’s power to investigate and pursue sanctions for immigration violations (Section II C of Proposed Rule), restating the antidiscrimination provisions (Section II E of Proposed Rule), and providing an initial regulatory flexibility analysis (Section II F and III B of Proposed Rule).

on an expedited basis.¹²⁴ As a result, the injunction is still in place, and litigation is ongoing.

In practice, the court's willingness to grant injunctive relief bolsters the argument that the receipt of no-match letters cannot be used to conclusively establish that an employee should be fired for being undocumented. In *Aramark Facility Services v SEIU Local 1877*,¹²⁵ the Ninth Circuit upheld an arbitrator's decision that an employer lacked good cause to discharge employees simply on the basis of having received a no-match letter.¹²⁶ There, the employer received a no-match letter for forty-eight of its employees, and, suspecting immigration violations, told the employees they had three days to correct the mismatches. The employer eventually terminated thirty-three employees who did not comply. The employees' union, the SEIU, filed a grievance arguing that the terminations lacked just cause and therefore violated the collective bargaining agreement. The arbitrator agreed with the union, concluding that the employer lacked "convincing information" that any of the workers were undocumented.¹²⁷

The employer sought to overturn the arbitrator's decision as contrary to public policy. It argued that the arbitrator's ruling required it to employ these workers—even after it had "constructive knowledge" that they were undocumented—thereby subjecting itself to criminal and civil sanctions under the immigration laws. The district court agreed and overturned the arbitrator's ruling on the theory that the ruling would require the employer to violate the immigration laws.¹²⁸ The appellate court reversed the district court's ruling and reinstated the arbitrator's decision. The court relied on SSA's statements that a no-match letter should not be used by itself to prove that an employee is undocumented and should not be used to take adverse action against an employee.¹²⁹ Although this case arose out of a no-match letter sent before the new DHS regulation, the appellate court noted

¹²⁴ *Court Rejects Proposal to End No-Match Lawsuit by January*, BNA (Dec 15, 2008), available at <<http://subscriber.bna.com/pic2/hr2pic.nsf/id/BNAP-7MDSPW>> (last visited Mar 29, 2009). See also NAFSA, *No-Match Letter Rule Updates*, available at <http://www.nafsa.org/regulatory_information.sec/no_match_letter_rule> (last visited Mar 29, 2009).

¹²⁵ 530 F3d 817 (9th Cir 2008).

¹²⁶ *Id.* at 832.

¹²⁷ *Id.* at 821–22 (noting that all the employees had, at the time they were hired, provided facially valid documents to show their ability to work legally in the United States by completing the federal Employee Eligibility Verification Form).

¹²⁸ *Id.*

¹²⁹ *Aramark Facility Services*, 530 F3d at 826.

that, even under the new regulations, the no-match letters could not be used by themselves to establish constructive knowledge.¹³⁰

3. ICE raids.

Beginning in December of 2006, the Immigration and Customs Enforcement ("ICE") agency has engaged in a large number of workplace raids. During these raids, employees are detained, and those found to be without proper authorization may be arrested and charged with a variety of administrative or criminal offenses. The number of enforcement actions has been steadily increasing since 2002. In 2007, 863 criminal and 4,077 administrative arrests were made.¹³¹ Administrative arrests include technical violations of immigration laws, and criminal arrests include crimes such as identity theft or employers knowingly hiring undocumented workers.¹³² The five largest and most publicized raids include: (1) the December 2006 series of raids at various Swift Company plants, which resulted in 1,282 detentions and/or arrests;¹³³ (2) the March 2007 raid at Michael Bianco, Inc. in New Bedford, Massachusetts, which resulted in over 300 employees being arrested/detained, and over 200 of those employees being sent immediately to holding facilities in Texas;¹³⁴ (3) the May 2008 raid at Agriprocessors in Postville, Iowa, resulting in

¹³⁰ *Id.* at 827–28.

¹³¹ US Immigration and Customs Enforcement, *ICE Fiscal Year 2007 Annual Report*, iv (2007), available at <http://www.ice.gov/doclib/about/ice07ar_final.pdf> (last visited Mar 29, 2009).

¹³² See US Department of Homeland Security Office of Immigration Statistics, *Annual Report Immigration Enforcement Actions: 2007*, 2–4 (2008), available at <http://www.dhs.gov/xlibrary/assets/statistics/publications/enforcement_ar_07.pdf> (last visited Mar 29, 2009).

¹³³ Julia Preston, *Immigrants' Families Figuring Out What to Do After Federal Raids*, NY Times A13 (Dec 16, 2006), available at <http://www.nytimes.com/2006/12/16/washington/16immig.html?_r=1&scp=1&sq=swift%20201,282&st=cse> (last visited Mar 29, 2009). See also Complaint for Declaratory and Injunctive Relief, *Swift & Co v ICE*, Civil Action No 2-06CV-314-J (N D Tex filed Nov 28, 2006) (seeking relief ahead of time in anticipation of impending raids); Petition for Writ of Habeas Corpus, *Yarrito v Meyers*, Civil Action No 06-cv-2494-JLK-MJW (D Colo filed Dec 13, 2006) (relating to claims arising out of December 2006 raids); Original Complaint–Class Action Request for Injunctive and Declaratory Relief and Damages, *United Food and Commercial Workers Intl Union v Chertoff*, Civil Action No 2-07CV-188-J (N D Tex filed Sept 12, 2007) (relating to claims arising out of December 2006 raids).

¹³⁴ Michael R. Triplett, *Defense Contractor Arrested, Charged With Hiring Illegal Workers in Massachusetts*, Daily Labor Rep (Mar 7, 2007). See also Amended Class Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Aguilar v ICE*, Civil Action No 07-10471-RGS (D Mass filed Mar 13, 2007) (available on LexisNexis at 2007 US Dist Ct Pleadings LEXIS 11067), *Aguilar v ICE*, 510 F3d 1 (1st Cir 2007) (relating to claims arising out of Bianco raid).

