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"AGRICULTURAL UNDERDOGS"¹ AND INTERNATIONAL AGREEMENTS: THE LEGAL CONTEXT OF AGRICULTURAL WORKERS WITHIN THE RURAL ECONOMY

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As soon as cheap labor from Europe was stopped, many lines of American industry which had been run on a cheap-labor basis turned to the Mexican supply. For here, right at our doors, was a great reservoir of the cheapest and most docile labor. The Mexican "peon" (Indian or mixed-breed) is a poverty-stricken, ignorant, primitive creature, with strong muscles and with just enough brains to obey orders and produce profits under competent direction.²

INTRODUCTION

On the basis of its perceived uniqueness, the agriculture industry sustains an impressive array of federal entitlements that have long contributed to its continued expansion and growth.³ To accommodate labor demands, offsets from income tax obligations and innumerable subsidies and exemptions from labor and immigration laws extend immeasurable assistance

1. DWIGHT MACDONALD, HENRY WALLACE: THE MAN AND THE MYTH 47 (2d. 1948) (characterization of agricultural workers during promulgation of agricultural relief legislation). During that period, approximately three million wageworkers on farms, thirteen million individuals in tenant families, and three million in sharecropping families were included within the rural population. Agricultural legislative benefits, however, excluded wageworkers, and members of tenant and sharecropper families, in part because they were not landowners of agricultural property. *Id.* at 46.

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2. LOTHROP STODDARD, RE-FORGING AMERICA: THE STORY OF OUR NATIONHOOD 214 (1927).

3. See, e.g., JIM CHEN, AGRICULTURAL PUBLIC LAW, CASES AND MATERIALS (1994); DON PAARLBERG, FARM AND FOOD POLICIES: ISSUES OF THE 1980s 1-7 (1980). U.S. agricultural legislation is based on the "concept of agriculture's uniqueness" responding to a set of ideas known as "agrarianism, or agricultural fundamentalism, or the agricultural creed." *Id.* at 1. The agricultural creed translates into such assertions as the following:

Farmers were considered uniquely worthy. The Jeffersonian ideal was a nation of family farm operators producing food, the most needed product of all. Farmers were considered good God-fearing citizens, stalwart defenders of the republic, and a stabilizing element in the society. Those who grew up in the country did not need to be taught these values; they absorbed them through their pores.

Id.

to the industry.⁴ An extensive system of institutionalized infrastructures such as land grant institutions and the agricultural extension service, moreover, have long provided the industry with invaluable assistance.⁵ Recent trade liberalization of global agricultural markets, as seen through the North American Free Trade Agreement (NAFTA), extends additional benefits to the sector.⁶ Not unlike other agricultural legislative and policy measures, supported by a "powerful degree of rhetoric," NAFTA's economic benefits do not extend to agricultural workers.⁸

This exclusion is demonstrated by the cumulative historical treatment of agricultural workers who fail to enjoy the benefits of agricultural programs or the progress of American agriculture. The impact of this structure is clear—according to the Census of Agriculture, fewer than 21,000 Chicano farm operators comprise the national total of 12.4 million farm operators.⁹ Thus, Latinos represent only 1.7 percent of all farm

4. Exemptions from federal legislation, normally applicable to those in non-agricultural settings, comprise the Doctrine of Agricultural Exceptionalism. See, e.g., ERNESTO GALARZA, *MERCHANTS OF LABOR, THE MEXICAN BRACERO STORY* 106 (1964) (referring to Carey McWilliams' "Great Exception" model describing agribusiness exceptions as "common principles of social legislation" and "the basic tenets of free enterprise"); Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335 (1987). For a general observation on the nature of employing field workers in light of conflicting laws, see generally, PHILIP L. MARTIN, *HARVEST OF CONFUSION, MEXICAN WORKERS IN U.S. AGRICULTURE* (1988); David M. Saxowsky et al., *Employing Migrant Agricultural Workers: Overcoming The Challenge of Complying With Employment Laws*, 69 N.D. L. REV. 307 (1993).

5. The consequences of this preferential treatment is evident by the size of the sector. See Carlo V. DiFlorio & Matthew McLees, *Pesticide Regulation: The Plight of Migrant Farmworkers v. The Politics of Agribusiness*, DICK. J. ENVTL. L. & POL'Y 148 (1992) (citing Dennis R. Dullinger, *Cursed Is The Ground: Pesticide Regulation and Farmworkers*, 5 LAW & INEQ. J. 453 (1987)); Donald B. Pedersen, *Introduction to The Agricultural Law Symposium*, 23 U.C. DAVIS L. REV. 401, 404 (1990) ("[A]griculture has been and remains the nation's most significant industry with special needs and with its own set of interest groups."). In 1992, the farm sector's position in the U.S. economy equaled \$85.6 billion. When the farm sector's effects are combined with other sectors of the economy, as in manufacturing, transportation and food processing, the contribution to the gross domestic product is over \$1 trillion. The nation's portion of the gross domestic product totals \$6 trillion. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-95-104FS, U.S. AGRIC.: STATUS OF THE FARM SECTOR 6-7 (1995). When expanded definitions of the farm sector include inputs such as fertilizer, seeds, machinery, and outputs which channel into other sectors of the economy, added totals reveal a \$1.1 trillion contribution to the 1992 gross domestic product. *Id.*

6. Signed by the governments of Mexico, Canada, and the United States, the North American Free Trade Agreement contracts the three countries to the creation of the world's largest free market. See North American Free Trade Agreement, Pub. L. No. 103-182, 107 Stat. 2057 (1993) (codified at 19 U.S.C. § 3301 (1994)) [hereinafter NAFTA or Agreement]. See also CCH, NAFTA TEXT (1994). The focus of this Article is on United States-Mexico relations. Canada, also a signatory to the Agreement, is omitted from this discussion. NAFTA adds to the wide array of benefits awarded agriculture through global restructuring which facilitates greater markets for growers and producers.

7. PAARLBERG, *supra* note 3, at 7.

8. A migrant or agricultural worker "means an individual employed in agricultural employment of a seasonal or other temporary nature, and who is required to be absent overnight from his permanent place of residence." 29 U.S.C. § 1802(8)(A) (1988). A seasonal worker is "an individual who is employed in agricultural employment of a seasonal or other temporary nature and is not required to be absent overnight from his permanent place of residence . . ." 29 U.S.C. § 1802(10)(A). Notwithstanding definitional demarcations, a field worker can occupy both categories. For an overview on the conflicting nature of identification of field workers, see generally MARTIN, *supra* note 4.

9. I use the term "Mexican" to refer to all people of Mexican birth and descent; "Mexican nationals" refers to citizens of Mexico; and "Chicana/Chicano" refers to Mexicans residing in the United States. I use the term "Latina/Latino" to refer to Puerto Ricans, Cubans, and those from

operators while constituting 9 percent of the nation's population.¹⁰ Their under-representation is even more stark given the historical and contemporary ties Mexicans have had to the land. Mexicans owned millions of acres of land and there were more Mexican farm owners in 1848, at the time of the Treaty of Guadalupe Hidalgo, than there are at present. Individuals of Mexican descent have remained in the agricultural industry, engaged in the production of food as workers in much of the country.

In the legislative and policy arena, farmworker concerns are discussed almost entirely within the context of labor law, thereby excluding capital and trade considerations. Given the range of legal considerations and power relations that determine the agricultural agenda, the focus on labor is partial and ensures that field workers lead a marginal existence.¹¹ This Article examines the disparate treatment of Chicana/os and the legal barriers to farm ownership. Part I provides a framework tracing the impact of

Central and South America. The terms are used interchangeably with an "emphasis on self-designations." See GENARO M. PADILLA, *MY HISTORY, NOT YOURS* (1993). Other authors employ alternative designators. See, e.g., Berta Esperanza Hernandez Trujol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369 (1994); Margaret Montoya, *Mascaras, Trenzas y Grenas: Un/Masking the Self While Un/Braiding Personal Experience, Latina Heritage, and Legal Socialization*, 17 HARV. WOMEN'S L.J. 188 (1994); Yvonne M. Cherena Pacheco, *Latino Surnames: Formal and Informal Forces in the United States Affecting the Retention and Use of The Maternal Surname*, 18 T. MARSHALL L. REV. 1 (1982).

10. U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF AGRICULTURE, U.S. DATA CHARACTERISTICS OF OPERATOR AND TYPE OPERATED BY BLACK AND OTHER RACES, 1992, 1987, AND 1982 (1994). Since the beginning of New Deal legislation, written to assist farming operations, the farm bloc was "extremely sensitive about 'interference' on behalf of farm laborers." MACDONALD, *supra* note 1, at 48. When agricultural officials were drafting the legislation, they received a "horrifying report" on the working conditions of farm laborers and allegedly asserted "we can't touch that. It's dynamite!" *Id.* In response to this hands off treatment, Congress excluded farm labor from the scope of wage and hour laws, formally imposed the unequal and disparate treatment of farm laborers, and simultaneously protected and privileged agricultural employers.

11. Legal commentary on the working conditions of field workers advance "powerlessness" models. Within the venue of agricultural law, the author disagrees. I seek the exposure of disparate conditions for field workers which are structurally imposed by agricultural law. By failing to reach field workers who seek access to the regulatory framework, agricultural law ensures field workers remain on the outside of federally derived agricultural benefits afforded others in the industry. Within the realm of agricultural law, my goal is to expose structural inconsistencies and the distributional impacts of its regulatory framework on field workers. Professor Gerald Torres asserts, "taking into account the racially distributional impacts of a particular regulation may be required in order to avoid perpetuating a racially identifiable set of harms." Gerald Torres, *Race, Class, Environmental Regulation, Introduction: Understanding Environmental Racism*, 63 U. COLO. L. REV. 839, 841 (1992). He states that "[o]nce a racially disparate impact is made clear, pleading ignorance is no defense." *Id.* Not dissimilarly, I contend that the economic interests of the agricultural sector are facilitated by federal agrarian legislation, the basis of which includes assertions attesting to its perceived "uniqueness." This federal emphasis is devoted almost exclusively to the interests of capital, employer, and production. Agricultural workers are legally disallowed from protections and treatment afforded other workers. The counterbalance of labor interests in other sectoral areas is specifically excluded. This impacts their equal participation within the economic agricultural agenda and ensures they fall into the realm of a marginal existence. This Article thus focuses on the outsider status of rural workers of Mexican descent. See, e.g., Mari Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989) [hereinafter *Considering the Victim's Story*] (the term "outsider" is used to avoid term "minority;" the term "minority" contradicts "the numerical significance of the constituencies typically excluded from jurisprudential discourse"); Philip D. Ortego, *The Chicano Renaissance*, in *LA CAUSA CHICANA, THE MOVEMENT FOR JUSTICE* 53 (Margaret M. Mangold ed., 1971/1972) ("Mexican Americans themselves were kept at arm's length as outsiders").

early agricultural legislation on those of Mexican descent.¹² Part II describes the current condition of the agricultural worker living in El Paso, Texas, a border region, a primary residence of rural laborers and a key export/input region impacted by trade liberalization measures. Part III examines the reduction of trade barriers, which has long promoted the expansion of agricultural trade. Part IV calls for an expansion of current agrarian analysis by incorporating field workers within the construct of agricultural law and ending their unequal treatment. Highlighting a "racially identifiable set of harms,"¹³ Part IV analyzes the economic, environmental, and distributional consequences of their exclusion from agricultural legislation and policy.¹⁴

This article proposes improving the economic conditions of field workers through the use of international agreements. In sum, it proposes a shift from "basic abstract macroeconomic entitlement policies," within agricultural legislation, toward "place-centered criteria" specific to the El Paso border region.¹⁵ This proposal stems from a model that recognizes the placement of new entrants into the farming sector as legitimate and beneficial.¹⁶

12. Across the country, Latino males, as identified by the U.S. Census, are more likely to be employed in farming, forestry and fishing than non-Latino males (8.6% v. 3.7%). Latino females share a similar characterization, totaling 1.2 percent compared to 0.9 percent non-Latinas. U.S. DEP'T CENSUS, *THE HISPANIC POPULATION OF THE U.S. SOUTHWEST BORDERLAND*, C3.196: P-23/172 (1991); see also CPR SERIES P-20, No. 465: *RURAL & RURAL FARM POPULATION* (1987). Population figures, however, remain inexact as a result of the mobility of the agricultural workforce during census surveys. See, e.g., Leslie A. Whitener, *A Statistical Portrait Of Hired Farmworkers*, MONTHLY LAB. REV. 49 (1994) (nature of seasonal work ensures undercounting of field workers when workers are not employed on farms during the census period). The failure of a national survey offering concise population figures hampers exact measurement of the agricultural workforce and is the subject of conjecture. See REPORT OF THE COMMISSION ON AGRICULTURAL WORKERS 1 (1992) ("farmworkers are consistently undercounted"). See also WILLIAM K. BARGER & ERNESTO M. REZA, *THE FARM LABOR MOVEMENT IN THE MIDWEST, SOCIAL CHANGE AND ADOPTION AMONG MIGRANT FARMWORKERS* (1994).

13. Richard Delgado, *Inequality "From the Top": Applying An Ancient Prohibition to An Emerging Problem of Distributive Justice*, 32 UCLA L. REV. 100 (1984) (critically examining issue of the federal sector conferring an "unconditional, substantial and enduring benefit on a few favorites" and its "impact on matters of equality relative to distributional purposes").

14. The author is conscious of the fact that the use of a case study is subject to criticism. See, e.g., Daniel A. Farber & Suzanne Sherry, *The 200,000 Cards of Dimitri Yurasov: Further Reflections on Scholarship and Truth*, 46 STAN. L. REV. 647, 652 n.38 (1994); Daniel A. Farber & Suzanne Sherry, *Telling Stories Out of Law School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807 (1993). But see, Richard Delgado, *On Telling Stories in School: A Reply to Farber and Sherry*, 46 VAND. L. REV. 665 (1993); Jane B. Baron, *Resistance to Stories*, 67 S. CAL. L. REV. 255 (1994).

15. Devon Peña & Jose Rivera, *Historic Acequia Communities In The Upper Rio Grande* (1995) (unpublished essay on file with the author). This approach is required in light of the ongoing retrenchment of affirmative action law. See, e.g., *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constr., Inc. v. Peña*, 63 U.S.L.W. 4523 (1995). For an examination of the close relationship between law and retrenchment relative to antidiscrimination law, see Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation In Anti-discrimination Law*, 101 HARV. L. REV. 1331 (1988).

16. At the federal and state levels, regulatory programs sponsor programs targeting new farmers. See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-95, *FARM FINANCE: NUMBER OF NEW FARMERS IS DECLINING* (1993). See also Food, Agriculture, Conservation, and Trade Act of 1990, Pub. L. No. 101-624, §§ 1465-1470, 104 Stat. 3359, 3616-19 (1990). Most programs fund the acquisition of farmland and depreciable property, including farm machinery and breeding livestock. To qualify, applicants must meet farmland ownership and net worth tests. Field workers are typically excluded from land ownership because they cannot meet minimal requirements.

I. THE ORIGINS OF SEPARATE AND UNEQUAL TREATMENT

In 1954, the United States Supreme Court issued its momentous decision declaring "separate but equal" public facilities and institutions unconstitutional.¹⁷ The subsequent enactment of antidiscrimination legislation further clarified the government's commitment to formal legal equality before the law.¹⁸ Although a great deal of legal commentary has recently examined this body of equal protection law, agricultural workers remain largely ignored. This neglect parallels a longstanding agricultural ideology which places the distributional effects of federal agricultural policy regarding the Mexican rural community outside the realm of beneficial agricultural legislation.¹⁹ The origin of this separate and unequal treatment requires examination. The relevant historical framework reveals chains of causation in the downward mobility of Chicana/os in the rural sector.

HISTORICAL FRAMEWORK

So, that's the way it turns out, that after working so many years, after having acquired an estate, which I certainly didn't dispose of by selling or by any other means, here I find myself in the greatest poverty,

17. *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

18. See, e.g., Fair Housing Act, 42 U.S.C. §§ 3601-3619 (1988) (the Act, originally enacted as Title VIII of the Civil Rights Act of 1968, was expanded by the Fair Housing Amendments Act of 1988); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 (1976) (barring discriminatory acts and practices by private employers). Individuals of Mexican background have long struggled to achieve access to public programs and have earned small gains in the area of public accommodations. See, e.g., *Terrell Wells Swimming Pool v. Rodriguez*, 182 S.W.2d 824 (Tex. Ct. App. 1944) (swimming pools); *White v. Register*, 412 U.S. 755 (1973) (the franchise through the elimination of poll taxes and literacy tests and assurance of minimally fair representation); *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (the equality of education directed at property poor school districts); JUAN GOMEZ QUINOÑES, *CHICANO POLITICS: REALITY & PROMISE 1940-1990* (1990); JOHN STAPLES SHOCKLEY, *CHICANO REVOLT IN A TEXAS TOWN* (1974). These small increments of structural change, nonetheless, consistently face resistance by those purporting to apply constitutional directives. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constr., Inc. v. Peña*, 63 U.S.L.W. 4523 (1995). Legal commentary noting this general erosion and retrenchment calls for the "serious reflection of civil rights." See, e.g., Derrick Bell et al., *Racial Reflections: Dialogues In The Direction of Liberation*, 37 UCLA L. REV. 1037 (1990).

19. "Latinos residing in rural areas have access to less human capital, are underemployed and have lower incomes than their metro counterparts." M. Leif Jensen & Marta Tienda, *Nonmetropolitan Minority Families in the United States: Trends In Racial and Ethnic Economic Stratification, 1959-1986*, 54 RURAL SOC. 509 (1989); see also Refugio I. Rochin, *Hispanic Americans in the Rural Economy: Conditions, Issues, Probable Future Adjustments*, NAT'L RURAL STUD. COMM. 62 (1992); DEMOGRAPHIC DYNAMICS OF THE U.S.-MEXICO BORDER (John R. Weeks & Roberto Ham-Chande eds., 1992); RAUL A. FERNANDEZ, *THE MEXICAN-AMERICAN BORDER REGION* (1989) Rogelio Saens & John K. Thomas, *Minority Poverty in Nonmetropolitan Texas*, 56 RURAL SOC. 204 (1991); U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-40FS, RURAL DEVELOPMENT PROFILE OF RURAL AREAS (1993) ("Many of the poorest nonmetro counties are located where populations contain a high percentage of racial minorities"); U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-94-165, RURAL DEVELOPMENT: PATCHWORK OF FEDERAL PROGRAMS NEEDS TO BE REAPPRAISED (1994); DENNIS U. FISHER, TEXAS AGRICULTURAL EXTENSION SERVICE, STATUS OF RURAL TEXAS (1992).

living only by the grace of God and through the charity of those who give me a mouthful to eat.²⁰

Long a focus of song,²¹ poetry,²² and extensive conflict,²³ the border between Mexico and the United States extends over two thousand square miles.²⁴ Before the United States annexed former Mexican territory, Mexican residents had established a largely self-sufficient economy. Farmers planted, cultivated, and harvested perishable and non-perishable commodities such as corn, beans, melons, watermelons, barley, and other food and fiber.²⁵ Two key developments, however, set the framework for the region's economic segregation;²⁶ the United States-Mexico War of 1846²⁷ and attendant

20. Disenfranchised property owner Mariano Guadalupe Vallejo, *quoted in* PADILLA, *supra* note 9, at 3. Mariano Guadalupe Vallejo was the prior owner of vast numbers of territories in San Francisco, Sonoma and Napa valleys, instrumental in formation of California as a state, and served as Mayor of Sonoma. *Id.* at 78. For an example of litigation affecting Vallejo's property see *United States v. Vallejo*, 28 F. Cas. 356 (1859).

21. *See, e.g.*, AMERICO PAREDÉS, *A BORDER BALLAD AND ITS HERO*, "WITH HIS PISTOL IN HIS HAND" 152 (1958); MARIA HERRERA-BOBEK, *NORTHWARD BOUND: THE MEXICAN IMMIGRANT EXPERIENCE IN BALLAD AND SONG* (1993); AMERICO PAREDÉS, *A TEXAS-MEXICAN CANCIONERO* (1976).

22. *See, e.g.*, AMERICO PAREDÉS, *BETWEEN TWO WORLDS* (1991); GUILLERMO GOMEZ-PEÑA, *WARRIOR FOR GRINGOSTROIKA* (1993).

23. *See, e.g.*, OSCAR J. MARTINEZ, *TROUBLESOME BORDER* (1988) (location of "international disputes, banditry, racial strife, uncontrolled illegal migration, large-scale smuggling of drugs, corrupt behavior of officials, and a haven for unassimilated and separatist-prone people"); JUAN GÓMEZ-QUIÑONES, *ROOTS OF CHICANO POLITICS, 1600-1940* (1994); Joel Brinkley, *A Success at the Border Earned Only a Shrug*, N.Y. TIMES, Sept. 14, 1994, at A1 ("Operation Blockade" placed 400 border patrol officers at El Paso border, to deter undocumented entry into the United States). Critics charge, however, blockade tactics equal "xenophobia," Mexico has filed a diplomatic protest, and El Paso merchants are pleading hardship because of declining sales. Sue Anne Pressley, *Bordering on Extreme: A U.S. Clampdown on Illegals Crossing Into El Paso Has Created A Controversy*, WASH. POST NAT'L WKLY ED., Nov. 22-28, 1993, at 34.

24. The term "border" is used in a demographic sense. DEMOGRAPHIC DYNAMICS OF THE U.S.-MEXICO BORDER, *supra* note 19, at 4 (any demarcation defining a territory for the study of border phenomena should be considered more as a "geographic context" than a region "owing to the recognition of 'specific problems' unique to the area"). Functional definitions of the border, nonetheless, remain elusive. *Id.*

25. *See, e.g.*, Rochin, *supra* note 19, at 62; PAREDÉS, *A BORDER BALLAD AND ITS HERO*, *supra* note 21, at 11; JOSIAH GREGG, *THE COMMERCE OF THE PRAIRIES*, 303 (1844) (personal account of 1831 trip of the Santa Fe Trail encountered group from Paso del Norte transporting fresh and dried, apples, pears, grape, wine to "distant markets"); MARIO T. GARCIA, *DESERT IMMIGRANTS, THE MEXICANS OF EL PASO, 1880-1920* (1981); *Teschmacher v. United States*, 23 F. Cas. 862 (1855) (cultivation of corn, beans, watermelons in Mexican rural settlements). For a historical perspective of the Chicana/o presence in the Midwest, see Dennis N. Valdés, *The New Northern Borderlands: An Overview of Midwestern Chicano History*, 2 PERSP. IN MEXICAN AMER. STUD. 1 (1989); Dennis N. Valdés, *Betabeleros: The Formation of an Agricultural Proletariat in the Midwest, 1897-1930*, 30 LAB. HIST. 537 (1989).

26. The City of El Paso, is one of the poorest cities in a major border region. *See, e.g.*, U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, *HOUSEHOLD AND FAMILY CHARACTERISTICS* (1992); THE INSTITUTE FOR MANUFACTURING AND MATERIALS MANAGEMENT, *PASO DEL NORTE REGIONAL ECONOMY SOCIOECONOMIC PROFILE* (1992) [hereinafter *PASO DEL NORTE REGIONAL ECONOMY*]; EL PASO DEP'T OF COMMUNITY & HUMAN DEV., *COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY FOR EL PASO* (1993) [hereinafter *COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY*]. The segregation of this community dates to annexation of former Mexico territories. *See, e.g.*, Richard Griswold del Castillo, *Myth and Reality: Chicano Economic Mobility in Los Angeles, 1850-1880*, 6 AZTLAN 51 (1975); Arnolde de León & Kenneth L. Stewart, *Lost Dreams and Found Fortunes: Mexican and Anglo Immigrants in South Texas, 1850-1900*, 14 WEST. HIST. Q. 291 (1983) (census data). For an analysis on how Mexicans took the environmental, social, economic, and political circumstances about them

federal agrarian legislation and policies. The former ensured the exclusion of Mexicans from land ownership.²⁸ The latter established a labor system in which landless, rural Mexicans continue to comprise a poorly paid agricultural working class to the present time. The contextual framework underlying the dissimilar treatment of Mexicans and the dominant population²⁹ is examined below.

A. *The Treaty of Guadalupe Hidalgo And Anglo American Law: The "Rule of Cowboys"*³⁰

It is the conquered who are humbled before the conqueror, asking for his protection, while enjoying what little their misfortune has left them, . . . They are foreigners in their own land. . . . They have been humiliated and insulted. They have been refused the privilege of taking water from their own wells.³¹

The Treaty of Guadalupe Hidalgo of 1848 represented the culmination of negotiations following the United States' invasion of Mexico.³² As drafted, the Treaty was to protect the property interests of Mexican

and developed a bicultural identity equipping them to resist oppression, see ARNOLDO DE LEÓN, *THE TEJANO COMMUNITY 1836-1900* (1982); GLORIA ANZALDÚA, *BORDERLANDS/LA FRONTERA* (1987).

27. The States of California, Arizona, New Mexico, Texas, and parts of Utah and Colorado were former Mexican territory annexed after the U.S.-Mexico War of 1846. The circumstances underlying the transfer of former Mexican property is well documented. See generally ALFREDO MIRANDÉ, *GRINGO JUSTICE* (1987); RUDOLFO ACUÑA, *OCCUPIED AMERICA* (3d ed. 1998); ARNOLDO DE LEÓN, *THEY CALLED THEM GREASERS, ANGLO ATTITUDES TOWARD MEXICANS IN TEXAS, 1821-1900* (1983); MARIO BARRERA, *RACE AND CLASS IN THE SOUTHWEST, A THEORY OF RACIAL INEQUALITY* (1979). For an examination of the period during Spanish governance of Texas, see generally DONALD E. CHIPMAN, *SPANISH TEXAS 1519-1821* (1992).

28. The author recognizes the displacement of land tenure relative to the Native American population in the United States. See, e.g., *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543 (1823); *Merrion v. Jicarilla Apache Tribe*, 617 F.2d 537 (1979); *Wichita Indian Tribe v. United States*, 696 F.2d 1378 (Fed. Cir. 1983); U.S. GEN. ACCOUNTING OFFICE, *GAO/RCED-94-157, INDIAN ISSUES, EASTERN INDIAN LAND CLAIMS AND THEIR RESOLUTION* (1994). This Article, however, addresses the issue of land disenfranchisement of Mexican landowners in their former territories. For an analysis of Native Americans and land displacement within traditional jurisprudence, see VINE DELORIA, JR. & CLIFFORD M. LITTLE, *AMERICAN INDIANS, AMERICAN JUSTICE* (1983); Robert A. Williams, Jr., *Documents of Barbarism: The Contemporary Legacy of European Racism and Colonialism in the Narrative Traditions of Federal Indian Law*, 31 ARIZ. L. REV. 237 (1989).

29. The terms "dominant population," "European-American," and "Euro-American" reference individuals of European descent.

30. DAVID MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986* 52 (1989).

31. DAVID J. WEBER, *FOREIGNERS IN THEIR NATIVE LAND* vi (1973) (quoting Pablo de la Guerra, Speech to the California Senate, 1856).

32. The Treaty entered into force on July 4, 1848, reads in part:

In the name of Almighty God

The United States of America, and the United Mexican States, animated by a sincere desire to put an end to the calamities of the war which unhappily exists between the two Republics, and to establish upon a solid basis relations of peace and friendship, which shall confer reciprocal benefits upon the citizens of both, and assure the concord, harmony and mutual confidence, wherein the two peoples should live, as good neighbors

Treaty of Peace, Friendship, Limits and Settlement between the United States of America and the Mexican Republic.

Treaty of Guadalupe Hidalgo, Feb. 2, 1848, Art. VIII, 9 Stat. 922.

landowners.³³ In sum, it (a) transferred nearly half of Mexican Territory to the United States government; (b) guaranteed the protection of Mexican property rights;³⁴ and (c) permitted Mexican residents, who remained in the annexed territory, to elect United States citizenship, whereby they acquired all the rights of United States citizens.³⁵

Treaties are cloaked in longstanding legal principles. The Supremacy Clause of the United States Constitution declares treaties "the supreme Law of the Land."³⁶ As international instruments, treaties are recognized as contracts between nations and require compliance.³⁷ After the acquisition of Mexico's northern territories, the United States Supreme Court, in *Leitensdorfer v. Webb*, recognized various stipulations fashioned between the two countries and stated:

By this substitution of a new supremacy, although the former political relations of the inhabitants were dissolved, their private relations, their rights vested under the government of their former allegiance, or those arising from contract or usage, remain in full force and unchanged, except so far as they were in their nature and character found to be in conflict with the Constitution and laws of the United States, or with any regulations which the conquering and occupying authority should ordain.³⁸

33. Article VIII of the Treaty provides:

Mexicans now established in territories previously belonging to Mexico, and which remain for the future within the limits of the United States, as defined by the present treaty, shall be free to continue where they now reside, or to remove at any time to the Mexican republic, retaining the property which they possess in the said territories, or disposing thereof, and removing the proceeds wherever they please; without their being subjected, on this account, to any contribution, tax, or charge whatever.

Id.

34. Article VIII stipulated that all property of Mexican citizens was to be "inviolably respected." See also Act of March 3, 1851, ch. 41, § 8, 9 Stat. 631, 632.

35. The Article states:

Those who shall prefer to remain in the said territories, may either retain the title and rights of Mexican citizens, or acquire those of citizens of the United States. But they shall be under the obligation to make their election within one year from the date of the exchange of ratifications of this treaty; and those who shall remain in the said territories, after the expiration of that year, without having declared their intention to retain the character of Mexicans, shall be considered to have elected to become citizens of the United States.

Article VIII of the Treaty with the Republic of Mexico. See also Art. IX ("enjoyment of all the rights as citizens of the United States according to the principles of the Constitution").

36. Clause 2 of Art. VI of the United States Constitution provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

37. See, e.g., *Geofroy v. Riggs*, 133 U.S. 258, 271 (1890) (A treaty stands on the same footing of supremacy as the Constitution of the United States which direct courts to give them legal effect); U.S. CONST. art. VI, cl. 2.

38. 61 U.S. (20 How.) 176, 177 (1857). See also *Ely's Administrator v. United States*, 171 U.S. 220 (1898) ("in harmony with the rules of international law, as well as with the terms of the treaties of cession, the change of sovereignty should work no change in respect to rights and titles. That which was good before should be good after . . ." *Id.* at 220.).

Laws implemented during this period, however, substantively altered the stipulations and contractual obligations set forth in the Treaty of Guadalupe Hidalgo. Agricultural legislation, moreover, served in large measure as its basis and, ultimately, expedited the process of land disenfranchisement.

B. Restricting Mexican Landownership

In contradiction of the Treaty of Guadalupe Hidalgo, new legal procedures required every person claiming lands to demonstrate proof of their property interests. This requirement imposed two questionable legal premises, with exigent consequences, disadvantaging the Mexican population. First, notwithstanding treaty rights, Mexican landowners were presumed guilty of not possessing clear title to their landholdings. Second, the legal determination of property rights was commonly made by legal officers who coveted the land for themselves.³⁹ The results of these determinations can only be described as erratic, arbitrary, and as evidence of bias against Mexican landowners.

The California Land Act of 1851, requiring affirmative proof of ownership, was the first federal statute to alter the Treaty's terms and, thereby, its intent of protecting the property rights of Mexican landholders.⁴⁰ The Act established a Land Claims Commission and a Court of Private Land Claims whose representatives were to decide the validity of any claim according to the laws, usages and customs of Mexico.⁴¹ Claims not presented within a two year period were considered part of the public domain.⁴² Appellate review was within the purview of judicial discretion and permitted

39. "[I]n every legal system a large and important field is left open for the exercise of discretion by courts and other officials in rendering initially vague standards determinate, in resolving the uncertainties of statutes, or in developing and qualifying rules only broadly communicated by authoritative precedents." H.L. HART, *THE CONCEPT OF LAW* 132 (1961). This "field" allows for judicial decisions with outcomes derived from "conscious or unconscious discretionary policy preferences." See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958). Other legal commentators advance this argument: "[L]aw is indeterminate in the sense that legal materials—statutes and court decisions—often permit a judge to justify multiple outcomes to lawsuits." DAVID KAIRYS, *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 140, 160-61 (1982) ("[S]ince precedents and reasoning can be distinguished, modified, or discarded, they do not require any particular rule or result . . . the law merely provides a variety of bases for justifying choices made on other grounds."). This process facilitated their unequal treatment and failed to protect the legal rights of Mexican landowners. For an interpretation of legal indeterminacy and its impact on those of Mexican background in other venues, see George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994).

40. 9 Stat. 631 (1951). In New Mexico, Congress established yet another method to consider land claims through the Surveyor General. 10 Stat. 308 (1854). In California the legislation was introduced to Congress by William Gwinn, who "openly admitted that his intent was to encourage squatters and force Mexicans off the land." MIRANDÉ, *supra* note 27, at 39. Subsequent legislation permitting anyone having an interest in the land to contest land holdings produced yet further litigation burdens for Mexican landholders. See, e.g., *Rodriguez v. United States*, 68 U.S. 582, 587 (1863).

41. See, e.g., *United States v. Perot*, 98 U.S. 428, 430 (1878) ("The laws of Mexico . . . were the laws not of a foreign, but of an antecedent government . . . Its laws are not deemed foreign laws . . . and we take judicial notice of them.").

42. See, e.g., *United States v. Hancock*, 30 F. 851 (1887), *aff'd*, 133 U.S. 193 (1890).

only where "applicable." Disputes over ownership rights and establishing clear title produced extensive landmark litigation. One court thus observed that "controversies respecting Spanish titles, are constantly brought before the courts."⁴³

Within this framework, the inconsistent application of the law by judges, sheriffs, and other legal officials permitted patterns of discriminatory treatment.⁴⁴ This discrimination, evidenced by the allocation of the burden of proof⁴⁵ and other extra-legal methods, forced Mexican landowners from their property.⁴⁶

In contrast to the strict and valued emphasis on private landownership of the new order, villages and communities also comprised the realm of Mexican landownership.⁴⁷ The landowners, who relied on "terrestrial landmarks" and watersheds, as a means of defining the boundaries of Mexican

43. *Perot*, 98 U.S. at 430. Land displacement claims continue into the present time. *E.g.*, *Alliance of Descendants of Texas Land Grants v. United States*, 27 Cl. Ct. 837 (1993).