390 arrests;¹³⁵ (4) the August 2008 raid at Howard Industries in Laurel, Mississippi, resulting in 595 arrests;¹³⁶ and (5) the October 2008 raid at Columbia Farms in Greenville, South Carolina, resulting in over 300 arrests.¹³⁷

Numbers and statistics, however, do not tell the whole story. Workers who experienced the raids describe horror stories of being confronted and rounded up by ICE agents in full riot gear, carrying large guns.¹³⁸ Workers were held for hours without access to restrooms, food, water, telephones, medication, family members, priests, or lawyers.¹³⁹ Many times, ICE agents also raided the homes of workers, terrorizing the children and other nonworkers who were left there.¹⁴⁰ All workers—documented and undocumented alike—were subjected to these conditions.¹⁴¹ Undocumented immigrants were subject to additional deprivations.

¹³⁵ Susan Saulny, *Hundreds Are Arrested in U.S. Sweep of Meat Plant*, NY Times A13 (May 13, 2008), available at <http://www.nytimes.com/2008/05/13/us/13immig.html?_r=1&scp=3&sq=agriprocessors&st=cse> (last visited Mar 30, 2009). See also Petition for Writ of Habeas Corpus and Complaint for Declaratory and Injunctive Relief, *Candido v ICE*, Case No 08-CV-1015-LRR (N D Iowa filed May 15, 2008) (relating to claims arising out of Agriprocessors raid).

¹³⁶ Adam Nossiter, *Nearly 600 Were Arrested In Factory Raid, Officials Say*, NY Times A16 (Aug 27, 2008), available at <<http://www.nytimes.com/2008/08/27/us/27raid.html?scp=1&sq=howard%20595&st=cse>> (last visited Mar 30, 2009).

¹³⁷ Richard Fausset, *More than 300 arrested in immigration sweep*, LA Times A20 (Oct 8, 2008), available at <<http://articles.latimes.com/2008/oct/08/nation/na-raid8>> (last visited Mar 30, 2009).

¹³⁸ For a general description of the raids, see Nina Bernstein, *Citizens Caught Up in Immigration Raid*, NY Times B5 (Oct 4, 2007), available at <<http://www.nytimes.com/2007/10/04/nyregion/04raid.html?scp=8&sq=immigrant%20raid%20&st=cse>> (last visited Mar 30, 2007); Nossiter, *Nearly 600 Were Arrested In Factory Raid, Officials Say*, NY Times A16 (cited in note 136) (reporting about the Howard Industries raid). See also Complaint for Violations of the Fourth and Fifth Amendments to the United States Constitution, *Reyes v Alcantar*, Case No C07-2271-SBA, *2–3 (N D Cal filed Apr 26, 2007), available at <http://www.aifl.org/lac/clearinghouse_122106_ICE.shtml> (last visited Apr 2, 2009); Plaintiffs' Amended Complaint for Declaratory and Injunctive Relief and Damages, *Arias v ICE*, Civil No 07-CV-1959, *16–22 ADM/JSM (D Minn filed July 27, 2007); Amended Class Action Complaint, *Aguilar v ICE*, Civil Action No 07 CIV 8224 (JGK) (FM), *19–40 (S D NY filed Oct 4, 2007), available at <http://www.aifl.org/lac/clearinghouse_122106_ICE.shtml> (last visited Apr 2, 2009); Complaint, *Barrera v Boughton*, Civil Action No 3:07-cv-01436-RNC, *13–28 (D Conn filed Nov 26, 2007); First Amended Complaint, *Argueta v ICE*, Civil Action No 2:08-cv-1652, *11–14 (D NJ filed May 22, 2008), available at <<http://law.shu.edu/cs/j/icer raids.html>> (last visited Apr 2, 2009) (focusing on raids and subsequent treatment of immigrants done outside of the employment environment such as in-home, pretextual traffic stops, and day laborer centers). See also United Food and Commercial Workers, *National Commission on ICE Misconduct and Violations of Fourth Amendment Rights*, Draft Report, *9 (2009) (on file with U Chi Legal F).

¹³⁹ UFCW, *National Commission on ICE Misconduct*, Draft Report, *8–9, *11, *13–14, *58 (cited in note 138).

¹⁴⁰ Id at *5, *48–49.

¹⁴¹ Id at *9–10, *13–15.

They were given little or no legal assistance (in either their native language or in English);¹⁴² were often sent to detention facilities far away from home,¹⁴³ were dispatched to these facilities without the ability to contact their families or make arrangements for their children,¹⁴⁴ and were either imprisoned or deported.¹⁴⁵

In many of these situations, the unions representing the workers have stepped forward to protest the incursions into the civil rights of the workers. These lawsuits help show both effective coalition action and help to define the causes of action which can be brought against the government by union coalitions. For example, the United Food and Commercial Workers International Union ("UFCW"), in conjunction with the Center for Human Rights and Constitutional Law, filed a lawsuit challenging the Swift Company raids because ICE engaged in mass warrantless detentions instead of focusing on workers with whom it had individualized suspicions.¹⁴⁶ It also asserted that UFCW members were detained for hours, not advised of legal rights, were refused representation, and were coerced into waiving their statutory and constitutional rights.¹⁴⁷ Specifically, the plaintiffs alleged causes of action for violations of, among other things, the First, Fourth, Fifth, and Seventh Amendments to the United States Constitution. The causes of action also included claims for damages under *Bivens*¹⁴⁸ and the Federal Tort Claims Act.¹⁴⁹ In bringing the lawsuit, the UFCW clearly represented all of its members—both documented and undocumented. The union also argued that it was harmed as an organization because the un-

¹⁴² Id at *11, *17–18.

¹⁴³ UFCW, *National Commission* at *17–18 (cited in note 138).

¹⁴⁴ Id at *16, *20–23.

¹⁴⁵ Id at *18.

¹⁴⁶ Complaint, *United Food and Commercial Workers Intl Union v Chertoff* at *8 (cited in note 133).

¹⁴⁷ Id at *11.

¹⁴⁸ Id at *14–15. Named after *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 US 388 (1971), these claims provide a civil damage remedy for constitutional violations in certain instances. The importance of these claims is discussed in Section III.