44. The examination of the role of racism within this construct is well documented. For a general overview of this perspective, see, *e.g.*, DE LEON, *THEY CALLED THEM GREASERS*, *supra* note 27 (describing European-Americans' treatment of Mexicans as "cultural chauvinism"). The author includes the following observation:

There is a report in camp that our company has been ordered to Corpus Christi which I hope is so. I am getting rather tired of the Rio Grande and the greasers, of all the contemptible, despicable people on Earth the greasers in my estimation are the lowest, meaner even than the Comanche. They are ugly, thieving, rascally in every way and to be educated only makes a greaser the grander rascal. I think the whole nation ought to be peoned rich and poor, they would make the best plantation hands in the world. They fear and respect authority and are a great deal more humble and less intelligent than our negroes.

Id. at xiii (quoting Letter from George L. Robertson to his sister from Rancho Palmito, Mar. 26, 1864; George L. Robertson Papers, 1839-1869, University of Texas Archives, Austin, Texas.). The nexus to the present time can be found in Dennis N. Valdés, *Historical Background of Farmworkers in New Mexico: Roots of Grower Attitudes*, Affidavit in *Hernandez v. Stuyvesant*, No. Civ. 93-887 (D.N.M. 1993).

45. See, *e.g.*, *United States v. Pico*, 27 F. Cas. 532 (D.C.N.D. Cal. 1859) (No. 16,047).

46. See, *e.g.*, TEX. GOV'T. CODE ANN. § 411.023 (West 1994) (law enforcement entity). The Texas Rangers were used by governing forces and settlers to pressure Mexican landowners from use of their lands and surrounding natural resources. Some historians assert they epitomize the essence of police abuse, brutality, and mistreatment of Mexicans residing in border regions. JULIAN SAMORA, JOE BERNAL, & ALBERT PEÑA, *GUNPOWDER JUSTICE: A REASSESSMENT OF THE TEXAS RANGERS* (1979) (documents widespread abuse of mistreatment of Mexican community by Texas Rangers). "[T]he Rangers became a corps that enjoyed the tacit sanction of the white community to do to Mexicans in the name of the law what others did extralegally." DE LEÓN, *THEY CALLED THEM GREASERS*, *supra* note 27. See also MIRANDÉ, *supra* note 27, at 20. The Texas Rangers proved instrumental in "controlling" the Mexican population. During the El Paso Salt War in 1870, the Rangers challenged Mexican residents use of the area's salt beds who believed them community property since the original land grants. See, *e.g.*, GRISWOLD DEL CASTILLO, *THE TREATY OF GUADALUPE HIDALGO* 83 (1990); MARTINEZ, *supra* note 23, at 85. For a perspective supporting the use of Texas Ranger methods, see Harold J. Weiss Jr., *The Texas Rangers Revisited: Old Themes and New Viewpoints*, 97 S.W. HIST. Q. 621 (1994). This perception is reflected in part by one court which attested of one particular Texas Ranger "Col. Hays, so well known to the country 50 years ago as the famous Texas ranger and gallant soldier of the Mexican War . . ." *United States v. Hancock*, 30 F. 851, 858 (1887), *aff'd*, 133 U.S. 193 (1890). The Colonel's reputation as a "gallant soldier" protected him from charges of committing fraud against the United States. *Id.* at 857.

47. See, *e.g.*, *Moya v. Chilili Coop. Ass'n*, 529 P.2d 1220 (1974), *cert. denied*, 421 U.S. 965 (1975) (1841 grant to twenty families).

communities, soon lost their holdings on the basis of imprecision.⁴⁸ This form of property demarcation contradicted the country's newly enacted grid system.⁴⁹ Despite the environmental and practical value of delineating territories in this manner, the use of territorial landmarks was deemed confusing. Ostensibly, because this method of property delineation did not conform to the grid-based form of surveying,⁵⁰ courts disallowed confirmation.⁵¹ Conversely, the claims of Euro-Americans possessing imprecise boundary surveys were confirmed.⁵² In those situations where the holdings of Mexican landowners were confirmed, courts frequently required a greater quantum of proof than required in similar claims by contestants from the dominant population.

New legal structures and extraneous litigation proved financially exhausting for Mexican landowners.⁵³ In *United States v. Soto*, for example, the court recognized expensive litigation expenses caused war widow Teodora Soto to live in "a small hut built of hides and tulle and poles, which she constructed for a shelter."⁵⁴ Similarly, war widow Josefa Romero, who possessed confirmed, clear title to Las Animas Rancho, confronted collateral legal actions challenging her ownership rights.⁵⁵

One particularly egregious example of inducing extraneous litigation included a Texas Constitutional provision providing that "no claim or right to land which issued prior to November 13, 1835, shall ever hereafter be used in evidence in any courts of the state unless recorded in the county in which the land is situated."⁵⁶ Before the adoption of this provision, however, the failure to record did not render such claims inadmissible as evidence.⁵⁷ Although ultimately held in violation of the United States

48. For example, one grant stated its boundaries as "the tract known by the name of Mariposas, to the extent of ten square leagues, within the limits of the Sierra Nevada, and the rivers Chowchillas, Merced and San Joaquin." *United States v. Fremont*, 25 F. Cas. 1214, 1215 (D.C.N.D. Cal. 1853) (No. 15,164), *rev'd*, 58 U.S. 542 (1854). *See also* *State v. Balli*, 190 S.W.2d 71 (1944), *cert. denied*, 328 U.S. 852, *reh'g denied*, 328 U.S. 880 (1946) (dispute over Padre Island, Texas).

49. *See, e.g., An Ordinance for Ascertaining The Mode of Disposing of Lands In The Western Territory: May 20, 1785*, in 28 J. CONTINENTAL CONG. 1774-1789 (Library of Congress ed. 1933).

50. Numerous cases demonstrating the scope of boundary disputes are examined in the author's forthcoming article: Guadalupe T. Luna, *The Great American Land Bubble: Mexicans, Property and Legal Indeterminism* (unpublished manuscript, on file with author).

51. *See, e.g., United States v. Sutter*, 27 F. Cas. 1368 (D.C.N.D. Cal. 1861) (No. 16,421), *rev'd*, 69 U.S. 562 (1864) (Mexican law permitted 11 leagues, yet challenger asserted 22 leagues); *United States v. Reading*, 27 F. Cas. 716 (D.C.N.D. Cal. 1853) (No. 16,127), *aff'd*, 59 U.S. 1 (1855).

52. *See, e.g., United States v. Reading*, 27 F. Cas. 716 (D.C.N.D. Cal. 1853) (No. 16,127), *aff'd*, 59 U.S. 1 (1855); *United States v. Hancock*, 30 F. 851 (1887), *aff'd*, 133 U.S. 193 (1890) (favorable disposition of land claimant granted, in large part, on his reputation).

53. *See, e.g., United States v. Rodriguez*, 27 F. Cas. 883 (D.C.N.C. Cal. 1855) (No. 16,185); *Vallejo v. United States*, 28 F. Cas. 926 (D.C.N.C. Cal. 1856) (No. 16,819); *United States v. Pico*, 27 F. Cas. 532 (D.C.N.C. Cal. 1859) (No. 16,047) (the Pico family was active in Mexican politics before and after U.S. conquest). For a review of Governor Pico's participation in California politics, see GÓMEZ-QUIÑONES, *supra* note 23.

54. 27 F. Cas. 1262, 1263 (D.C.N.C. Cal. 1856) (No. 16,356). For an examination of the role women played during this historical period, see GÓMEZ-QUIÑONES, *supra* note 23.

55. *See United States v. Sanchez*, 27 F. Cas. 948 (D.C.N.C. Cal. 1855) (No. 16,218).

56. TEX. CONST. art. 13, § 4 (1876) (repealed 1969).

57. *Texas Mexico Ry. Co. v. Locke*, 12 S.W. 80 (Tex. 1889).

Constitution, these new legal standards created formidable obstacles for Mexican landowners.

Linguistic differences also presented obstacles to the Mexican property owner. Although property deeds were written in Spanish, in some instances the determining official would proceed without the benefit of a translator. The absence of a translator hindered the appeal process thereby obscuring the record for those adjudicating subsequent appeals.⁵⁸

The United States government also served a major role in displacing Mexicans from their land. Land contestants, lacking standing to challenge Mexican property interests, were assisted in the filing of legal challenges to the title holder. Upon paying a one thousand dollar bond, challengers could initiate lawsuits in the name of the United States even though the government had no interest in the lands adversely claimed by the private parties.⁵⁹

Federal agricultural land management legislation complemented disenfranchisement and greatly expedited the despoilment of Mexican land ownership. Specifically, the Homestead Act of 1862,⁶⁰ the Reclamation Act of 1888,⁶¹ and the Morrill Act,⁶² promulgated to ease the entry into farming and to preserve the status of the small-scale farmer, facilitated land ownership for the dominant population. Settlers responding to agricultural legislation commonly selected parcels of land, wherever it suited their purpose, without regard to its Mexican holders.⁶³ In *Wheeler v. Bolton*, the court noted that with "the ideas brought with them from the older states, individuals sought to appropriate by possession whatever land they deemed necessary for themselves"⁶⁴ As one historical writer noted, federal agrarian legislation perpetuated "outright confiscation and

58. *United States v. Graham*, 26 F. Cas. 7 (1859) (No. 15,246) (Russian magistrate imperfectly acquainted with Spanish obscured the record).

59. See, e.g., *United States v. San Jacinto Tin Co.*, 23 F. 279, 290-91 (1885), *aff'd*, 125 U.S. 273 (1888) (private parties, that could not maintain an action in their own names, could indemnify the government in order to prosecute a lawsuit in the name of the United States); *United States v. Throckmorton*, 98 U.S. 61 (1878) (private parties authorized to litigate their claims, in the name of United States, without having a paramount interest in lands adversely claimed by private parties).

60. Enlarged Homestead Act of 1909, ch. 160, 35 Stat. 639 (codified at 43 U.S.C. §§ 218-221) (repealed 1976); Stock Raising Homestead Act of 1916, ch. 9, 39 Stat. 862 (codified at 43 U.S.C. §§ 291-301) (repealed 1976).

61. Reclamation Act of 1888, ch. 1069, 25 Stat. 527. See also Desert Lands Act of 1877, ch. 107, 19 Stat. 377 (codified at 43 U.S.C. §§ 321-339 (1982)).

62. Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. § 301 (1988)). The Act assisted the agricultural sector as universities dedicated their research to the sophisticated mechanization of the agricultural sector. But see California Agrarian Action Project v. Regents of the Univ. of Cal., 258 Cal. Rptr. 769 (Cal. Ct. App. 1989) (lawsuit sought to enjoin research of agricultural mechanization project, benefitting agribusiness interests, asserting that its focus contributed to, *inter alia*, unemployment or displacement of farmworkers, the demise of small family farms, deterioration of rural homes and rural life). See also Paul S. Taylor, *Public Policy and The Shaping of Rural Society*, 20 S.D. L. Rev. 475, 485 (1975) ("a land policy means social control over one of the greatest instruments of production").

63. See, e.g., *United States v. Peralta*, 27 F. Cas. 502 (D.C.N.D. Cal. 1859) (No. 16,032); *Armijo v. United States*, 1 F. Cas. 1129 (D.C.N.D. Cal. 1857) (No. 536), *aff'd*, 72 U.S. (5 Wall.) 444 (1866); *State v. Gallardo*, 166 S.W. 369 (Tex. 1914).

64. 28 P. 558, 560 (1891). See also *Peralta*, 27 F. Cas. 502; *Kenedy Pasture Co., v. State*, 231 S.W. 683 (Tex. 1921) *cert. denied*, 258 U.S. 617 (1922).

fraud" of holdings that were purportedly "sold" to settlers during the westward expansion hysteria.⁶⁵

In the aggregate, the efforts of contestants and protracted extraneous litigation overwhelmed the material and cultural resources of Mexican landowners. Landownership status dropped sharply and, by 1860, only two out of 263 Texans owning property in excess of 100,000 acres were of Mexican origin.⁶⁶

Leaving "little to protect," land encroachers used agricultural legislation to reduce the former landholding Mexican population to poverty stricken status.⁶⁷ For those retaining agricultural landholdings, extraneous litigation ensured the loss of communal grazing rights or the access to water, whereupon land ownership rights and the economic independence of its Mexican landholders were sharply reduced.⁶⁸ Courts and subsequent agricultural legislation ensured the ongoing process of Mexican dispossession, moving the Mexican population from the center to the margins of Anglo-American law. With few remaining alternatives, Mexicans returned to their former properties as laborers. As laborers, they became subject to a new form of legal discrimination and dispossession. The dominant agricultural ideology would shape the destinies of later arrivals, including the rural workers of Mexican descent in the El Paso region.⁶⁹

II. EL PASO BORDER REGION: A CASE STUDY

El Paso County, dominated by the City of El Paso, is one of the fastest growing regions in the State of Texas. The region, in its totality, consists of innumerable contrasts. As one of the largest cities along the border, it is also one of the poorest cities in the nation.⁷⁰ Notwithstanding poverty levels, El Paso is instrumental to the export of domestic food products.⁷¹ Since the 1880s, when railroads linked El Paso with international markets, the region has continued to serve a critical role in the agricultural sector by providing labor throughout the United States. Mexican and Chicana/

65. MONTEJANO, *supra* note 30, at 51-53; see also FREDERICK MERK, *MANIFEST DESTINY AND MISSION IN AMERICAN HISTORY* (1963).

66. MIRANDÉ, *supra* note 27, at 45; see also MALCOLM EBRIGHT, *THE TIERRA AMARILLA GRANT: A HISTORY OF CHICANERY* (1993); CAREY MCWILLIAMS, *NORTH FROM MEXICO* (1948) (transfer of eight million acres of land between 1830-1846).

67. See MONTEJANO, *supra* note 30, at 51-53.

68. See, e.g., *Sanchez v. Taylor*, 377 F.2d 733 (1967) ("[a]ny grazing, timber, and water rights which owners of nearby realty may have had under Mexican law and Treaty of Guadalupe-Hidalgo by reason of original grant from Mexico were extinguished . . ."); A. Dan Tarlock & Darcy Alan Frownfelter, *State Groundwater Sovereignty After Sporhase: The Case of the Hueco Bolson*, 43 OKLA. L. REV. 27 (1990).

69. For an examination of the agricultural ideology, see Jim Chen, *American Ideology*, 48 VAND. L. REV. 809 (1995).

70. See U.S. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HOUSEHOLD AND FAMILY CHARACTERISTICS* (1992).

71. Four international bridges connect El Paso to Ciudad Juarez, Mexico. Notwithstanding distinct international demarcations, El Paso and Ciudad Juarez are identified as twin cities sharing significant socioeconomic characteristics and linkages. See generally *DEMOGRAPHIC DYNAMICS OF THE U.S.-MEXICO BORDER*, *supra* note 19, at 46; MONTEJANO, *supra* note 30, at 30; ROBERT A. PASTOR & JORGE G. CASTANEDA, *LIMITS TO FRIENDSHIP: THE UNITED STATES AND MEXICO* (1988).

o labor, from the El Paso region, play a central role in planting, harvesting and processing the country's food supply.⁷² In Texas, specifically, agricultural legislation introduced large scale commercial farming requiring a larger workforce for the production of food.⁷³ El Paso, thus, provides an important case study on the impact of agricultural legislation and international agreements on workers of Mexican descent.⁷⁴

A. *El Paso's Demographic Attributes*

El Paso County became part of the State of Texas after the Treaty of Guadalupe Hildago established the Rio Grande as the international boundary in 1848.⁷⁵ In 1873, the Texas Legislature incorporated the City of El Paso. The city's physical size has also expanded rapidly from 13.5 square miles in 1924 to 247 square miles in 1987. Natural boundaries constrain expansion to the eastern edges of the county, an area encompassing ancient, fragile desert floor and existing agricultural areas.⁷⁶ Long a successful agricultural community, El Paso benefits from favorable climatic seasons.

El Paso is also one of the country's largest ports of entry.⁷⁷ Between sixty to ninety percent of El Paso's commerce is international. One author

72. See, e.g., GARCIA, *supra* note 25; OSCAR MARTÍNEZ, BORDER BOOM TOWN, CIUDAD JUAREZ SINCE 1848 (1975); LINDA C. MAJKA & THEO J. MAJKA, FARMWORKERS, AGRIBUSINESS, AND THE STATE (1982).

73. See, e.g., Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended in scattered sections of 43 U.S.C. §§ 371-375 (1986)); MONTEJANO, *supra* note 30, at 100.

74. The focus of this Article evolved from a varied mix of research methods, employing formal and informal meetings and interviews with a vast number of individuals at the city and federal governmental levels and public and private sector. This included developers, legal officials, community activists, farmworker activists, health officials and numerous agencies. I employed interrelated research methods and participated in farmworker litigation in the region. I sought to examine the intersection of international agreements and the accumulative historical treatment of agricultural workers and the consequences of agricultural subsidy legislation that consistently perpetuates the exclusion and disparate treatment of agricultural workers. I focused on the El Paso area because of its urgent need for place-specific remedies in contrast to vague macroeconomic theories and models, and in light of current retrenchment of affirmative action strategies by the present United States Supreme Court and political process. See, e.g., *Adarand Constr. Inc. v. Peña*, 63 U.S.L.W. 4523 (1995).

75. See, e.g., *Clark v. Hiles*, 2 S.W. 356, 357 (Tex. 1886) (discussing jurisdictional boundaries established by Treaty of Guadalupe Hidalgo). Boundary demarcations were a source of controversy and dispute between Texas and Mexico. See, e.g., GRISWOLD DEL CASTILLO, *supra* note 46, at 55-59. For a historical review of the Rio Grande in case law, see *Texas v. Hidalgo County Water Control and Improvement Dist.*, 443 S.W.2d 728 (Tex. Civ. App. 1969). El Paso began with six settlements in 1680, where missions were located along the Camino Real (King's Highway), later becoming part of the Santa Fe-Chihuahua-Mexico City Trail. During the 1830s and 1840s, a yearly average of \$90,000 worth of merchandise destined for Chihuahua, Mexico, came through the area known as Paso Del Norte. See, e.g., COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 26, at 9.

76. Doña Ana County, New Mexico borders the northern edge of El Paso County, and Ciudad Juarez, Mexico prevents growth into the southern perimeter. Natural formations including the Franklin Mountains, the Rio Grande, and military reservations impose additional growth barriers. This leaves expansion into primary desert and agricultural areas. See, e.g., THE PLAN FOR EL PASO, GUIDE TO THE YEAR 2010 (1988); Telephone Interview with U.S. Dep't Agric., Agric. Stabilization and Conservation County Comm., El Paso, Tex. (Nov. 18, 1993).

77. The region is fundamentally important to the free flow of goods and services specific to international markets. PASO DEL NORTE REGIONAL ECONOMY, *supra* note 26, at 3. Each year more than 15 million people pass through U.S. immigration border points adding to the congestion of border cities and, in sum, blocking the stream of commerce. See, e.g., THE INSTITUTE FOR MANUFACTURING AND MATERIALS MANAGEMENT SOUTHWEST BORDER INFRASTRUCTURE INITIATIVE 89 (1992).

projects commercial, NAFTA-related activities and traffic between Mexico and the United States will "double and redouble again before the turn of the century."⁷⁸ The expected increase in commercial endeavors and traffic demands will thus push the boundaries of urban areas into the region's open and rural spaces.

The population of the city, reflecting this expansion, increased from 130,000 in 1950 to 515,360 in 1990, representing an annual increase of about 2.1 percent each year.⁷⁹ Two-thirds of the population of El Paso is of Mexican origin.⁸⁰ Although this is a major international region, a large segment of the population in El Paso is poverty stricken.⁸¹ Notwithstanding its diverse economy, the region suffers from high unemployment rates.⁸² The low educational levels of its population reflect the nature of employment. Forty percent of El Paso's population, twenty-five years or older, lack a high school diploma.⁸³ High poverty rates and

78. Charles W. Thurston, *Proposed Accord Fuels Expansion of U.S.-Mexican Road, Rail Links*, J. COM. & COMM., July, 8, 1991, at 1A. See also Jan Gilbreath Rich, *Trade Takes its Toll, Mexican Border Clearly Not Ready For Rapid Growth*, SAN ANTONIO LIGHT, May 12, 1991, at D1. The NAFTA created the North American Development Bank [hereinafter NADBank] and Border Environment Cooperation Commission [hereinafter BECC] to address environmental and infrastructure issues along the U.S.-Mexico Border. U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-95-10BR, NORTH AMERICAN FREE TRADE AGREEMENT: STRUCTURE AND STATUS OF IMPLEMENTING ORGANIZATIONS (1994). "Capitalized and governed by the two countries" the two institutions are to "provide additional support for community adjustment and investment related to NAFTA." DEP'T OF THE TREASURY, FACT SHEET ON THE U.S./MEXICAN AGREEMENT ON THE BORDER ENVIRONMENT COOPERATION COMMISSION (BECC) AND THE NORTH AMERICAN DEVELOPMENT BANK (NADBank). The BECC is to mobilize sources to finance border environmental projects and provide support for community adjustment and investment. The United States and Mexico will provide \$450 million in paid-in-capital shares to the NADBank to leverage financing. Ten percent of the resources of the NADBank will be available for community adjustment and investment in both countries. *Id.* Excluded from its scope of review is a focus on preserving open spaces in the region and issues germane to land ownership for agricultural workers.

79. El Paso is the fastest growing area in the state. The combined 1990 population of El Paso City, El Paso County, and Ciudad Juarez, consists of 1.7 million persons. U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, POPULATION & HOUSEHOLD DATA (1990).

80. As of 1990, sixty-six percent of El Paso's population was of Mexican descent. Rochin, *supra* note 19, at 63. In Texas, identifiable pockets of impoverished, nonmetro individuals of Mexican origin exist throughout the state and are located in large measure, at the border. MONTEJANO, *supra* note 30. In the aggregate poverty, unsanitary living conditions and difficult and unsafe work environment contribute to much higher incidences of illnesses for field workers.

81. Poverty rates show that 28.6% of all households in El Paso fall below poverty levels. COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 26, at 15-22. See also U.S. DEP'T OF COMMERCE, BUREAU OF CENSUS, POPULATION & HOUSEHOLD DATA 20 (1990). European American households did not experience such sharp increases in poverty rates as those of Mexican households between 1980 and 1985. *Id.* at 21. The median family income for the El Paso metropolitan area, according to the 1990 Census, was \$24,057. The median family income for the City of El Paso was \$25,157. In contrast the national median family income was \$35,939. *Id.* Of the 160,595 households counted, 38% or 61,026 were at or below 80% of the median family income (19,246 or less). Of those families, 36,936 were at or below 50% of the median (\$12,029 or less). *Id.*

82. COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 26, at 14, 22 (unemployment rate over 10 percent).

83. Drop-out levels are among the highest in the state. Figures, for the 1989-90 school year, show 3,000 students left before graduation. See COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 26, at 14. The quality of education has induced litigation to reform educational levels in the state. Texas is criticized for its unequal treatment of children of Mexican descent. See, e.g., *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391 (Tex. 1989). This results, in large measure, from its property poor neighborhoods which reflect the poverty status of its residents. In El Paso,

unemployment are linked to the low-skilled requirements of major employers in the region.⁸⁴ Residents are employed in low-skill, low-wage areas in the agriculture, construction, and manufacturing industries. In the service industry, Chicana/os find employment in transportation, tourism, and retail centers.⁸⁵

The City of El Paso and rural communities in El Paso County are a major source of labor for agriculture in the United States.⁸⁶ In Texas, estimates of the farmworker population range between fifty thousand and seven hundred thousand.⁸⁷ In El Paso, agricultural workers comprise one percent of the city's population, but the migratory nature of employment, the erratic timing of the census, and a lack of interest hinder more precise enumeration.⁸⁸ The population functions in meeting sectoral labor requirements, not only in Texas, but throughout the United States.⁸⁹

B. Agricultural Legislation and Fieldworkers

Unlike the region's new landowners, who have long benefitted from federal agricultural economic programs, those retaining a new status as fieldworkers remain excluded from this economic framework.⁹⁰ Additionally, federal agricultural legislation, with its primary emphasis on capital and employer development, permits erratic terms and deplorable conditions of employment for field workers. The federal emphasis on capital and employer development protects the agricultural industry by denying farmworkers the rights granted to other employees.⁹¹

four property-poor school districts perpetuate high dropout levels. The Texas State Legislature is under a court mandate to resolve the issue of inequitable funding of school districts in Texas. *Id.* at 398. For an example of the long history of segregated school district litigation, see *Independent Sch. Dist. v. Salvatierra*, 33 S.W.2d 790 (Tex. Civ. App. 1930), *cert. denied*, 284 U.S. 580 (1931).

84. In 1990, rural poverty rates were higher compared to poverty rates eighteen years before. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-94-165, RURAL DEVELOPMENT: PATCHWORK OF FEDERAL PROGRAMS NEEDS TO BE REAPPRAISED, *supra* note 19 at 39 (demonstrating the increasing rate of poverty in rural areas). This reflects the concentration of low-skill, low paying jobs in manufacturing in rural areas. *Id.* at 39.

85. See COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 26, at 11.

86. See, e.g., Louise Palmer, *Border Union*, THE TEXAS OBSERVER, Feb. 8, 1991, at 4.

87. TOMAS RIVERA CENTER, MIGRANT ENUMERATION (1993). Labor accounts for 35 to 45 percent of production costs. ANNE CHADWICK, REPORT TO THE COMMISSION ON AGRICULTURAL WORKERS FOR THE UNITED STATES HORTICULTURAL INDUSTRY i (1991).

88. Interview with Motivation, Education and Training, Inc., Austin, Tex. (July 1991).

89. For example, approximately 9,000 agricultural workers, the majority of whom are Chicana/os from the Rio Grande Valley, migrate to Wisconsin. See Paula M. Lantz et al., *Peer Discussions of Cancer Among Hispanic Migrant Farm Workers*, 109 PUB. HEALTH RPTS. 512 (1994). For an interpretation of Mexican rural workers constituting a "transnational labor force" and "reserve army of labor," see Dixon et al., *Chicanas and Mexicanas Within a Transnational Working Class: Theoretical Perspectives*, VII FERNAND BRANDEL REV., 115-117 (1989) ("reserve army of labor" refers "to a variable proportion of the labor force, which may be employed when capital has a need for labor and unemployed when the need declines." *Id.* at 116.).

90. An examination of the types of benefits would require the study of, *inter alia*, income support measures, deficiency payments, and extensive loans, all which have aided the agricultural sector immeasurably. Agricultural programs are those established or authorized by, *inter alia*, the Agricultural Act of 1949, 7 U.S.C. § 1421 (1988), the Consolidated Farm and Rural Development Act, 7 U.S.C. § 1921 (1988), and the Agricultural Adjustment Act of 1938, 7 U.S.C. § 1281 (1988).

91. Since displacing Mexicans from their property, the dominant population within the sector

Not only are farmworkers largely excluded from the protection of labor laws, but post-1954 legislation, promulgated specifically to "protect" rural workers, consists of weak remedies.⁹² These weak remedies contain buried exceptions which permit courts to make "fine line distinctions," thereby preventing structural long-term remedies for complainants in the process.⁹³ Although the working and living conditions of field workers have undergone intensive scrutiny, their circumstances remain materially dismal.⁹⁴

As an illustration, farmworkers are denied the right to organize and bargain collectively.⁹⁵ Furthermore, the ability of growers to evade legal obligations required of other employers has contributed to the under-employment and impoverishment of field workers.⁹⁶ Social and economic

has promulgated agricultural legislation and policies. Newly established new legal structures mirrored a close, intimate relationship between the drafters and interpreters of law. The sector has thus, historically ensured their exclusion from favorable terms and conditions of employment. *See generally* ERNESTO GALARZA, *FARM WORKERS AND AGRI-BUSINESS IN CALIFORNIA* (1970); ERNESTO GALARZA, *SPIDERS IN THE HOUSE, WORKERS IN FIELDS* (1970).

92. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/T-HRD-91-40, *FARMWORKERS FACE GAPS IN PROTECTION AND BARRIERS TO BENEFITS* (1991).

93. *See, e.g.*, Joanne M. Glader, *A Harvest of Shame: The Imposition of Independent Contractor Status on Farmworkers and Its Ramifications on Migrant Children*, 42 HASTINGS L.J. 1455 (1991).

94. The drama of the working conditions of agricultural workers is documented, but beyond the scope of this review. For a general overview, *see* MARTIN, *supra* note 4; DENNIS N. VALDÉS, *AL NORTE: AGRICULTURAL WORKERS IN THE GREAT LAKES REGION, [1917-1970]* (1991); Patrick M. Anderson, *The Agricultural Employee Exemption From the Fair Labor Standards Act of 1938*, 12 HAMLINE L. REV. 649 (1989); Thomas E. Murphy, *An End to American "Serfdom"—The Need for Farm Labor Legislation*, 25 LAB. L.J. 85 (1974); Howard S. Scher & Robert S. Catz, *Farmworker Litigation Under the Fair Labor Standards Act: Establishing Joint Employer Liability and Related Problems*, 10 HARV. C. R. L. REV. 575 (1975); Ellen S. Greenstone, Comment, *Farmworkers In Jeopardy: OSHA, EPA, and The Pesticide Hazard*, 5 ECOLOGY L.Q. 69 (1975); Viviana Patiño, *Migrant Farm Worker Advocacy: Empowering The Invisible Laborer*, 22 HARV. C.R.-C.L. L. REV. 43 (1987).

95. *See* National Labor Relations Act, 29 U.S.C. § 152(b) (1973) (farmworker exclusion). This emphasizes the lack of legal machinery to assist farmworker efforts to form unions and other protective labor vehicles to elevate standards of working conditions. Thus, attempts to recover minimum wages, improved housing conditions, and social security are not uncommon actions. *See, e.g.*, *Cavazos v. Foster*, 822 F. Supp. 438 (W.D. Mich. S.D. 1993) (class action of migrant pickle harvesters alleging defendant company paid less than minimum wage, allowed substandard housing and evaded social security responsibilities). Similarly, early minimum wage legislation also excluded agricultural employees from coverage. Act of June 25, 1938, ch. 676, § 13(a)(6), 52 Stat. 1067 (1938). This continued until 1966, when some coverage was extended to field workers. Act of Sept. 23, 1966, Pub. L. No. 89-601, §§ 201-204(b), 205(a), 213(c), 80 Stat. 833, 834, 836-838 (1966). Coverage, however, is limited and subject to exceptions inherent within its legislative framework. Limited coverage thus also generates litigation. *See, e.g.*, *Aviles v. Kunkel*, 765 F. Supp. 358 (S.D. Tex. 1991), *vacated*, 978 F.2d 201 (1992).

96. The NAFTA has infused measurable capital into the retraining of low skilled workers. Such efforts are not new and have produced contrary results which prevent the training of farmworkers. Even with training, the need for comprehensive skills building is not apparent. Workers and farmworker advocates assert farmworkers are trained for low-skilled positions and/or in occupations in which the region's labor market is already saturated. Structurally deficient retraining initiatives, which fail to reach rural-based farmworkers, compel a comprehensive employability strategy for agricultural workers. In Texas, less than two percent of the state's share of section 402 appropriation is targeted for the training of displaced field workers. Of added concern is the failure of growers to provide long-term contracts that would enable workers to complete retraining programs. Field workers have special needs and face several obstacles, including eligibility and longer training periods. Interview with Motivation, Education, and Training, Inc., *supra* note 88; *see also* Lisa Richwine, *Migrant Farm Workers Fear They Won't Benefit from Job Training Plan*, STATES NEWS SERV., Jan. 14, 1994; *Farm Workers And NAFTA*, L.A. TIMES, Nov. 30, 1993, at B6. Field workers will

analyses of the agricultural framework, and attendant laws facilitating food production in the country, demonstrate a direct relationship between agricultural exceptionalism and farmworker poverty.

In turn, low wages and underemployment result in the exclusion of farmworkers from most workers' compensation and unemployment insurance plans across the country.⁹⁷ Working conditions for field workers are poorly regulated, and remedies intended to alleviate their status within the rural economy are primarily limited to instances where field workers seek lost wages.⁹⁸ Unlike other forms of employment, field workers are not compensated for travel to and from work in distant locations. Some employers, moreover, have sought to define field workers as independent contractors,⁹⁹ thus avoiding liability for abusive labor contractors or

find it difficult to pinpoint job dislocation directly on the NAFTA. Even if they are able to identify direct causation, meeting eligibility criteria will also prevent training. A comprehensive employability enhancement strategy for agricultural workers requires skills training for farmworkers to move out of the industry or within the industry into employment providing some measure of security. For an examination of shortcomings in training initiatives under the NAFTA, see generally U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-31, *DISLOCATED WORKERS: AN EARLY LOOK AT THE NAFTA TRANSITIONAL ADJUSTMENT ASSISTANCE PROGRAM* (1994). For a critical examination of the Job Training Partnership Act, see generally JOHN D. DONOHUE, *SHORTCHANGING THE WORKFORCE, THE JOB TRAINING PARTNERSHIP ACT AND THE OVERSELLING OF PRIVATIZED TRAINING* (1989).

97. For a general overview of the exclusion of field workers from workers' compensation coverage, see generally the workers compensation statutes in Alabama, Alaska, Arizona, Colorado, Delaware, Georgia, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Michigan, Missouri, New Mexico, Pennsylvania, Tennessee, Utah, West Virginia, Wyoming. Other states permit farmers' election to permit coverage of field workers. Some workers' compensation acts cover work performed on farms, but also impose limitations not applicable to employment in other industries. See, e.g., *Washington State Sch. Directors Assoc. v. Department of Labor & Indus.*, 510 P.2d 818 (Wash. 1973). Even where they come within the purview of the workers' compensation laws, the mobility of workers and transitory nature of employment prevent farmworkers from earning a sufficient amount of credits to permit coverage. Interview with Motivation, Education, and Training, Inc., *supra* note 88. Where field workers are covered their mobility hinders them from accumulating the required number of hours to qualify for workers' compensation. This translates into zero benefits should on-site occupational hazards occur.

98. See, e.g., *Cavazos v. Foster*, 822 F. Supp. 438 (W.D. Mich. S.D. 1993). The inability to contract legal representation proves an additional barrier in seeking remedies for occupational injuries sustained on site. Legal causation standards, moreover, add to this difficult set of circumstances by disallowing recovery for pesticide-related illnesses. Interview with Motivation, Education, and Training, Inc., *supra* note 88. This does not include workers unable to prosecute employers for fear of retribution and or blacklisting from future employers. See Wilson Ring, *Migrant Workers in McHenry Fighting The Odds To Be Paid*, CHI. TRIB., July 25, 1991, at 3.