¹⁴⁹ 28 USC §§ 1346(b), 2671–80 (2006). The FTCA sets forth the terms and limits on tort suits against the United States for negligence of its agents. For similar cases bringing FTCA claims, see Complaint for Violations of the Fourth and Fifth Amendments to the United States Constitution, *Reyes v Alcantar*, Case No C07-2271-SBA, *2–3 (N D Cal filed Apr 26, 2007), available at <http://www.aifl.org/lac/clearinghouse_122106_ICE.shtml> (last visited Apr 2, 2009) (cited in note 138); Complaint, *Barrera v Boughton*, at *13–28 (cited in note 138); First Amended Complaint, *Argueta v ICE*, at *11–14 (cited in note 138).

lawful and unconstitutional actions of the government prevented it from performing its mission.¹⁵⁰

In these lawsuits, the UFCW is developing two legal theories to help protect the civil rights of low-wage workers. The first theory serves to protect the civil rights of equal protection and nondiscrimination. The lawsuit's Fourth and Fifth Amendment claims focus on the need for law enforcement officials and immigration officials to have individualized suspicion to detain or arrest workers.¹⁵¹ In addition, they argue that simply *looking Latino* is not sufficient to create a reasonable suspicion that someone is undocumented for Fourth Amendment purposes¹⁵² and that "racial profiling or otherwise targeting individuals for interrogation and/or arrest during an immigration raid solely or predominantly because of their race constitutes a violation of their due process rights [under the Fifth Amendment]."¹⁵³ Requiring the government to have individualized suspicion helps all low-wage workers, and the racial profiling argument helps low-wage workers of color, in particular.

The second legal theory developed in the lawsuits focuses on Fifth Amendment due process rights. Under this theory, the union coalition argues that workers must be advised of the reason for their arrest and their right to be represented by an attorney.¹⁵⁴ In addition, the union coalition argues that workers must have access to lawyers and qualified interpreters.¹⁵⁵ These arguments can help protect procedural due process rights for all low-wage workers.

The UFCW has also launched an important initiative called The National Commission on ICE Misconduct and Violations of

¹⁵⁰ Complaint, *United Food and Commercial Workers International Union v Chertoff*, at *3 (cited in note 133) ("The UFCW goals and programs seek to improve the lives and working conditions of workers and their families and communities, and to protect the legal rights of its members, particularly when they are at work.").

¹⁵¹ UFCW, *National Commission on ICE Misconduct*, Draft Report, at *43–45, *50 (cited in note 133).

¹⁵² *Id.* at *45. See also *United States v Manzo-Jurado*, 457 F3d 928, 935 n 6 (9th Cir 2006) ("[I]n regions heavily populated by Hispanics, an individual's apparent Hispanic ethnicity is not a relevant factor in the reasonable suspicion calculus."), citing *United States v Montero-Camargo*, 208 F3d 1122, 1132 (9th Cir 2000).

¹⁵³ UFCW, *National Commission on ICE Misconduct*, Draft Report, at *50 (cited in note 138).

¹⁵⁴ *Id.* at *53–54.

¹⁵⁵ *Id.* at *53–55. During interrogation, workers were not allowed to speak to anyone, including attorneys. Access to lawyers was also problematic because after arrest the workers were transported hundreds of miles away from their retained counsel.

Fourth Amendment Rights.¹⁵⁶ Styled after other citizen-based civil rights commissions, this Commission has held a series of regional hearings to investigate, gather testimony, and produce a report on ICE misconduct during workplace raids. The multi-ethnic commissioners include a state governor, immigrant human rights and civil rights leaders, religious leaders, an officer of the AFL-CIO, and professors. The purpose of the project is “to ensure that workers do not check their constitutional rights at the door when they respond to work.”¹⁵⁷ Testimony has come from a wide range of workers, including one citizen and veteran of the Korean War who said, “I saw all our civil rights being taken away from us in the raid. I want to do something about it to bring back those rights to people.”¹⁵⁸

The ability of people to work together in coalition is found in the introduction to the Commission’s Draft Report, which states:

In writing this report, the Commission hopes to start a new dialogue about immigration, workers’ rights and our core values as a nation. As we put pen to paper, we realized that the most powerful and effective voices were those who bore witness to the actions of ICE in their workplaces and communities.

Their eloquence and courage moved us. The ability of these workers—both immigrant and native born—to move past their differences, to draw strength from their diversity and to form a common bond in the workplace, should inspire us as a nation to follow their lead.¹⁵⁹

In addition to the constitutional violations discussed in the lawsuits, the Commission also brought to light violations of workers’ rights exacerbated by the raids. Several raids appeared to have been conducted in retaliation for workers asserting their statutory labor rights, either by complaining, filing claims or going on strike.¹⁶⁰ Other commentators have reported on how the raids are used to drive wedges between low-wage workers, espe-

¹⁵⁶ Information about the National Commission within the United Food and Commercial Workers website is available at <<http://www.ufcw.org/icemisconduct/index.cfm>> (last visited May 13, 2009).

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ UFCW, *National Commission on ICE Misconduct*, Draft Report, at *7 (cited in note 138).

¹⁶⁰ *Id.* at *31–33.

cially between immigrants and other people of color.¹⁶¹ In at least one instance, however, the UFCW has successfully used the raids as a way to unite Latino immigrant and African American workers.¹⁶² The Commission also found that employers were not prosecuted for labor violations, at least partially because no effort was made to keep the undocumented workers in the country to testify to labor abuses.¹⁶³ The Commission Report will present specific recommendations to help protect these civil rights for low-wage workers.¹⁶⁴

C. Domestic and International Challenges Working in Tandem: Responses to *Hoffman*

In 2002, the Supreme Court decided *Hoffman Plastic Compounds, Inc v NLRB*.¹⁶⁵ In *Hoffman*, a union supporter was discharged during an organizing campaign in violation of the NLRA. Although such an employee would normally be entitled to reinstatement and back pay, the Court ruled that the employee could not be reinstated and could not collect back pay because he did not have the legal right to work in the country.¹⁶⁶ In so doing, it effectively decided that undocumented workers were entitled to fewer remedies than documented workers¹⁶⁷ and made it easier for employers to exploit undocumented workers without suffering adverse consequences.¹⁶⁸ The decision was met with strong criticism and reaction by a broad coalition of actors. Their response incorporated both international and domestic strategies and illustrates how these various strategies can work in tandem.

On the international side, advocates turned first to the ILO. In the 1990s, the employer, worker, and governmental members

¹⁶¹ See David Bacon, *The Politics Driving Mississippi's ICE Raid*, AlterNet (Sept 2, 2008), available at <http://www.alternet.org/immigration/97279/the_politics_driving_mississippi's_ice_raid/> (last visited Mar 28, 2009); David Bacon, *After ICE Raid, Mississippi Workers Labor to Overcome Racial Divisions*, New America Media (Sept 3, 2008), available at <http://news.newamericamedia.org/news/view_article.html?article_id=4d57c6d08246f09b9ed7877bac7a4a56> (last visited Mar 28, 2009).

¹⁶² David Bacon, *Unions Come to Smithfield*, The American Prospect (Dec 17, 2008), available at <http://www.prospect.org/cs/articles?article=unions_come_to_smithfield> (last visited Mar 28, 2009).

¹⁶³ UFCW, *National Commission on ICE Misconduct*, Draft Report, at *36 (cited in note 138).

¹⁶⁴ Id at *59–60.

¹⁶⁵ 535 US 137 (2002).

¹⁶⁶ Id at 149.

¹⁶⁷ Id at 149–51.

¹⁶⁸ Id at 153–54 (Breyer dissenting) (noting that employers may now violate labor laws at least once with impunity).

of the ILO issued a "Declaration on Fundamental Principles and Rights at Work."¹⁶⁹ The document enunciated four principles which all members agreed constitute the four basic human rights of workers: freedom of association and protection of the right to organize and collectively bargain, freedom from forced labor, equality in employment, and abolition of child labor.¹⁷⁰ In response to *Hoffman*, the AFL-CIO and the Confederation of Mexican Workers brought a challenge to the ILO, alleging a violation of the right to freedom of association and protection of the right to organize and bargain collectively. The ILO's Committee on Freedom of Association concluded that the remedy scheme did not adequately protect these rights and asked the United States to reconsider its policies.¹⁷¹ A domestic coalition of immigrant rights advocates also filed an amicus curiae brief to challenge *Hoffman* under other international human rights laws.¹⁷² These challenges helped to establish a "workers' rights as human rights" model for addressing the civil rights of low-wage workers.

On the domestic front, scholars began to use *Hoffman* as a way to understand the interrelatedness of immigration and labor laws to a greater extent.¹⁷³ I argued that *Hoffman* could be a jumping-off point for beginning to consider ways in which the treatment of undocumented immigrant workers could be considered a violation of the Thirteenth Amendment of the United States Constitution because the creation of a caste of workers of color laboring beneath the floor for free labor replicated the

¹⁶⁹ Lee Swepston, *Closing the Gap between International Law and U.S. Labor Law*, in James A. Gross, ed, *Workers' Rights as Human Rights* 53, 58–59 (Cornell 2003).

¹⁷⁰ *Id.* at 59.

¹⁷¹ See International Labour Organization, *332nd Report of the Committee on Freedom of Association*, 148–60 (Nov 2003), available at <<http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/pdf/gb-7.pdf>> (last visited Mar 31, 2009).

¹⁷² Sarah Cleveland, Beth Lyon, and Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 Seattle J Soc Just 795, 796–97 (2003). The decision was also found to violate the human rights of workers, under the Charter of the Organization of the American States and other customary international law, by the Inter-American Court of Human Rights. Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 2003*, (Dec 29, 2003), available at <<http://iachr.org/annualrep/2003eng/toc.htm>> (last visited Mar 31, 2009); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 Georgetown Immig L J 651, 678–79 (2004).

¹⁷³ See, for example, Ruben J. Garcia, *Ghost Workers in an Interconnected World: Going Beyond the Dichotomies of Domestic Immigration and Labor Laws*, 36 Mich J L Reform 737, 739–41 (2003); Christopher David Ruiz Cameron, *Borderline Decisions: Hoffman Plastic Compounds, The New Bracero Program, and the Supreme Court's Role in Making Federal Labor Policy*, 51 UCLA L Rev 1, 2–7 (2003).

harms that the Thirteenth Amendment sought to eliminate.¹⁷⁴ My work complemented other ongoing work focusing on how the Thirteenth Amendment could be used to protect other civil rights of low-wage workers.¹⁷⁵ Thus, a new theoretical framework grounded in the Thirteenth Amendment to the Constitution began to emerge in reaction to *Hoffman*.

On a more pragmatic front, many domestic coalitions were also responding to *Hoffman*. The work of the Coalition of Immigrant Workers Advocates ("CIWA") illustrates what can be done. The CIWA, established by the Maintenance Cooperation Trust Fund, collaborates with the Garment Worker Center, Sweatshop Watch, Coalition of Humane Immigrant Rights of Los Angeles, National Day Laborer Organizing Network, Korean Immigrant Workers Advocate, the Legal Aid Foundation of Los Angeles, and the UCLA Labor Center.¹⁷⁶ CIWA responded to *Hoffman* with a strategy focused on "creating and maintaining a nexus between legal, advocacy, and organizing work," and "the importance of creating strong leadership among immigrant workers."¹⁷⁷ Partnering with the California Federation of Labor, California Rural Legal Assistance, the National Immigration Law Center, the Mexican American Legal Defense and Educational Fund ("MALDEF") and other labor organizations and unions, they pushed the California legislature to pass Senate Bill 1818, which amended the labor codes of California to "reaffirm that '[a]ll protections, rights, and remedies available under state law, except any reinstatement remedy prohibited by federal law, are available to all individuals regardless of immigration status who have applied for employment or who have been employed in [California].'"¹⁷⁸ They also collaborated with the California Department of Labor Standards Enforcement to create the Office of Low

¹⁷⁴ For a general discussion, see Ontiveros, 18 *Georgetown Immig L J* 651 (cited in note 172). See also Ontiveros, *Female Immigrant Workers and the Law* at 241–42 (cited in note 10) (applying the idea to immigrant workers in general); Maria L. Ontiveros, *Noncitizen Immigrant Labor and the Thirteenth Amendment: Challenging Guest Worker Programs*, 38 *U Toledo L Rev* 923 (2007) (applying the idea to guest worker programs).