99. See, e.g., Marc Linder, *Crewleaders and Agricultural Sweatshops: The Lawful And Unlawful Exploitation of Migrant Farmworkers*, 23 CREIGHTON L. REV. 213 (1989/1990). By defining field workers as independent contractors, the employer is not responsible, *inter alia*, for social security obligations. See, e.g., *Cavazos v. Foster*, 822 F. Supp. 438 (W.D. Mich. S.D. 1993); *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984) (migrant workers held independent contractors); *Aviles v. Kunkle*, 765 F. Supp. 358 (S.D. Tex. 1991); *Real v. Driscoll Strawberry Ass'n*, 603 F.2d 748 (9th Cir. 1979). The independent contractor classification burdens field workers with the responsibility of deducting social security taxes from their earnings, a difficult task in light of their low wage structure. Courts in other jurisdictions have ruled that migrant workers are employees. See, e.g., *Yeska v. State, Labor and Indus. Rev. Comm'n*, 440 N.W.2d 823 (Wis. Ct. App. 1989) (pickle harvesters not independent contractors but covered employees under state unemployment law); *Brock v. Lauritzen*, 624 F. Supp. 966 (E.D. Wis. 1985), *aff'd*, 835 F.2d 1529 (7th Cir. 1987) (migrant workers were employees); *Lauritzen v. McLaughlin*, 109 S. Ct. 243 (1988) (six criteria to determine relationship between farmer and migrant workers); *Donovan v. Gillmor*, 535 F. Supp. 154 (N.D. Ohio 1982) (held migrant workers employees); *Castillo v. Givens*, 704 F.2d 181 (5th Cir. 1983),

providing the necessity of basic housing for migrants.¹⁰⁰ Yet, even where remedies are available, legal distinctions and exceptions disallow their application to agricultural labor.¹⁰¹

Further evidence of deficient legal protections for farmworkers is manifested in their encounters with occupational hazards,¹⁰² health¹⁰³ and safety dangers,¹⁰⁴ exposure to pesticides,¹⁰⁵ and at times, the prevalence

cert. denied, 464 U.S. 850 (1983); *Beliz v. W.H. McLeod & Sons Packing Co.*, 765 F.2d 1317 (1985). Courts generally consider six criteria in determining the nature of relationship between agricultural employers and migrant workers. *See, e.g.*, *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984) (issue to be addressed on a case-by-case basis). Where legal assistance is available, the end result is time consuming and extensive.

100. *Farmer v. Employment Sec. Comm'n of North Carolina*, 4 F.3d 1274 (4th Cir. 1993) (alleged violation of Federal Fair Housing Act's prohibition against familial status housing discrimination conflicts with growers using foreign agricultural workers under the H-2A program). Legal Services attorneys, in their representation of field workers, cite to violations of MAWPA and FLSA more often than violations of other laws in representing migrant farmworkers in disputes against growers. *See, e.g.*, U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-90-144, LEGAL SERVICES CORPORATION: GRANTEE ATTORNEYS' HANDLING OF MIGRANT FARMWORKER DISPUTES WITH GROWERS 5 (1990). The alleged violations included growers' failing to pay wages for all hours worked; to pay wages promptly; to pay minimum wage rates; to accurately describe working conditions; and to meet minimum housing standards. *Id.* In the aggregate, these strategies exhaust civil rights efforts, stymie unionization efforts, and establishes a culture that impedes the field worker's right to pursue alleged violations of laws that directly impact their terms and conditions of employment. During periods of retrenchment, the work of legal services undergoes intensive scrutiny and budgets are curtailed. *See Legal Aid Debate Pits Farmers Against Laborers*, STATES NEWS SERV., Nov. 22, 1991.

101. *See, e.g.*, *Gonzalez v. Puente and Holmes*, 705 F. Supp. 331 (W.D. Tex. 1988) (buyer shielded by not being defined as an "employer" of workers within meaning of Fair Labor Standards Act and within meaning of MSAWPA); *Donovan v. Brandel*, 736 F.2d 1114 (6th Cir. 1984). Another difficulty for field workers is access to legal services when employed in the fields. *See, e.g.*, *State v. Shack*, 277 A.2d 369 (N.J. 1971) (agricultural employers and farm labor contractors often disallow entry into migrant camps and, thereby, ensure yet further litigation demands on workers). For a general observation of the role of law and its default bias that benefits agribusiness, see HART, THE CONCEPT OF LAW, *supra* note 39. Assisting in this process are lobbyists for the agricultural industry who seek a retrenchment in the few safety valves permitted field workers. *See, e.g.*, Suzanne Steele, *Farmers Seek Another Delay To Starting Worker Safety Rules*, COLUMBUS DISPATCH, Jan. 19, 1995, at B2.

102. Some reports identify work in the agricultural industry as the most hazardous occupation in the United States. *See generally* U.S. DEP'T LAB. BUREAU OF LABOR STATISTICS, SURVEY OF OCCUPATIONAL INJURIES AND ILLNESSES (1992); U.S. DEPT. OF LABOR, *Occupational Injury and Illness Incidence Rates by Industry*, 118 MONTHLY LAB. REV. (1988); George S. Rust, *Health Status of Migrant Farmworkers: A Literature Review and Commentary*, 80 AM. J. PUB. HEALTH, 1213 (1990) (injury recognized as a leading cause of morbidity and mortality); EPA estimates agricultural employees annually suffer 20,000-30,000 acute illness and injuries from exposure to pesticides. *See also Special Report: A Farmworker Perspective on Pesticides*, *Farmworker Justice Fund*, FARMWORKER JUST. NEWS (1990).

Legislation aimed at farmworkers largely consists of remedial efforts. *See* Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §§ 1801-1872, 1803(a)(1). Critics assert federal policy is aimed at the labor needs of the agricultural sector. For an elaboration on this issue see generally VALDÉS, *supra* note 94; BARRERA, *supra* note 27; GALARZA, *supra* note 91. Judicial rulings, moreover, advance "fine line" distinctions that frustrate protective legislation. *See, e.g.*, *Gonzalez v. Puente*, 705 F. Supp. 331 (W.D. Tex. 1988); *Farmer v. Employment Sec. Comm'n of North Carolina*, 4 F.3d 1274 (4th Cir. 1993). In sum, agricultural employers are accommodated and subsidized even further when a federal structure is implemented discouraging the fair treatment of field workers.

103. *See* U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-92-46, HIRED FARMWORKERS; HEALTH AND WELL-BEING AT RISK (1992).

104. *See id.*; Carlo V. Di Florio & Matthew McLees, *Pesticide Regulation: The Plight of Migrant Farmworkers v. The Politics of Agribusiness*, *supra* note 5, at 1; Lantz, *supra* note 89. Workers in the food processing industry report "crippled hands and wrists, damaged lungs, and on rare

of physical and emotional difficulties.¹⁰⁶ Child labor is not infrequent,¹⁰⁷ and children, at times, are jeopardized by pesticide spraying¹⁰⁸ and other hazards.¹⁰⁹

occasion, even death." *A Journal-Constitution Special Report, Chicken: At What Cost? Poultry Workers Risk Health For Low Pay*, ATLANTA J. & CONST., June 2, 1991, at A01. See also Larry Tye, *Poultry Plant Blaze Lights Era of Neglect*, BOSTON GLOBE, Sept. 8, 1991, at A1; Lisa Pollak, *Poultry Workers Allege Unfair Labor Practices*, CHARLOTTE OBSERVER, May 21, 1993, at A1.

105. See, e.g., C. Sagarser et al., *Occupational Pesticide Poisoning In Apple Orchards—Washington, 1993, Epidemiological Notes and Reports*, 42 MORBIDITY & MORTALITY WKLY. RPT. 993 (1994) ("data identified a high proportion of Hispanics in cases of agriculturally related pesticide poisoning"); *Congressional Testimony, Shelly Davis Attorney Farmworker Justice Fund House Agriculture/Operations & Nutrition EPA Worker Protection Standards For Agricultural Pesticides*, FED. DOCUMENT CLEARING HOUSE INC., Nov. 10, 1993; U.S. GEN. ACCOUNTING, GAO/PEMD-94-6, *PESTICIDES ON FARMS—LIMITED CAPABILITY EXISTS TO MONITOR OCCUPATIONAL ILLNESS AND INJURIES* (1993). Monitoring pesticide exposure is hindered by a regulatory process that is neither valid nor employs a reliable method and is comprised of limited capability. U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-91-35, *OCCUPATIONAL, SAFETY AND HEALTH, OSHA POLICY CHANGES NEEDED TO CONFIRM THAT EMPLOYERS ABATE SERIOUS HAZARDS* (1991). Measuring the full scope of field related illnesses has escaped scrutiny. Delayed, long-term symptoms present causation difficulties in pinpointing a direct nexus to the exposure. Additionally, the lack of reporting pesticide exposure hinders monitoring of exposure rates. See, e.g., Sagarser et al., *supra* note 105. In addition to pesticide exposure, field workers confront, *inter alia*, tuberculosis, respiratory illnesses, parasitic infections, hunger-related illnesses, musculoskeletal ailments, eye problems, hypertension, diabetes, and women are especially prone to kidney and bladder infections resulting from the lack of sanitation in the fields. See, e.g., THE NATIONAL RURAL HEALTH CARE ASSOCIATION, *THE OCCUPATIONAL HEALTH OF MIGRANT AND SEASONAL FARMWORKERS IN THE UNITED STATES*; REPORT SUMMARY (1985); Valerie A. Wilk & D. Michael Hancock, *Farmworker Occupational Health and Safety In The 1990s*, NEW SOLUTIONS 6 (1991). Barriers to treatment include, *inter alia*, the closings of clinics due to financial setbacks, poverty status of the workers, language barriers, limited health clinic hours, and the absence of standardized care. *Id.* at 2. Field workers assert that the Worker Protection Standard, a regulatory framework providing for the training and informing field workers as to the dangers of pesticides, are not fully enforced. They also criticize the Environmental Protection Agency, citing to the relaxation of federal standards. *Id.* See also Bill Lambrecht, *Environmental Agency Seeks to Practice "Common Sense,"* ST. LOUIS POST-DISPATCH, May 15, 1995, at B5; Deborah Vanpelt, *Farmworker Protections Compromised, Advocates Say*, TAMPA TRIB., Apr. 29, 1995, at 4 (Worker Protection Standard modified five times since becoming law on January 1, 1995).

Finally, even when pesticide exposure is recognized as dangerous and has captured the attention of authorities, pesticide usage of known poisons does not result in prohibition or ensure that changes occur. In 1989, for example, 112 field workers were exposed to Phosdrin, a pesticide used to control worms. The incident led to meetings and public health specialists produced videos and attended congressional testimony while workers waited for stronger regulations and "stiff sanctions." See Marlene Sokol, *Still A Bitter Harvest*, ST. PETERSBURG TIMES, June 25, 1995, at 1B. Five years later Phosdrin remains dangerous, legal, and still in use by fruit and vegetable growers. *Id.*

106. For a portrait of the migrant experience, see generally HELENA MARIA VIRAMONTES, *UNDER THE FEET OF JESUS* (1995); CECUNDINO REYES, *DESPERATE MEN* (1993); Juan Luna and Cecundino Reyes interviews, *cited in* DENNIS NODIN VALDÉS, *AL NORTE, AGRICULTURAL WORKERS IN THE GREAT LAKES REGION 1917-1970*, (1991); FARMWORKER JUSTICE FUND, INC., *FARMWORKER WOMEN SPEAK OUT* (1994).

107. See, e.g., Stan Grossfeld, *Children Of The Harvest; Underage Migrant Farmworkers Help Feed A Nation—But At What Cost?*, BOSTON GLOBE, Apr. 30, 1995, at 73 (estimates of children working on farms range between 100,000 to 800,000). Children are allowed in the fields as a result of the Child Labor Exemption of the Fair Labor Standards Amendments, ch. 736 § 11, 63 Stat. 910, 918 (1949) (current version at 29 U.S.C. § 213(c) (1988)).

108. For example, 14-year-old Joe Alaniz was sprayed with "sticky green stuff" by a tractor spraying an adjoining row next to where he was working. "The sticky green stuff got on our hands and we didn't have any water to wash them. And nobody was getting gloves." Nancy Stancill, *Migrant Farm Labor In Texas Gives Children Tough Row to Hoe*, HOUS. CHRON., Jan. 12, 1993, at A1. Children in the fields are also plagued by other hazards. See, e.g., THE PLAIN DEALER, *Labor Leader Wants Kids Out of Farm Fields*, Sept. 3, 1993, at B3 (death of six month old when

The failure of state and federal agencies to adequately enforce laws protecting the health and working conditions of farmworkers extends beyond mere neglect.¹¹⁰ Farm worker advocates contend that enforcement agencies and agricultural employers share a tacit understanding that a token administration of labor laws and other protective legislation will remain in force.¹¹¹ Agricultural legislation precludes workers from access to health programs and ensures that farmworkers, in large measure, lead marginal lives within the rural economy. Within this construct, low wage levels further impede access to viable housing markets, the subject of which is examined next.

C. "Like Camping In A House:"¹¹² El Paso Colonias

There is an element of racism in allowing people to live like this. This whole condition of colonias would never be tolerated in any other areas or states.¹¹³

pickup truck that was providing shade over baby's carrier ran over infant); Mitch Weiss, *Children of Migrant Workers Toil Illegally In Fields of Ohio*, CHI. TRIB., Sept. 13, 1992, at W8.

109. See, e.g., Grossfeld, *supra* note 107. Federal labor law and child labor regulations provide agriculture with children at younger ages than in other industries. See HIRED FARMWORKERS, HEALTH AND WELL-BEING AT RISK, *supra* note 103, at 3.

110. ROBERT MARIL, POOREST OF AMERICANS, THE MEXICAN-AMERICANS OF THE LOWER RIO GRANDE VALLEY OF TEXAS 105 (1989). See also Jason DeParle, *The Nation: New Rows to Hoe in the 'Harvest of Shame'*, N.Y. TIMES, July 28, 1991, at 1; Michael G. Wagner & Marcos Breton, *Fields of Pain, Regulators Have Failed to Protect the Exploited Farmer Worker*, SACRAMENTO BEE, Dec. 8, 1991, at A1; *Five Years After Poisonings, Migrant Farmworkers Are Resigned*, LA PRENSA, June 29, 1995, at 4 (Phosdrin pesticide poisonings of 112 farmworkers failed to induce regulatory reform five years after poisonings. Implementation of regulations coming "slowly, largely because of pressure from Congress and growers."); Jack Lesar, *Study Says U.S. Negligent on Child Labor*, UPI, Sept. 6, 1992, available in LEXIS, Nexis Library, UPI file; Barbara Presley Noble, *At Work: A Health Risk Escaping Regulators*, N.Y. TIMES, Apr. 3, 1994, at 23 (green tobacco sickness). Protective legislation is handled on a case by case basis, thereby, disallowing longlasting reform. *EPA Misses Pesticide Safety Deadline*, UPI, May 9, 1994, available in LEXIS, Nexis Library, UPI file.

111. See, e.g., Testimony of Shelley Davis, Farmworker Justice Fund, FED. DOC. CLEARING HOUSE CONG. TESTIMONY, Nov. 10, 1993. Ms. Davis, an attorney, testified that the Department of Agriculture is deficient in enforcing worker protection standards against growers, many of whom are seen as constituents. She testified that the Arizona Commission of Agriculture sustains a close relationship with the state's agricultural industry and has demonstrated a lack of commitment to enforcement. An audit reported that the commission (1) refused to investigate pesticide complaints by community members and farmworkers; (2) downgraded violations following closed-door meetings with violators; (3) deliberately allowed statutes of limitations to expire without taking disciplinary action; and (4) failed to punish repeat violators. *Id.* It further reported a farmworker child almost died from playing in bags of improperly disposed pesticide concentrate. *Id.* Advocates criticized the low \$150.00 fine, the lack of civil or criminal violations filed, and the blame focusing on the child's father for the incident. *Id.* It is this framework that perpetuates inequality for field workers, ultimately assuming and perpetuating what is deemed acceptable "legal" treatment.

112. Mark Muro, *Colonias The Nation's Newest Slums, Spawned by Greed and Indifference House 250,000 Mexican-Americans*, BOSTON GLOBE, July 31, 1988, at 73.

113. Jo Ann Zuniga, "Don't Drink The Water:" Nun Works For Better Conditions In Colonias, HOUS. CHRON., Sept. 6, 1992, at 6 (quoting Sister Maribeth Larkin, El Paso Interreligious Sponsoring Organization (EPISO)). See also Thaddeus Herrick, *Taste of Poverty*, HERALD-POST, Apr. 7, 1987, (El Paso's 10,000 Special Report) at 1; James Pinkerton, *Living on the Edge; U.S. and Mexico: A Common Destiny?*, HOUS. CHRON., Oct. 17, 1993, at A1 ("The other America, the forgotten Texas: that's what the border is, what it has been, and what it will continue to be.").

In El Paso, as elsewhere, the demand for adequate low income housing exceeds the available supply.¹¹⁴ Urban field workers share crowded, high density, tenement structures which frequently violate habitability standards,¹¹⁵ exact exorbitant rents, and lack normal conveniences like private washroom facilities.¹¹⁶ In rural areas, farmworkers seek housing in colonias. Colonias are located primarily in the unincorporated peripheries of El Paso and other counties adjacent to the United States-Mexico border. Colonias are defined as:

rural and unincorporated subdivisions characterized by substandard housing, inadequate plumbing and sewage disposal systems, and inadequate access to clean water. They are highly concentrated poverty pockets that are physically and legally isolated from neighboring cities.¹¹⁷

Colonia residents in El Paso include United States citizens, resident aliens, and undocumented Mexicans working in agriculture,¹¹⁸ the maquila

114. In El Paso, the shortage of low income housing is due to the failure to redevelop condemned structures, the difficulties imposed by building codes and regulations that prohibit the development of urban centers, and property owners who remove housing structures from the urban market in hopes of renting their units for NAFTA-directed purposes. Interview with Sister Mary Beth Larkin, El Paso Interreligious Sponsoring Org., El Paso, Tex. (July 17, 1993); Interview with Sandy New, farmworker advocate, El Paso, Tex. (Dec. 2, 1992); Interview with Steve Junes, Junes Realty, El Paso, Tex. (Dec. 2, 1993). In El Paso, however, housing construction in high priced regions is "booming," but is out of the economic range for those employed in low wage sectoral levels. See COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 26, at 24.

115. Rural environments, contrary to urban substandard dwellings, escape reform. See *Javins v. First Nat. Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970). For specific instances on the living conditions of several field workers, see *Migrant Laborers Sue Over Unsafe Housing*, CHI. TRIB., May 6, 1992, at C3; Jorge Casuso, *Migrants Suffer in Fetid Camps*, CHI. TRIB., Sept. 15, 1991, at C3 (field workers living in hole dug in ground slept on cardboard boxes and showered when a foreman "hosed them down at the same time he watered the crop"); Stephen Franklin, *Migrant Nightmare At "Ranch of Devils"*, CHI. TRIB., Sept. 6, 1992, at C3 (migrant camps in California called "Rancho Los Diablos" the ranch of the devils because "of the way its residents are treated by some farmers"); Michael Martinez, *Reforms Come Slowly For Migrant Farmhands*, CHIC. TRIB., May 18, 1992, at M1. Legal Services attorneys cite to field workers seeking minimum housing standards as a leading issue.

116. Interview with Rose Garcia, Director, Tierra del Sol, Las Cruces, N.M. (Nov. 22, 1993). Tierra del Sol seeks to develop farmworker housing projects in New Mexico and El Paso, Texas. *Id.*

117. TEXAS DEP'T OF HUMAN SERV., THE COLONIAS FACTBOOK: A SURVEY OF LIVING CONDITIONS IN RURAL AREAS OF SOUTH TEXAS AND WEST TEXAS BORDER COUNTIES (1988) [hereinafter COLONIAS FACTBOOK]. See also PAN-AMERICAN HEALTH ORG., UNITED STATES-MEXICO BORDER HEALTH STATISTICS (1991); JORGE CHAPA & JORGE DEL PINAL, ENUMERATION, HOUSING CHARACTERISTICS AND SAMPLING RATES IN THE COLONIAS OF THE TEXAS BORDER AREA: A PERSPECTIVE ON CENSUS DATA, 1993 RESEARCH ON UNDOCUMENTED ETHNIC POPULATIONS (1993); Henry McGee et al., *Lost Cities At The Border Unlawful Habitation in Mexico and the United States* (1990) (unpublished manuscript, on file with the author); COMMITTEE ON NATURAL RESOURCES, TEXAS HOUSE OF REPRESENTATIVES, A REPORT TO THE HOUSE OF REPRESENTATIVES 72ND TEXAS LEGISLATURE 13-18 (1990); Allen R. Myerson, *This Is The House That Greed Built*, N.Y. TIMES, Apr. 2, 1995, at 3-1.

"Colonias" is a Spanish term that translates as "neighborhood." See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-91-37, RURAL DEVELOPMENT: PROBLEMS AND PROGRESS ON COLONIAS SUBDIVISIONS NEAR THE MEXICO BORDER (1990). Colonias exist along the border in the following state counties: California—San Diego, Imperial; Arizona—Yuma, Pima, Santa Cruz, Cochise; New Mexico—Hidalgo, Grant, Luna, Dona Ana; Texas: El Paso, Hudspeth, Culberson, Jeff Davis, Presidio, Brewster, Terrall, Val Verde, Kinney, Maverick, Webb, Zapata, Starr, Hidalgo, Willacy, Cameron.

118. Interview with Sandy New, farmworker union organizer, El Paso, Tex. (Dec. 2, 1993).

plants, or service-oriented industries.¹¹⁹ Unemployment or underemployment levels for colonia residents are among the highest in the state.¹²⁰

The rapid and unsystematic expansion of colonia developments makes it difficult to determine the number of colonias or their populations with precision.¹²¹ One study estimated the existence of approximately 122 colonias with 9,522 dwellings in El Paso County. Population estimates begin at 47,827 residents.¹²²

Several factors contribute to the appearance and expansion of colonias. First, low wage levels exclude thousands of families from more expensive segments of the housing market and, consequently, create a pressing demand for affordable family housing.¹²³ Second, urbanization in the El Paso region encourages owner-operators to sell small tracts of land.¹²⁴ By dividing land into small units, sellers earn higher profits than by remaining in ranching or farming operations. Third, sellers convey property through the use of contract for deed. This form of conveyance facilitates the easy transfer of land. Low wage levels encourage the forfeiture of property. Although several states have a means of alleviating the harsh results of property sold through the contract for deed, Texas offers among the least equitable remedies against forfeitures. As a result, high default rates ensure the ongoing "sale" of rural land to poor families

119. Census figures of employment in the region exclude the under-economy of service workers employed, *inter alia*, as house maids, gardeners, and child care workers. For an examination of the nature of the Mexican population employed in the under-economy, see generally DEBBIE NATHAN, *WOMEN AND OTHER ALIENS, ESSAYS FROM THE U.S.-MEXICO BORDER* (1991).

120. See U.S. DEPT. OF COMMERCE, BUREAU OF CENSUS, *POPULATION & HOUSEHOLD DATA* (1990).

121. Interview with Viviana Patiño, County Attorney of El Paso, Tex. (July 5, 1993).

122. TEXAS WATER DEV. BOARD, *WATER AND WASTE WATER MANAGEMENT PLAN FOR EL PASO COUNTY, TEXAS* (1989). Estimates report about 1,193 colonias with 887 located in four counties of the Lower Rio Grande Valley, and place about 10.2 percent in El Paso County. *Id.* at 3.

123. See Emily Jauregui, *El Paso's Demand For Inexpensive Homes Grows*, EL PASO TIMES, Dec. 4, 1993, at A1. Income levels of less than \$10,000 a year disallow home ownership. At least 38 percent of El Paso families, approximately 61,000 families, are in need of low-income housing alternatives. *Id.* The housing stock of inexpensive homes, costing \$50,000 or less, constitutes less than 15 percent of all houses for sale in the city. *Id.* These conditions worsen for families earning \$13,300 a year or less. *Id.* The study shows that the city retains only about 17,000 housing units for the 39,937 families in this income bracket. *Id.* Condemnation and the failure to redevelop condemned structures, difficulties imposed from the regulatory process, and the withdrawal of housing stock for NAFTA expected activity are adding to the dire need for low income housing alternatives. Interview with Sandy New, *supra* note 118; Interview with Steve Junes, Junes Realty, El Paso, Tex. (Dec. 1, 1994); Interview with Rose Garcia, *supra* note 116. Vacancy rates in subsidized housing units are almost non-existent. Urban landlords are removing existing commercial, residential property for NAFTA activity, and public housing availability is saturated. *Id.* Over 6,000 families are on lengthy waiting lists for public housing. Interview with Sandy New, *supra* note 118.

124. Interview with U.S. Department of Agric., Agriculture Stabilization and Conservation County Committee, El Paso, Tex. (Nov. 18, 1993). In El Paso County, land under cultivation in 1963 dropped from 60,407 acres to 44,262 acres in 1986. THE PLAN FOR EL PASO, *supra* note 76. Between 1962 and 1987, the El Paso region lost about one-third of its total acreage. *Id.* See also U.S. DEP'T AGRIC. AGRIC. CENSUS (1992). The first colonias formed from severe drought conditions. See Mark Muro, *Colonias The Nation's Newest Slums, Spawned by Greed and Indifference, House 250,000 Mexican-Americans*, BOSTON GLOBE, July 31, 1988, at 73 (severe conditions hurt cotton farmers who began selling cropland to developers). Escape from urban crime, the absence of low income alternatives, and the pursuit of the "American Dream" of home ownership are other factors pulling families into colonia areas. Interview with Sandy New, *supra* note 118.

which sellers eventually reacquire and, thus, reproduce the cycle.¹²⁵ Fourth, the absence of a defined regulatory process and county rules, prohibiting developers from subdividing and selling rural land without providing urban infrastructure, makes the transition from farmer-operator to developer not only easy, but inexpensive.¹²⁶

Until May 1990, a lax regulatory process and state regulatory code only required that developers record a plan of lot layouts that conformed to "reasonable" requirements regarding streets and infrastructure. No law explicitly required the "developer" provide running water, drainage, and electricity.¹²⁷ Therefore, a significant number of the lots lack the infrastructure necessary to sustain housing structures.¹²⁸ Promises of a "forthcoming infrastructure" encourage potential buyers, who are drawn in by easy terms of purchase and the hopes fleeing urban crime.

Deemed "among the poorest (communities) in the nation," the colonias have several features in common regarding their origins.¹²⁹ Developers commonly convey unplatted lots of rural property, ranging from 50 feet by 100 feet to one-half acre lots, based on the contract of deed form of sale.¹³⁰ Low income buyers purchase lots for as low as \$5.00 down and \$5.00 a week.¹³¹ Colonia housing stock ranges from brick ranch-style homes and mobile homes to units built from materials such as discarded lumber, cereal boxes, and other inferior construction materials.¹³²

125. Interview with Viviana Patiño, *supra* note 121.

126. Interview with Eric Morales, former County Attorney, El Paso, Tex. (July 5, 1993).

127. Former county attorney Eric Morales refers to this result as "urbanization without regulation." *Id.* El Paso, a home rule jurisdiction, does not possess zoning authority. TEX. LOC. GOV'T CODE § 211.001. Consequently, colonia developments falling outside its jurisdiction are free to develop. Legislation was subsequently enacted to curtail colonia growth. Subdivision Regulations of El Paso County, Texas (May 2, 1990). The efforts of the Texas Attorney General, moreover, targets the growth of colonias through a Colonias Strike Force, litigation, and new legislation. See, e.g., Anna Borgman, *State Investigation of Illegal Colonias Sought*, THE MONITOR, June 23, 1993, at 3; Cindy Rugeley, *Colonias Task Force Formed; Panel To Probe Alleged Abuses by Developers*, HOUS. CHRON., Sept. 22, 1993, at A17. Stephen Power, *Laxity on Border Housing Cited*, DALLAS MORNING NEWS, Mar. 12, 1995, at 30A. The Strike Force is involved in litigation and civil and criminal investigations. See, e.g., *In re D & A Realty, Inc., Debtor v. In re Cecil McDonald*, No. 92-21915-L-11 (Bankr. S.D. Tex. 1994); *State of Texas v. Maverick County Comm'r*, No. 94-11-12800-CV (Tex. 1994); *State of Texas v. Zavala Water Supply*, No. 9315309 (Tex. 1993); *State of Texas v. De La Cruz*, No. 9315309 (Tex. 1993). The Strike Force succeeded in introducing new legislation to assist the colonias. The legislation, however, fails to specify where future development can take place. Because colonia growth rates expand geometrically, alternative legislative remedies are required.

128. Interview with Viviana Patiño, *supra* note 121; Interview with Eric Morales, *supra* note 126. While state regulations have since amended the process, a grandfather clause exempts earlier residents. Grants, moreover, are available for some water hookups. Residents, however, must still qualify. See, e.g., Joe Olvera, *\$15 Million Federal Grant Will Help Colonias Get Water Hookups*, EL PASO TIMES, Mar. 21, 1991, at B1; Joe Olvera, *Despite Government Aid, Colonias Still Struggle to Get Water*, EL PASO TIMES, Mar. 22, 1991, at 1A; Vic Kolenc, *Some Colonias to Get El Paso Water Services*, EL PASO HERALD POST, Aug. 29, 1991, at 2 (water limited to five mile radius from city).

129. See COMMITTEE ON NATURAL RESOURCES, *supra* note 117, at 13-18.

130. Lots were sold for about \$2,000 to \$8,000. Developers finance the purchase for a 10% down payment and \$10.00 to \$80.00 monthly payments. See, e.g., *Hi, Amigo*, ECONOMIST, Dec. 12, 1992, at 21.

131. Interview with Viviana Patiño, *supra* note 121.

132. Author's notes observing the use of cereal boxes, plastic, corrugated tin and cardboard for housing materials throughout several El Paso colonias. Author's Research Notes, El Paso, Tex. (July 5, 1993).

High proportions of household units are overcrowded and have only one or no bedrooms.

Lax regulations permit inadequate sewage disposal and an absence of paved streets, sidewalks, storm drainage, public gas, electricity, and basic telephone services.¹³³ The absence of paved roads or enumerated addresses often prevents medical personnel from assisting victims of automobile accidents and other emergencies.¹³⁴ Running water is rare in the colonias, and water is commonly stored in fifty gallon steel drums and plastic containers that previously stored hazardous or toxic waste.¹³⁵ The colonia's water sources include polluted runoff, contaminated wells, and irrigation canals that are contaminated with sewage and agricultural chemicals.¹³⁶

D. Health Conditions

The legal environment, which permits the existence of communities lacking essential urban infrastructure, influences the health of residents as well as the broader public.¹³⁷ Colonia residents experience high levels of chronic and environmentally related illnesses, including tuberculosis, gastroenteritis, cholera, lead poisoning, diarrhea, and hepatitis.¹³⁸ Several illnesses are the result of the improper disposal of human waste.¹³⁹ Inadequate sanitation leads to higher incidents of chronic diseases, hypertension and skin rashes.¹⁴⁰ The absence of monitoring air quality leads to additional health problems. Congested, unpaved streets and the open

133. CHAPA & DEL PINAL, *supra* note 117, at 247.

134. Interview with Nestor Valencia, El Paso Community Foundation (July 7, 1993). In one instance, a helicopter had to be procured from a local military base in order to reach the victims and transport them to a local hospital. *Id.*

135. *Down Mexico Way*, *ECONOMIST*, Apr. 18, 1992, at 24. See also Maggie Rivas, *El Paso Health Chief Pushes to Improve Border Conditions*, *DALLAS MORNING NEWS*, Jan. 17, 1993, at A41 (drum for toxic chemicals used to store drinking water).

136. Zuniga, *supra* note 113, at 6 (out of fourteen private wells found in Sparks colonia, all contained fecal contamination).

137. See, e.g., William E. Clayton Jr., *Diseases Spread Along Border; AMA President Describes Situation As "Ticking Time Bomb,"* *HOUS. CHRON.*, July 15, 1993, at A8; Rivas, *supra* note 135, at 41A ("disease knows no boundaries"). Prior to the NAFTA's ratification, environmental groups sought an environmental impact statement before submittal to Congress. *Public Citizens v. United States Trade Rep.*, 5 F.3d 549 (D.C. Cir. 1993).

138. In the schools of San Elizario, an "urban colonia" in El Paso County, virtually all the children have contracted some form of hepatitis. See, e.g., *COLONIAS FACTBOOK* *supra* note 117; *UNITED STATES-MEXICO BORDER HEALTH STATISTICS*, *supra* note 117.

139. Dust generated by human waste, for example, creates "biblical diseases." See, e.g., Wayne Hearn, *Borderline Risks: At the U.S.-Mexico Border, the Caldron of Poverty, Pollution and Neglect Threatens to Spill Its Toxic Brew Nationwide; Disease and Environmental Hazards Threaten Public Health*, 36 *AM. MED. NEWS*, Sept. 20, 1993, at 11 (colonia residents afflicted with diabetes, gallbladder disease, breast cancer striking Mexican-American and Mexican females in El Paso at rates higher than rest of country, and an increase of birth defects, such as anencephaly are possibly linked to environmental exposure to toxins and poor nutrition).

140. Parasite afflictions are difficult to cure because they recur every four to six weeks, largely resulting from children playing in standing water. Health statistics also reveal children contracting or spreading intestinal disorders. *COLONIAS FACTBOOK*, *supra* note 117; *UNITED STATES-MEXICO BORDER HEALTH STATISTICS* *supra* note 117. See also James Pinkerton, *Living on the Edge; Health Care System Strains To Keep Up*, *HOUS. CHRON.*, Oct. 21, 1993, at A1 (mail carrier underwent emergency surgery in McAllen to remove a ball of tapeworm larvae from brain; doctors suspected "Rio Grande water tainted by millions of gallons of human feces—and then used for crop irrigation caused the ghastly infestation").

burning of garbage and of tires—outdoors and in stoves—to warm homes during cool evenings also imperil breathing. Substandard heating materials are used, principally, because they are inexpensive and not legally prohibited. In sum, colonia residents are paying the costs of disparate living conditions based on their exclusion from the federal regulatory structure. This exclusion is examined in the following section.

E. Regulatory Framework

The Farmers Home Administration (FmHA) provides home loans to rural residents who are ineligible for private financing.¹⁴¹ Colonia buyers, however, fail to qualify for home improvement loans for three principal reasons. First, colonia residents lack clear title. Second, the lack of established credit hinders and disqualifies colonia residents from borrowing from the FmHA. Third, the FmHA excludes the contract for deed form of sale from its regulatory framework.