¹⁷⁵ See, for example, Lea S. VanderVelde, *The Labor Vision of the Thirteenth Amendment*, 138 *U Pa L Rev* 437 (1989); James Gray Pope, *Labor's Constitution of Freedom*, 106 *Yale L J* 941 (1997); Kathleen Kim, *Psychological Coercion in the Context of Modern-Day Involuntary Labor: Revisiting United States v. Kozminski and Understanding Human Trafficking*, 38 *U Toledo L Rev* 941 (2007); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 *Duke L J* 1609 (2001).

¹⁷⁶ Victor Narro, *Impacting Next Wave Organizing: Creative Campaign Strategies of the Los Angeles Worker Centers*, 50 *NY L Sch L Rev* 465, 497 (2005–06).

¹⁷⁷ *Id.* at 501–02.

¹⁷⁸ *Id.* at 504.

Wage Industries.¹⁷⁹ CIWA has become a model for coalitions collaborating with governments to improve labor enforcement.¹⁸⁰

III. HOW THESE CHALLENGES ADDRESS THE OBSTACLES TO PROTECTION OF LOW-WAGE WORKERS

When looking at lawyering for social change, recent legal scholarship has focused on *either* the need to establish a rights framework¹⁸¹ *or* the need for social movement mobilization¹⁸² in order to generate change. In many ways, these arguments echo the social science debate between collective behavior and resource mobilization theorists.¹⁸³ While some legal scholars focus on the need for a lawyer, established rights paradigm and others focus more on the need for lawyers to allow clients to create a movement, social change theorists would argue that both are necessary.¹⁸⁴ This Section analyzes the ways in which the lawsuits discussed above and the coalitions which brought them can be seen as providing both a rights framework and a space for social mobilization to help low-wage workers.

These lawsuits can be analyzed to understand how they help address the obstacles of lack of a coherent legal framework and lack of an identifiable change agent. This Section argues that the international treaties and constitutional theories can establish a workable rights framework for advocates who wish to protect the civil rights of low-wage workers. It also argues that coalitions can become the identifiable change agents. Labor unions, in the process, can take on a more active role as advocates for worker rights vis-à-vis the government, not just as representatives for better terms and conditions of employment vis-à-vis employers.

¹⁷⁹ Janice Fine, *Worker Centers: Organizing Communities at the Edge of the Dream*, 50 NY L Sch L Rev 417, 436 (2005–06).

¹⁸⁰ Michele LeVoy and Nele Verbruggen, *Ten Ways to Protect Undocumented Migrant Workers*, Platform for International Cooperation on Undocumented Migrants, 95–96 (2005).

¹⁸¹ For an extensive compilation of scholarship on the debate over a rights framework in constitutional theory and social movement mobilization, see Nice, 35 Fordham Urban L J 629 (cited in note 11).

¹⁸² For a recent discussion focusing on the social movement aspect of lawyering for social change, see Symposium, *Race, Economic Justice, and Community Lawyering in the New Century*, 95 Cal L Rev (2007), especially Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 Cal L Rev 1879 (2007); Jennifer Gordon, *The Lawyer is not the Protagonist: Community Campaigns, Law, and Social Change*, 95 Cal L Rev 2133 (2007).

¹⁸³ See discussion in Section I of this Article.

¹⁸⁴ See discussion in Section I of this Article.

A. Lack of a Coherent Legal Framework

Both international and domestic law can provide a rights framework to protect the civil rights of low-wage workers. The rights framework found at the international level can be articulated as either a list of fundamental labor rights for North American workers under the NAALC or as the concept of labor rights as human rights under the ILO. These frameworks have already been fairly well established internationally and are starting to take effect in domestic courts, as well. The domestic rights framework has been developing as a patchwork of constitutional rights. This Section argues that one way to give coherency to that patchwork of constitutional rights is through a robust definition and use of the Thirteenth Amendment.

1. International standards: Fundamental labor rights under the NAALC and labor rights as human rights under the ILO.

The submissions brought under the international treaties have begun to create a legal framework for challenging government incursions into the civil rights of low-wage workers. Those brought under the NAALC have begun to establish the principles found in the treaty as a set of North American workers' rights.¹⁸⁵ These rights include the labor principles of freedom of association, the right to organize, the right to bargain collectively, the right to strike, prohibition of forced labor, protection of child workers, provision of minimum employment standards, elimination of employment discrimination, equal pay for men and women, prevention of and compensation for occupational injuries and illness, and protection of migrant workers, as well as the Article 5 guarantee of transparent and timely adjudication of labor claims.

The case studies discussed in Section II of this Article show how the international justice system has been used to protect the civil rights of low-wage workers through the use of these principles. Because they apply to all North American workers, the principles provide rights for low-wage workers, including those left out of the "protected category" analysis of equal protection

¹⁸⁵ See, for example, Ontiveros, *Female Immigrant Workers and the Law* at 249–50 (cited in note 10); Tamara Kay, *Labor Transnationalism and Global Governance: The Impact of NAFTA on Transnational Labor Relationships in North America*, 111 *Am J Sociology* 715, 723 (2005).

and Title VII law, as well as those who work in situations excluded from the labor laws which apply to some, but not all workers.¹⁸⁶

The advances described above occurred as a result of international negotiation, moral suasion, and threats of more severe penalties, rather than through a legally imposed remedy. It can be argued, though, that American courts are also beginning to recognize the NAALC as a legitimate tool to help low-wage immigrant workers. When the government of Mexico sued, in an American court, to protect Mexican workers in a poultry plant in Maine, the court ruled that the Mexican government lacked standing and referred to the NAALC as the appropriate remedy.¹⁸⁷ Thus, courts are beginning to recognize the NAALC principles as a potential rights framework for all workers in North America.

The cases brought under the ILO and other treaties focus on the idea of labor rights as human rights. Three of the four fundamental labor rights identified as human rights by members of the ILO (including the United States)—freedom of association, including the right to organize and collectively bargain; freedom from forced labor; and nondiscrimination—can all be used to help defend civil rights of low-wage workers.

Rebecca Smith, of the Immigrant Worker Project, National Employment Law Project, argues,

[the] human rights paradigm is a means to develop a shared vision of human rights, to expand the body of international law, and to build leadership in and unite communities of workers on the ground. The incremental steps that can be taken now can help build towards a future set of policy principles shared across borders.¹⁸⁸

She argues that a “human rights” approach can be used to overcome the limited legal construction given to constitutional and statutory civil rights and labor rights in the United States.¹⁸⁹ Thus, these concepts can protect the civil rights of low-wage workers. This approach also helps to develop coalitions between workers because workers from other countries, especially Latin

¹⁸⁶ See Section I A.

¹⁸⁷ *Estados Unidos Mexicanos v Decoster*, 229 F3d 332, 341–43 (1st Cir 2000).

¹⁸⁸ Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 Stan J CR & CL 285, 287 (2007).

¹⁸⁹ *Id* at 295–96.

America, bring with them an understanding of human rights that is broadly understood to include worker rights as human rights.¹⁹⁰

Once established, these international norms can be used to protect the civil rights of low-wage workers in United States courts. A rich body of scholarship exists to explain how these treaties can be used.¹⁹¹ Both state, and especially, federal courts are increasingly citing to U.N. documents in their decisions.¹⁹² Recent cases¹⁹³ decided by the United States Supreme Court that cite foreign and international law include *Roper v Simmons*,¹⁹⁴ *Lawrence v Texas*,¹⁹⁵ and *Atkins v Virginia*.¹⁹⁶ The concurrence in the Supreme Court case, *Grutter v Bollinger*,¹⁹⁷ also looked to international law in looking at whether affirmative action violated nondiscrimination principles. Thus, the labor rights as human rights framework established in the ILO can be helpful to protect the civil rights of low-wage workers.

2. Constitutional protection for workers: From a patchwork of theories to a coherent theory under the Thirteenth Amendment.

The case studies have also shown coalitions using the United States Constitution to find protection for the civil rights of low-wage workers. The equal protection doctrine was used to protect the noncitizen airport screeners, and the First Amendment was used to protect the freedom of association and free speech rights of the federal employee airport screeners. The due process clause was used to protest the arbitrary action taken by DHS in the no-

¹⁹⁰ *Id* at 297–98.

¹⁹¹ See, for example, Connie de la Vega and Conchita Lozano-Batista, *Advocates Should Use Applicable International Standards to Address Violations of Undocumented Migrant Workers' Rights in the United States*, 3 *Hastings Race & Poverty L J* 35 (2005).

¹⁹² Paul Hellyer, *U.N. Documents in U.S. Case Law*, 99 *L Libr J* 73, 85 (2007) (showing the number of such citations in five year increments from 1951 to 2005).

¹⁹³ These cases are gathered in Beth Lyon, *Tipping the Balance: Why Courts Should Look to International and Foreign Law on Unauthorized Immigrant Worker Rights*, 29 *U Pa J Intl L* 169, 206–207 (2007).

¹⁹⁴ 543 US 551, 578 (2005) (banning the imposition of capital punishment for juveniles).

¹⁹⁵ 539 US 558, 576–77 (2003) (overturning criminal bans on sodomy).

¹⁹⁶ 536 US 304, 316 n 21 (2002) (banning the imposition of capital punishment for mentally retarded defendants).

¹⁹⁷ 539 US 306, 344 (2003) (Ginsburg concurring), cited in David Weissbrodt, *Remedies for Undocumented Noncitizens in the Workplace: Using International Law to Narrow the Holding of Hoffman Plastic Compounds, Inc. v. NLRB*, 92 *Minn L Rev* 1424, 1444 (2008).

match case. The lawsuits brought in response to the ICE raids look to protection under the Fourth, Fifth, and Seventh Amendments.

Many of these cases have also used a *Bivens* claim to seek damages against governmental actors. Named after *Bivens v Six Unknown Named Agents of Federal Bureau of Narcotics*,¹⁹⁸ these claims provide a cause of action for civil damages against a federal official based on the violation of a constitutional right, absent any statutory or other remedy. The original *Bivens* case allowed plaintiffs to recover damages against federal narcotics agents who entered the defendant's apartment without a warrant or probable cause. *Bivens* has been extended to provide a private cause of action for violations of some other constitutional rights, notably the Eighth Amendment¹⁹⁹ and Fifth Amendment,²⁰⁰ but its use has also been in decline.²⁰¹ The ICE cases which bring and develop *Bivens* claims²⁰² are useful because they help keep the *Bivens* theory alive. The *Bivens* theory is important because, by providing for monetary damages for the violation of civil rights, it establishes the importance of the rights for an individual. The financial exposure also serves as an extra deterrent to violations of those rights.

The constitutional claims that have been brought in these cases each individually make sense; however, they offer a patchwork of claims to protect low-wage workers in a variety of situations without a unifying theme or rights framework. Instead, or in addition, advocates should begin to use the Thirteenth Amendment as a coherent legal theory to protect the civil rights of low-wage workers. The Thirteenth Amendment has the moral resonance of a rights framework that can work.²⁰³ It provides a rallying cry for the protection of workers. Professor James Pope has suggested that the Thirteenth Amendment should be to the

¹⁹⁸ 403 US 388 (1971).

¹⁹⁹ *Carlson v Green*, 446 US 14, 17, 24–25 (1980).

²⁰⁰ *Davis v Passman*, 442 US 228, 243–44 (1979).

²⁰¹ Lumen N. Mulligan, *Why Bivens Won't Die: The Legacy of Peoples v. CCA Detention Centers*, 83 Denver U L Rev 685, 686–87 (2006).