The FmHA loan process adds to this difficult set of circumstances for a number of reasons. First, the agency's alleged bias against low income buyers, in some areas, triggers apprehension regarding its federal authority.¹⁴² Second, critics of the agency's process and procedure charge that the FmHA neglects to inform the public whether FmHA funds available. Guidelines and eligibility criteria for the program are not reaching the rural poor, and delays and rejections in pre-application procedures are the source of extensive disapproval.¹⁴³ Critics of the agency, however, raise concerns over the agency's subjective criteria used to determine who is eligible for funding.¹⁴⁴

Critics emphasize that the FmHA subjectively applies two additional criteria regarding colonia developments. First, the applicant must meet eligibility requirements, including established income limitations, a good credit history, and capacity to meet the loan repayment terms. Low wages from service-industry employment and agricultural employment invariably hinder a favorable credit history. Second, the house selected for purchase must meet FmHA's standards for modest, decent, safe, and sanitary housing. Housing advocates assert that regulatory barriers and poor

141. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-57, *FmHA's HOME LOAN PROGRAM NOT MEETING THE NEEDS OF ALL RURAL RESIDENTS* 1 (1993). The FmHA is funded through the U.S. Department of Agriculture. State programs are funded through a formula based on eligibility of the proposed borrower. The borrower must meet certain economic conditions, such as a good credit history and an ability to repay the loan. *Id.* at 2. The focus of funding housing for the rural population is a nationally identified goal. For example, under the Housing Act of 1949, Congress established the "national goal that every American, including the rural poor, should have decent, safe and sanitary housing." *Id.* Notwithstanding national policy, funds have generally been allocated on the basis of estimated needs, but funding processes do not guarantee that the neediest areas will always be served. *See id.* at 12.

142. *See id.*

143. *See, e.g.,* GOVERNOR'S BORDER WORKING GROUP, 9-10 (Tex. 1993). *See also* FmHA's HOME LOAN PROGRAM NOT MEETING THE NEEDS OF ALL RURAL RESIDENTS, *supra* note 141.

144. GOVERNOR'S BORDER WORKING GROUP, *supra* note 143 at 9-10. *See also* FmHA's HOME LOAN PROGRAM NOT MEETING THE NEEDS OF ALL RURAL RESIDENTS, *supra* note 141.

administration of housing funds contribute to the lack of qualifications of colonia residents.¹⁴⁵

One major concern to colonia residents and critics of the FmHA process is that the agency fails to perform outreach in local districts. This failure, in effect, circumscribes the intent of the legislation.¹⁴⁶ For example, Texas returned over one-third of its original allocation, in part, because of over zealous application of subjective criteria.¹⁴⁷

Outside the FmHA, seven other agencies have the potential to assist rural areas in need of infrastructure.¹⁴⁸ Yet rural areas experience difficulty in identifying, comprehending, and using the multiplicity of federal programs.¹⁴⁹ Although the objectives of the agencies and programs are similar, eligibility criteria are "significantly different."¹⁵⁰ For example, FmHA's Very Low-Income Housing Repair Loans and Grants Program provides grants to low-income, elderly homeowners. Loans and grants can be used for repairs to a home's water or waste disposal system. In contrast, other programs restrict eligibility to states, municipalities, nonprofit businesses, or Indian tribes with a specific population size.¹⁵¹ In the aggregate, the process that has the potential to provide rural residents with avenues to

145. See generally GOVERNOR'S BORDER WORKING GROUP, *supra* note 143; FmHA's HOME LOAN PROGRAM NOT MEETING THE NEEDS OF ALL RURAL RESIDENTS, *supra* note 141, at 10.

146. See, e.g., GOVERNOR'S BORDER WORKING GROUP, *supra* note 143, at 10.

147. See *id.* at 30. Standards set by FmHA's National Office broadly require that eligible houses be structurally sound, functionally adequate, in good repair; and adequate in size, design, and cost, with no more than 1,300 square feet of living area for households of two or more persons. They must also meet thermal standards, inspection and certification for adequacy of electrical, plumbing, heat, water, sewer, and termite infestation. Each state is allowed to implement and interpret these standards. Identical housing and basement amenities are assessed differently in other states. FmHA's HOME LOAN PROGRAM NOT MEETING THE NEEDS OF ALL RURAL RESIDENTS, *supra* note 141. In 1987, 310 farmworkers in El Paso were surveyed to measure the need for proposed FmHA farm labor housing slated for the region. The average annual income reported was \$6,476. GOVERNOR'S BORDER WORKING GROUP, *supra* note 143. The survey reported:

30 percent reported sharing their home with at least one other family; 27 percent described the condition of their home as poor; 50 percent reported overcrowded conditions; 33 percent indicated that their home required a "lot of repairs;" 43 percent had no indoor toilets, 45 percent no tubs or showers, 33 percent no stoves, 54 percent no heaters, 9 percent indicated bad electrical wiring, 19 percent bad foundations, and 23 percent a leaking roof.

Id. at 21.

148. Eight federal agencies retain programs designed for rural areas in constructing water and/or wastewater facilities. They include the U.S. Department of Agriculture's (USDA) Rural Development Administration, USDA's Farmers Home Administration, Appalachian Regional Commission, Department of Housing and Urban Development, Department of Commerce's Economic Development Administration, Environmental Protection Agency, Department of Health and Human Services, and Department of the Interior. See PATCHWORK OF FEDERAL WATER AND SEWER PROGRAMS IS DIFFICULT TO USE, *supra* note 19, at 13-15. Other organizations assist rural areas in "identifying, applying for, and administering program grants, loans, and technical assistance.

149. See generally *id.*

150. See *id.* at 33.

151. Specifically, the Regional Development Centers, Water and Waste Disposal Systems for Rural Communities Program, and FmHA's Rural Housing Site Loan Program are directly restricted to populations of 10,000 or less; RDA's Emergency Community Water Assistance Grants are restricted to populations of 15,000 or less; and RDA's Rural Development Grants Programs limits availability to a community outside a city with a population of 50,000 or less. *Id.* at 11. The unwieldy federal processing of applications, with differing standards, application criteria, and the demands of meeting timetables with funding cycles, hinder eligibility. *Id.* at 15.

improvement, facilitates rural slum developments. The impact of unregulated land use on rural space and the added costs of rural slums is examined in the next section.

F. *Agricultural Disenfranchisement*

Gone are the days when cotton fields bloomed everywhere and the odor of manure was considered perfume. "Nothing like the smell of cow manure in the morning. Now that's country life."¹⁵²

Without conscious efforts to address appropriate land use and regulation, the colonias and the problems residents face are expected to increase in the foreseeable future. Evidence of the expected increase is found in rural communities themselves and the loss of open space and former sites of agricultural activity.¹⁵³

The expansion of colonia developments in the outlying areas encroaches on fragile desert floor. As urban areas expand, families seeking low-income housing alternatives are pulled into the rural lots.¹⁵⁴ The prospect of immediate profits induces farmers and ranchers¹⁵⁵ to convert thousands of acres of former agricultural,¹⁵⁶ ranch, and ancient desert floor¹⁵⁷ into land for sale to the low-income buyer.

Between 1962 and 1987, the region lost about one-third of its total acreage and thousands of former agricultural farming operations to unplanned housing subdivisions.¹⁵⁸ In its entirety, the region serves as a striking example of lost opportunity. The expected increase of international

152. Alfredo Corchado, *Special Report: Town of Socorro*, EL PASO HERALD POST, Feb. 17, 1993, at A1 (quoting Sergio Melendez, former Socorro City Planner).

153. Border regions are also losing approximately 2,500 acres to law enforcement activities seeking to control illegal drugs coming into the United States. See U.S. ARMY CORPS. OF ENGINEERS, FINAL PROGRAMMATIC ENVIRONMENTAL IMPACT STATEMENT FOR JTF-6 ACTIVITIES ALONG THE U.S./MEXICO BORDER (1994); SOUTHWEST CENTER FOR ENVIRONMENTAL RESEARCH AND POLICY, SUMMARY OF U.S.-MEXICO BORDER COMMUNITY ENVIRONMENTAL FORUMS (1993).

154. Interview with Sandy New, *supra* note 118; Interview with Sister Mary Beth Larkin, ESPISO, El Paso, Tex. (July 5, 1993).

155. Interview with Agriculture Stabilization and Conservation County Comm., *supra* note 76.

156. For the sake of convenience, ranching and/or agricultural lands are referred to as agricultural land throughout this text. Where farm-specific or ranching-specific distinctions are required, they will be noted accordingly.

157. In the 1870s, thick chaparral was "so heavy that herds of stolen beef or horses could be hidden a few miles from town in perfect secrecy." PAREDÉS, A BORDER BALLAD AND ITS HERO, *supra* note 21, at 10 (quoting Informe de la Comision Pesquisidora de la Frontera del Norte (Mexico 1877)). This characterization does not apply today. Flora, fauna, and the diverse plant habitat unique to the region are disappearing with unmitigated restraint. See generally SOUTHWEST CENTER FOR ENVIRONMENTAL RESEARCH AND POLICY, *supra* note 153. Miscellaneous items, food wrappers, paper cups, bottles and other littering are now found in isolated open spaces and former sites of agricultural enterprises. See Author's journal notes, El Paso, Texas.

158. Farming operations fell from 138,800 to 130,000. For the same period, the number of dislocated farms dropped from 187,000 to 183,000, and the number of corporate farming enterprises increased. See, e.g., GUIDE TO THE YEAR 2010, *supra* note 76. Losses of agricultural enterprises continues to the present. See U.S. DEP'T AGRIC. STATISTICS 1985-1992 (1995).

market activity also continues to compromise the region's open spaces.¹⁵⁹ The next section examines the direct impact of international agreements on field workers, primarily focusing on laborers working in the El Paso region.

III. TRADE LIBERALIZATION, AGRICULTURAL WORKERS, AND EL PASO

Contrary to popular debate, the expansion of global markets is not a recent phenomenon. Since the 1960s, and particularly over the past decade, trade barriers have been reduced in an effort to promote the expansion of agricultural trade.¹⁶⁰ The United States has granted duty-free treatment to selected commodities from developing countries, including Mexico.¹⁶¹ Securing greater access to foreign markets, NAFTA extends governmental privileges to growers and other producers.¹⁶² The expansion of global markets has resulted in the increased production of fruits and vegetables in Mexico while easing entry into U.S. markets.¹⁶³ This shift in food

159. See generally SOUTHWEST CENTER FOR ENVIRONMENTAL RESEARCH AND POLICY, *supra* note 153. Projected growth of the region, in sum, promises further congestion for border twin cities. See also OFFICE OF THE ATTORNEY GENERAL, TEXAS, HB 1001 AND RELATED COLONIAS ISSUES § 3 (1995) ("due to the implementation of the North American Free Trade Agreement (NAFTA), the General Agreement on Tariffs and Trade (GATT), other economic incentives, and the increasingly robust economic development along the Texas-Mexico border, the population in economically distressed subdivisions in the affected counties will continue to increase"); LaRue Corbin et al., *The Environment, Free Trade, and Hazardous Waste: A Study of the U.S.-Mexico Border Environmental Problems In The Light of Free Trade*, 1 TEX. WESLEYAN L. REV. 183, 205 (1994) (border regions are environmentally distressed, and the challenge of NAFTA is to "accomplish [its] objective without precipitating disastrous environmental consequences."); TOM BARRY & BETH SIMS, *THE CHALLENGE OF CROSS-BORDER ENVIRONMENTALISM: THE U.S.-MEXICO CASE* (1994).

160. The 1987 Bilateral Framework Agreement on Trade and Investment between the United States and Mexico, and several joint task forces between both countries, including three technical working groups from the United States Department of Agriculture and Mexico's Secretaria de Agricultura y Recursos Hidraulicos, worked towards greater access to trade and exports. See U.S. GEN. ACCOUNTING OFFICE, GAO/NSIAD-91-155, U.S.-MEXICO TRADE IMPACT OF LIBERALIZATION IN THE AGRICULTURAL SECTOR (1991). See also Liane L. Heggy, *Free Trade Meets U.S. Farm Policy: Life After the Uruguay Round*, 25 LAW & POL'Y INT'L BUS., 1367, 1378 (1994) (examination of nature of international agreements in Latin American countries).

161. U.S.-MEXICO TRADE IMPACT OF LIBERALIZATION IN THE AGRICULTURAL SECTOR, *supra* note 160.

162. Mexican agricultural exports demonstrate the benefits achieved from these efforts. In 1989, the value of agricultural trade was estimated at approximately \$200 million and has increased significantly throughout the past decade. For example, the total value of bilateral trade increased by 89% from \$27.8 billion in 1980 to \$52.6 billion in 1989. Mexico now ranks as the United States' third largest trading partner.

163. In addition to benefits derived from the federal regulatory structure, the Mexican economy benefits by way of disparate wage differentials and favorable climatic regions that compete with California, Texas, and Florida, traditionally the largest producers of fruits and vegetables in the United States. To protect the U.S. import and export market, NAFTA included phase-in periods and other protectionist mechanisms. The transfer of food processors into Mexico demonstrates the shift from producing food in the United States to food production in foreign markets. See, e.g., Marianne Biasotti, *Outlooks Differ On Food Processors' Closing*, SANTA CRUZ SENTINEL, Nov. 21, 1995, at A1 (Green Giant relocated to Mexico); Robert Collier, *What Green Giant Found South of the Border*, S.F. CHRON., June 28, 1994, at A7. Future relocations threaten the viability of initiating small and/or moderate sized farming operations. See Jennifer Dixon, *Texas Farms Head South, NAFTA Expected to Accelerate Drain of Jobs to Mexico*, S.F. EXAMINER, Oct. 5, 1992, at D1; Suzanne Steel, *Goods Produced, Grown In Ohio Could Find New Markets in Mexico*, COL. DISPATCH, Aug. 29, 1993, at G2. WILLIAM LIBMAN, TESTIMONY ON BEHALF OF THE UNITED STATES BROOMCORN BROOM INDUSTRY, FED. DOC. CLEARING HOUSE CONG. TESTIMONY, Sept. 23, 1993.

production escalates dependence on export markets with a continued rise in consumption of complementary and supplementary imported foods.¹⁶⁴ Agricultural legislation, promulgated during World War II, provides the foundation for current international agreements impacting agriculture.

A. Past Agricultural Legislation

The Bracero Program, responding to sectoral labor needs during World War II, constituted an international agreement meant to last the duration of the War. The Program permitted temporary labor from Mexico into the United States to work under contract in agriculture.¹⁶⁵ It authorized a significant exception to one of the most restrictive immigration laws passed during the period.¹⁶⁶ While employers fared well, the experiences of Mexican laborers makes the Bracero Program a notorious incident in Chicano history.

Breaches of contracts, failure to provide compensation, charges of discriminatory treatment, and slave-like treatment of workers plagued the program.¹⁶⁷ The increased flow of Mexican labor into the United States flooded the labor market and, consequently, depressed wage levels even

164. See, e.g., David Runsten & Sandra O. Archibald, *Technology and Labor—Intensive Agriculture: Competition Between Mexico And The United States*, U.S.-MEXICO RELATIONS, LABOR MARKET INTERDEPENDENCE (Jorge A. Bustamante et al. eds., 1992). As defined by the authors, complementary products are those not produced in the United States, such as coffee. Supplementary products are imports that compete with U.S. production, for example: garlic, broccoli, grapes, tomatoes, and asparagus. See Kent S. Foster & Dean C. Alexander, *The North American Free Trade Agreement (NAFTA) And The Agricultural Sector*, 40 LOY. L. REV. 63 (1994).

165. See 56 Stat. 1759 (1942). The Bracero Program received statutory authorization in 1951. 65 Stat. 119 (1957).

166. The Immigration Law of 1917 imposed literacy requirements, a head tax, and added to the list of inadmissible classes of aliens permitted entry into the U.S. For a discussion of the Immigration Act of 1917 and subsequent quota immigration laws, see OSCAR M. TRELLAS, II & JAMES F. BAILEY, III, IMMIGRATION AND NATIONALITY ACTS: LEGISLATIVE HISTORIES AND RELATED DOCUMENTS 54 (1979). The alleged labor shortages, as perceived by agricultural employers, are subject to criticism. See generally GEORGE C. KISER & MARTHA W. KISER, MEXICAN WORKERS IN THE UNITED STATES: HISTORICAL AND POLITICAL PERSPECTIVES (1979); VALDÉS, *supra* note 94. Agricultural employers commonly succeed in procuring legislation to accommodate perceived shortages. See, e.g., Migrant and Seasonal Agricultural Workers Protection Act, 29 U.S.C. §§ 1801-1872 (1988) (MSAWPA). Although authorized to protect migrant workers, MSAWPA exempts certain family farms. *Id.* The Seasonal Agricultural Worker Program (SAW Program), an exception to the stated goals of the Immigration Reform Control Act of 1986 in deterring the number of foreign workers into the United States, provides a present day example of federal legislation regulating and meeting the labor needs of the agricultural sector. Pub. L. 99-603, 100 Stat. 3359 (1986). In contrast to the Act's stated goals, the SAW Program permitted the entry of labor from foreign markets, ensuring the needs and demands of the agricultural sector were met. Other immigration laws also facilitate the entry of nonimmigrants into the United States "to perform agricultural labor." 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (Supp. 1991). Exceptions to key provisions of protective labor laws and immigration laws provide a managed and subsidized workforce for agricultural employers and set forth innumerable other examples of the exceptionalism allowed the industry. See, e.g., Fair Labor Standards Act, 29 U.S.C. § 213(a)(6) (1988) (excluding agricultural employees from the minimum wage and maximum hour provisions of 29 U.S.C. §§ 206-207 (1988); *cf. id.* § 152(3) (excluding farm laborers from the National Labor Relations Act); Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1994).