²⁰² Cases alleging a substantial number of *Bivens* claims include: Complaint, *Arias v ICE* at *25–27 (cited in note 138); Complaint, *Argueta v ICE* at *43–54 (cited in note 138); Complaint, *Barrera v Boughton* at *46–49 (cited in note 138).

²⁰³ For a general discussion, see Pope, Kellman, and Bruno, 16 New Labor F 9 (cited in note 3); Maria L. Ontiveros, *Immigrant Rights and the Thirteenth Amendment*, 16 New Labor F 26 (2007).

labor movement what the Second Amendment is to the National Rifle Association.²⁰⁴

Theoretically, the Thirteenth Amendment protects the civil rights of low-wage workers in many ways. Professor Lea VanderVelde has shown how the Thirteenth Amendment was originally meant to establish a floor for free labor and eliminate labor subjugation in general.²⁰⁵ Professor James Pope has analyzed how the Thirteenth Amendment provides for labor rights, such as the rights to organize, strike, and collectively bargain.²⁰⁶ Professor Risa Goluboff has shown how the history of the Thirteenth Amendment fits with a vision of racial equality in the workplace.²⁰⁷ Professor Kathleen Kim has focused on the role of the Thirteenth Amendment in combating trafficking and coerced labor.²⁰⁸ I have argued the amendment was meant to protect civil rights, citizenship rights, worker rights, and human rights in a way that protects immigrant workers, especially undocumented workers and workers on “guest worker” visas.²⁰⁹

Thus, the Thirteenth Amendment encompasses the variety of constitutional protections found in the suits brought to challenge governmental action. It reaches the equal protection claims of the airport screeners under the VanderVelde, Goluboff, and Ontiveros analyses, and their First Amendment claims under the Pope analysis. It reaches the no-match claims under the VanderVelde and Goluboff approaches. It reaches the issues raised in the ICE Raids cases under the VanderVelde and Ontiveros frameworks. Under the Ontiveros, Goluboff, and Pope approaches, it also supports the work done in the international venues. By encouraging advocates to use the Thirteenth Amendment, in addition to their other claims, a unifying, coherent framework to

²⁰⁴ Pope, Kellman, and Bruno, 16 New Labor F 9 (cited in note 3).

²⁰⁵ VanderVelde, 138 U Pa L Rev at 441–48 (cited in note 175).

²⁰⁶ For a general discussion, see Pope, 106 Yale L J 941 (cited in note 175); James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921–1957*, 102 Colum L Rev 1 (2002).

²⁰⁷ For a general discussion, see Goluboff, 50 Duke L J 1609 (cited in note 175); Risa L. Goluboff, *Race, Labor and the Thirteenth Amendment in the 1940s Department of Justice*, 38 U Toledo L Rev 883 (2007). See also Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 Fordham L Rev 981, 998–1035 (2002).

²⁰⁸ For a general discussion, see Kim, 38 U Toledo L Rev 941 (cited in note 175).

²⁰⁹ For a general discussion, see Ontiveros, 18 Georgetown Immig L J 651 (cited in note 172); Ontiveros, 38 U Toledo L Rev 923 (cited in note 175); Maria L. Ontiveros, *Immigrant Workers and the Thirteenth Amendment*, in Alexander Tsesis, ed, *Promises of Liberty: Thirteenth Amendment Abolitionism and Its Contemporary Vitality* (Columbia forthcoming 2010).

protect low-wage workers can emerge from the patchwork of constitutional claims.

B. Lack of an Identifiable Change Agent

Having a coherent legal theory or rights framework solves part of the problem facing low-wage workers, but it is only half the battle. As social movement theory suggests, there must also be an organization or group that embraces these rights. The labor union coalitions filing suits against the government can play this role. In addition, the lawsuits can help transform unions into a change agent for low-wage workers, even if they do not represent low-wage workers in a specific workplace.

1. Coalitions.

As illustrated by the case studies above, coalitions have been forming to protect the civil rights of low-wage workers. On the international front, these coalitions can and are becoming the agents of change. Sociologist Tamara Kay has documented how the NAALC submission process has helped foster strong relationships between unions in Canada, the United States, and Mexico and created transnational unions.²¹⁰ Professor Kimberly Nolan Garcia has studied the conditions under which NAALC submissions are more likely to be accepted and processed and emphasized the importance of coalitions.²¹¹ She found that submissions that are brought by groups of transnational advocates—as opposed to groups of national advocates—are more likely to be accepted.²¹² In addition, the acceptance of submissions is positively affected by testimony of workers, especially testimony that can be gathered by coalitions. She argues:

The inclusion of worker testimony as a filing strategy in petitions represents a natural convergence between the kinds of work labor rights and human rights groups perform within countries and the engagement of the petition process. Collection of testimony from affected groups to document abuses is at the core of the mission of some labor rights and human rights groups. Labor solidarity

²¹⁰ For a general discussion, see Kay, 111 Am J Sociology 715 (cited in note 185).

²¹¹ Kimberly A. Nolan Garcia, *Transnational Advocates and Labor Rights Enforcement in the North American Free Trade Agreement*, under review at Intl Stud Q at *16–24 (Sept 2008) (unpublished manuscript on file with U Chi Legal F).

²¹² Id at *18–20.

NGOs, for example, collect documentary evidence about violations in factories from the workers that suffer them, including instances of violence against workers, as they build momentum for campaigns that draw attention to conditions inside the factory.²¹³

Finally, her research has found that conditions in workplaces begin to improve as soon as submissions are filed.²¹⁴ She concludes, "This analysis further establishes that the usefulness of the NAALC is not in the strength or weakness of its enforcement mechanisms, but in the way that different groups engage the process to shed light on different labor rights issues and cases."²¹⁵

At the domestic level, coalitions have also become vitally important.²¹⁶ The various coalition members together become a change agent to help low-wage workers. Immigrant worker groups develop trust with these workers and provide an insight into the techniques that best fit their experiences. Immigrant rights groups possess expertise in the legal arguments which best help the workers. Established labor unions provide resources and power to help improve situations. The coalitions are also an important way to overcome the distrust and negative history of the relationship between unions and minority workers.

2. Changing the role of traditional labor unions.

Most of the coalitions discussed in this Article have included some traditional labor unions. The successes point to a new role for traditional labor unions in challenging the government to protect workers rights, not just challenging employers to increase the economic well-being of workers.²¹⁷ In the NAALC and ILO submissions, unions challenged the interpretations and administration of a wide variety of United States labor laws under international law. In the airport screeners' case, they challenged the government's post 9/11 citizenship requirement and governmental restrictions on organizing. Finally, in the ICE raids case,

²¹³ *Id* at *28.

²¹⁴ *Id* at *30.

²¹⁵ Garcia, *Transnational Advocates* at *29 (cited in note 211).

²¹⁶ Smith, 3 Stan J CR & CL at 307–12 (cited in note 188) (discussing coalitions in post-Katrina New Orleans and domestic workers).

²¹⁷ For a general discussion, see Maria L. Ontiveros, *Out of the Shadows and into the Spotlight: Immigrants and Organized Labor*, 11 WorkingUSA: J Labor & Socy 157 (2008).

they challenged the administration of immigration raids carried out by the government.

In each of these cases, the union is taking on a new and broader role as an advocate for workers' civil rights vis-à-vis the government. In the complaints filed by the unions, the unions explain their purpose in these broader terms. The opinion in the airport screeners' case also emphasizes the propriety of this mission. Although this role evidences a shift from the traditional work of American unions, it is an appropriate role for unions to play in civil society. Unions develop and emphasize participation by members in the workplace and in society.²¹⁸ Union members participate in deliberative activities at work and outside of work more than nonmembers, discuss workplace issues and elections at a greater level than others, and spur debate by the media and the government.²¹⁹ These actions are consistent with a union challenging governmental treatment of all workers, including low-wage workers. It is also consistent with the possibility of an independent political labor party, something which is commonplace in other countries and occasionally discussed in the United States.²²⁰ As Cornel West wrote:

A revitalized labor movement is the prerequisite for rejuvenated social motion and momentum in this country. . . . [The labor movement] happen[s] to be a group of Americans who tilt in a radical democratic direction to the degree to which they know that their relative powerlessness at the workplace means they're unable to live lives of decency and dignity without being organized and mobilized and bringing power and pressure to bear against management.²²¹

As traditional unions take on this role, the idea of "social movement unionism" can be embraced and can evolve. Social movement unionism, traditionally speaking, focuses on "a type of

²¹⁸ Peter Levine, *The Legitimacy of Labor Unions*, 18 Hofstra Labor & Empl L J 529, 549 (2001) (emphasizing the importance of joining organizations to civil society).

²¹⁹ Id at 567–68.

²²⁰ Joel Rogers, "The Folks Who Brought You the Weekend" *Labor and Independent Politics*, in Steven Fraser and Joshua B. Freeman, eds, *Audacious Democracy* 247, 255–261 (Houghton Mifflin 1997).

²²¹ Cornel West, *Audacious Democrats*, in Fraser and Freeman, eds, *Audacious Democracy* at 265–66 (cited in note 220).

unionism based on member involvement and activism."²²² Rather than being a theory of labor relations, it is

a descriptive term for an observable social force that occasionally, and recurrently, surfaces in a variety of different employment situations . . . [and entails] labor as a social movement. . . . Social movement organizations broadcast agendas for social change and mobilize, support, and deploy networks of membership and collective action in support of those agendas.²²³

As workers see themselves as advocates for workers-as-workers vis-à-vis the government, and as unions take on this role, social movement unionism *for* low-wage workers can be a way to rekindle the labor movement.²²⁴

For instance, when traditional unions and worker centers operate together they have experienced a great deal of success.²²⁵ The concept of open source unionism, practiced by the AFGE, also fits into this model, and it could be beneficial for the AFGE to partner more closely with immigrant and minority groups. Finally, the ICE Raids Commission utilizes a traditional civil rights procedure and a broad based commission membership to attain these ends.

The development of social movement unionism, however, is only the first step, because union members, once mobilized, also must focus on the values or rights for which they are mobilizing. Sometimes they will mobilize in support of and in coalition with other social movement groups, such as immigrants, women, or racial minorities. When they mobilize for themselves as low-wage workers, though, it is useful to have a set agenda. They must have a rights framework around which to mobilize. The international treaties and the United States Constitution both provide a

²²² Lowell Turner and Richard W. Hurd, *Building Social Movement Unionism: The Transformation of the American Labor Movement*, in Lowell Turner, Harry C. Katz, and Richard W. Hurd, eds, *Rekindling the Movement: Labor's Quest for Relevance in the 21st Century* 9, 11 (Cornell 2001).

²²³ Paul Johnston, *Organize for What? The Resurgence of Labor as a Citizenship Movement*, in Turner, Katz, and Hurd, eds, *Rekindling the Movement* at 28–29 (cited in note 222).

²²⁴ But see Harry C. Katz, *Whither the American Labor Movement?* in Turner, Katz, and Hurd, eds, *Rekindling the Movement* at 339–41 (cited in note 222) (critiquing the social movement unionism claim). However, Katz focuses on social movement unionism in general, rather than social movement unionism for low-wage workers.

²²⁵ Fine, *Worker Centers* at 227–31 (cited in note 26).

rights framework or coherent legal theory around which they can mobilize to help themselves.

IV. CONCLUSION

Much good work is being done to help protect the civil rights of low-wage workers. By focusing on the specific challenges being made to governmental incursions into the civil rights of low-wage workers, this Article has suggested that a strategic plan can emerge. Advocates are starting to develop a coherent set of legal principles, found in international law and the United States Constitution, to protect the civil rights of low-wage workers. Specific change agents, focusing on low-wage workers, have developed in the form of labor union coalitions. Traditional labor unions, as part of these coalitions, are also embracing a social movement role of advocating for low-wage workers vis-à-vis the government.

A successful social movement needs both a coherent legal theory or rights framework and an identifiable change agent. The labor union coalitions currently engaged in various lawsuits against the government are providing both of these necessary elements. If these processes are recognized and continued, the civil rights of low-wage workers can be protected, rather than ignored, by our legal system.