167. See, e.g., VALDÉS, *supra* note 94, at 94; ERNESTO GALARZA, MERCHANTS OF LABOR, THE MEXICAN BRACERO STORY (1964); MARIL, *supra* note 110.

further.¹⁶⁸ When workers objected or sought to assert their rights by joining unions or utilizing other legal venues, employers garnered the support of the federal sector to stifle their efforts.¹⁶⁹ The mechanization of the cotton harvest in El Paso and in other regions, which reduced the need for labor, and the intensified criticism from worker advocates ultimately ended the Bracero Program in 1964. The following year, however, the United States and Mexico agreed to yet another international program involving rural workers.

The Border Industrialization Program (BIP), introduced in 1965, was expected to offset high unemployment rates as a result of the termination of the Bracero Program. The program, however, did very little in providing employment for former braceros. Ultimately, the BIP and its predecessor, the Bracero Program, both laid the foundation for the region's "twin assembly plant" concept.

Twin assembly plant manufacturing occurs principally in Mexican "maquilas."¹⁷⁰ Primarily United States owned industries, maquilas assemble imported raw materials or component parts basically duty free.¹⁷¹ After processing, the products are returned to the United States for final assembly. Maquilas "epitomize the essence" of the region's economy. Corporations take advantage of disparate wage and labor benefits and employ hundreds of thousands of Mexicans and Chicana/os.¹⁷² Although initially justified as a program for male workers, the industry presently

168. VALDES, *supra* note 94, at 95.

169. See, e.g., MARIL, *supra* note 110, at 44. For an overview of how this translates for workers seeking representation through unions, see generally *Medrano v. Allee*, 347 F. Supp. 605 (S.D. Tex. 1972), *modified*, 94 S. Ct. 2191 (1974) (action by farmworker union and other individuals against certain Texas Rangers, state officers, and county officials who used threats of prosecution, subjected persons engaged in promoting farmworkers to arrests, detentions without filing charges, and threats of further prosecutions if pro-union activities did not cease); *Vasquez v. Bannworths Inc.*, 707 S.W.2d 886 (Tex. 1986); *Gault v. Texas Rural Legal Aid*, 848 F.2d 544 (5th Cir. 1988) (growers, packers and trade association action against union, union picketing statutes with civil rights counterclaims regarding constitutionality of picketing statutes). In their representation of field workers, the actions of legal services attorneys are subjected to the scrutiny of growers, producers, and their political representatives. LEGAL SERVICES CORPORATION, *supra* note 100 (requester's "general concern with the magnitude and propriety of grantee attorneys' actions against growers who employ field workers").

170. "Maquila" is a Spanish term derived from the verb "maquilar" which translates as "perform a task for another." Of the two thousand maquiladoras located in Mexico, three hundred are established in Ciudad Juarez comprising the highest concentration of maquilas in a border region. PASO DEL NORTE REGIONAL ECONOMY, *supra* note 26, at v. In El Paso, maquilas generate two of every five jobs. The maquila industry has induced some scholarship. See generally Dedra L. Wilburn, *The North American Free Trade Agreement: Sending U.S. Jobs South of the Border*, 17 N.C. J. INT'L L. & COM. REG. 489 (1992); David Voigt, *The Maquiladora Problem in the Age of NAFTA: Where Will We Find Solutions?*, 2 MINN. J. GLOBAL TRADE 323 (1993); M. Patricia Fernandez-Kelly, *Labor Force Recomposition and Industrial Restructuring In Electronics: Implications For Free Trade*, 10 HOFSTRA LAB. L. J. 623 (1993); ANNETTE FUENTES & BARBARA EHRENREICH, *WOMEN IN THE GLOBAL FACTORY* (1988).

171. The concept behind the program was to promote foreign investment and exports. See U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-94-22, U.S.-MEXICO TRADE: THE WORK ENVIRONMENT AT EIGHT U.S.-OWNED MAQUILADORA AUTO PARTS PLANTS (1993).

172. Starting salaries for maquila employees working a forty-nine hour week are about \$27.00 per week. The price of food and other essentials is similar in cost to U.S. prices. See, e.g., Michael Satchell, *Poisoning the Border*, U.S. NEWS & WORLD REP., May 6, 1991, at 32.

retains a hiring preference for young, female, first-time entrants into the labor force.¹⁷³ In many respects, work in this industry parallels working conditions in the fields. Those conditions include repetitive work tasks,¹⁷⁴ low wage levels, few benefits or options for promotion, and the absence of unions. Employers are also charged with designing the work process to ensure instability of employment and high turnover.

NAFTA is expected to increase the number of maquiladoras in the region.¹⁷⁵ This expectation has raised concerns regarding the alleged impact of the industry on the environment.¹⁷⁶ The primary issue addressed encompasses the alleged health hazards caused by the disposal of hazardous waste, cross-boundary air pollution, and workplace exposure to toxic substances.¹⁷⁷ Although several maquiladoras produce hazardous waste,

173. About 85 percent of maquila workers are women. See generally PASO DEL NORTE REGIONAL ECONOMY, *supra* note 26, at 31; Jan Gilbreath Rich, *Bordering on Trouble*, ENVTL. F. (1991) (assembly factories employ 1/10th of country's labor force); MARIA PATRICIA FERNANDEZ-KELLY, MEXICAN BORDER INDUSTRIALIZATION: FEMALE LABOR FORCE PARTICIPATION AND MIGRATION IN WOMEN, MEN AND THE INTERNATIONAL DIVISION OF LABOR 224 (June Nash & Maria Patricia Fernandez-Kelly eds., 1983); MICHAEL J. TWOMEY, MULTINATIONAL CORPORATIONS AND THE NORTH AMERICAN FREE TRADE AGREEMENT (1993). The value of the maquila industry is subject to dispute. The industry's critics contest the substandard working conditions and certain production processes that allegedly endanger employees' health. They also assert that employment in the industry prompts thousands of females to migrate from Mexico's interior to the border, and thereby increases the exploitation of young women. See generally Paul E. Brink, *Woman's Passion is Fighting Injustices of Maquiladora System*, EL PASO TIMES, July 7, 1993, at 4A; Sherri M. Durand, *American Maquiladoras: Are They Exploiting Mexico's Working Poor?*, 3 KAN. J. L. & PUB. POL'Y 128 (1994); COALITION FOR JUSTICE IN THE MAQUILADORAS: ANNUAL REPORT 1993 (1994). For an examination of how the female workforce in the maquilas is meeting the challenges of working in the industry, see DEVON PEÑA, *THE TERROR OF THE MACHINE, TECHNOLOGY, GENDER, AND ECOLOGY ON THE U.S.-MEXICO BORDER* (1995) (publication forthcoming).

174. One congressional study reported plants missing "some hazard-specific programs and training. This results in part, in inadequate and/or partial safety and health programs, machinery lacking machinery guards and exposed machine parts, common injuries recorded were contusions, lacerations, hand injuries, excessive machine noise. Moreover, the reporting of injuries and illnesses is also incomplete. U.S.-MEXICO TRADE: THE WORK ENVIRONMENT AT EIGHT U.S.-OWNED MAQUILADORA AUTO PARTS PLANTS, *supra* note 171, at 2-6.

175. See COMPREHENSIVE HOUSING AFFORDABILITY STRATEGY, *supra* note 26, at 22. Maquilas are also being incorporated into the food processing industries.

176. See, e.g., JAN GILBREATH RICH, *PLANNING THE BORDER'S FUTURE: THE MEXICAN-U.S. INTEGRATED BORDER ENVIRONMENTAL PLAN*, U.S.-MEXICAN POLICY STUDIES PROGRAM (1992); Rich, *Bordering on Trouble*, *supra* note 173, at 26-33 (ecological crisis on border resulting from industrialization and rapid population expansion); MARY KELLY, *NAFTA'S ENVIRONMENTAL SIDE AGREEMENT: A REVIEW AND ANALYSIS*, TEXAS CENTER FOR POLICY STUDIES (1993); Randy Lee Loftis, *Mexico Pushing A Cleaner Image*, DALLAS MORNING NEWS, Dec. 5, 1993, at A1; Xavier Carlos Vasquez, *The North American Free Trade Agreement and Environmental Racism*, 32 HARV. INT'L L.J. 357 (1993); Cheryl Schecter & David Brill, Jr., *Maquiladoras: Will the Program Continue?*, 23 ST. MARY'S L.J. 697 (1992); Daniel I. Basurto Gonzales & Elaine Flud Rodriguez, *Environmental Aspects of Maquiladora Operations: A Note of Caution for U.S. Parent Corporations*, 22 ST. MARY'S L.J. 659 (1991); U.S.-MEXICO TRADE: THE WORK ENVIRONMENT AT EIGHT U.S.-OWNED MAQUILADORA AUTO PARTS PLANTS, *supra* note 184; David J. Molina, *A Comment on Whether Maquiladoras Are in Mexico for Low Wages or to Avoid Pollution Costs*, 2 J. ENV'T & DEV. 221 (1993); Santos Gomez, *Environmental Risks Related to the Maquiladora Industry and the Likely Environmental Impact on NAFTA*, 6 LA RAZA L.J. 174 (1993).

177. See Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area, Aug. 14, 1983, U.S.-Mex., T.I.A.S. No. 10,827 (stating that waste materials generated by the maquiladora plants are to be transported back to the United States for disposal if they cannot be recycled and reused in Mexico). A study by the Texas Center for Policy Studies

including spent solvents, acids, caustic materials and paint waste, few studies have focused on its disposal.¹⁷⁸ While controversy over the above issues led to the adoption of a Supplemental Agreement to NAFTA which addresses specific environment concerns, its impact is uncertain.¹⁷⁹

B. NAFTA

A primary goal of trade liberalization ensures United States agriculture free access to a growing Mexican market by eliminating or lowering trade barriers. While it has openly and explicitly promoted an open marketplace for capital and goods,¹⁸⁰ the impact of NAFTA on agricultural labor remains largely obscured.

In its original form, NAFTA did not explicitly address labor issues. In response to criticism potentially strong enough to block the Agreement, its drafters permitted side accord agreements specific to agricultural la-

found that in a 2½ year period only 33 of the approximately 600 maquiladoras in the Texas-Mexico border area had filed the required notices for return of their hazardous wastes from Mexican operations to the United States as required by Mexican law. REMARKS OF MARY E. KELLY, SENATE COMM. ON FINANCE, MEXICO/UNITED STATES/CANADA FREE TRADE NEGOTIATIONS AND THE ENVIRONMENT 3 (Tex. Ctr. for Pol'y Stud. 1991). Several maquilas use "significant amounts of solvents and generate other wastes considered hazardous." *Id.* Residents at the border have long criticized the Environmental Protection Agency for lax regulatory treatment and for failing to address the environmental degradation at the border for over twenty years. See, e.g., Jorge B. Haynes, *Border Will Remain Polluted Without Free Trade*, HOUS. CHRON., Sept. 28, 1992, at A13; JOHN HALL, CHAIRMAN, TEX. WATER COMM'N, COMMENTS ON THE INTEGRATED ENVIRONMENTAL PLAN FOR THE MEXICO-U.S. BORDER AREA (1991) (exposure to toxic chemicals in workplace on daily basis).

178. Other effects of the hazardous waste include the birth of children whose mothers worked in the industry and/or lived near maquila plants with birth defects and children characterized as "Mallory children." *America's Deadly*, OBSERVER MAG., Dec. 12, 1993, at 16 (birth of anencephaly children where brain fails to develop and baby born with open skull, filled mainly with liquid). Lawsuits filed on behalf of the children allege their mothers inhaled a "cocktail of solvents, acids and heavy metals blown over . . . by prevailing south-easterly winds from the Matamoros industrial plants." *Id.* The women handled polychlorinated biphenyls in glass tubes without proper safety equipment or clothing sustaining burns and rashes. *Id.* Characteristics of Mallory children include "mongoloid features—flat noses, large, swollen lips—and suffering a range of mental and physical defects." *Id.* See also Carol Byrne, *What Is Killing These Babies?*, STAR TRIB., May 2, 1993, at A7; J. Michael Kennedy, *Teeming "Colonias"; Border Has Worst of Both Worlds*, L.A. TIMES, Oct. 2, 1989, at P1; Jim Morris, *Baby Tragedy Has No Bounds*, HOUS. CHRON. Aug. 2, 1992, at 1; Jo Ann Zuniga, *Maquiladoras Bring Pollution Along With New Prosperity*, HOUS. CHRON., Feb. 9, 1992, at A26.

179. See, e.g., TEXAS CENTER FOR POLICY STUDIES, MARY KELLY, NAFTA'S ENVIRONMENTAL SIDE AGREEMENT: A REVIEW AND ANALYSIS OF KEY PROVISIONS (1993); JAN GILBREATH RICH, THE NORTH AMERICAN FREE TRADE AGREEMENT: SOME ENVIRONMENTAL CONSIDERATIONS (1991).

180. NAFTA proponents assert that the free flow of agricultural goods and services promotes production efficiency through economies of scale. Free trade forces business to hold costs down and, in the process, improves quality, thereby providing consumers with greater choices and lower prices. See, e.g., Sidney Weintraub, *The North American Free Trade Debate*, 119 WASH. Q. (Fall 1990); Rudiger Dornbusch, *If Mexico Prospers, So Will We*, WALL ST. J., Apr. 11, 1991, at A14. In this country "efficiency is equated with profitability." INGOLF VOGELER, THE MYTH OF THE FAMILY FARM, AGRIBUSINESS DOMINANCE OF U.S. AGRICULTURE (1981). The above assertions advanced the Agreement's passage. Consequently, greater industrialization and further consolidation of larger sized agricultural operations is assured. In marked contrast, Ingolf Vogeler asserts efficiency and greater production are not the same. He disputes published data stating that the larger the farm operation, the lower the yields per acre. "A large-scale farmer seems more efficient but actually only produces more in quantity and value with fewer workers and more land." In contrast, Class II farms, he asserts, achieve economies of size. *Id.* at 192.

bor.¹⁸¹ The Supplemental North American Agreement on Labor Cooperation permits any of the three countries to file complaints based on health and safety,¹⁸² child labor, and minimum wage concerns of migrant farm workers.¹⁸³

Although written to create an illusion of worker-protection, the substance of the accords demonstrate the provisions neither guarantee better working conditions¹⁸⁴ nor provide economic incentives otherwise afforded to the agricultural sector. Meaningful standards and functional definitions, moreover, are consistently lacking throughout the Supplement's provisions. Rather than establish tangible labor standards, the Agreement provides generalities regarding its obligation to "promote" high-skill, high-productivity economic development in North America.¹⁸⁵

Punitive measures for violations of workers' rights, whether domestic or international, intentional or unintentional, moreover, are not pro-

181. See, e.g., NAFTA TEXT, *supra* note 6, at 775. The NAFTA culminated during the 1992 United States Presidential campaign. The side agreements were initially made to address concerns relative to wage differentials and alleged environmental hazards in Mexico. See, e.g., Terence J. Centner, *Changes Impacting Production Agriculture: NAFTA and New Environmental Regulations*, 24 U. TOL. L. REV. 371 (1993); Terence J. Centner, *Presidential Address: The Internationalization of Agriculture: Preparing for the Twenty-First Century*, 7 NEB. L. REV. 5 (1994); David G. Abler, *NAFTA, Agriculture and the Environment*, 28 TULSA L.J. 659 (1993); James F. Smith & Marilyn Whitney, *The Dispute Settlement Mechanism of the NAFTA and Agriculture*, 68 N.D. L. REV. 567 (1992). Opposition to global integration of the agricultural sector focused primarily on the degree of market competition from countries with producers or marketing organizations that enjoyed a competitive advantage: less stringent environmental laws, lower quality of goods, disparate wage levels and the absence of labor regulations in foreign countries. See, e.g., Centner, *supra*. Trade sensitive commodities received a considerable amount of scrutiny. In the United States, trade sensitive commodities include fresh fruits and vegetables particularly tomatoes. In Mexico, United States corn production markets retain competitive advantages. Trade sensitive products were permitted phase-in periods to protect agricultural markets. *Id.*

182. The Supplemental North American Agreement of Labor Cooperation, in NAFTA TEXT, *supra* note 6, at Art. 4: Private Action. The working conditions of field workers are vulnerable to political forces. For example, under the Reagan Administration, U.S. Department of Labor regulations precluded workers, injured on the job from suing their employers, even if they received state workers' compensation. *Farmworker Law Developments In 1990*, CLEARINGHOUSE REV. (1991). Agribusiness pressured the administration for changes after Congress strengthened the legal rights of field workers by enacting federal protective statutes with damage provisions to supplement workers' compensation statutes. These statutes permitted field workers to go directly into federal court to seek damages. Litigation challenging the regulations was successful, and they were eventually invalidated. *Adams Fruit Co. v. Barrett*, 110 S. Ct. 1384, 1386-87 (1990). The issue, however, and resistance to this form of protection for agricultural workers continue to the present time. See, e.g., STEVEN KENFIELD, VICE PRESIDENT, ALLIANCE LABOR CONTRACTORS, HOUSE COMM. ON THE ECONOMIC WORKFORCE, FED. DOC. CLEARING HOUSE CONG. TESTIMONY, May 25, 1995. For a detailed examination of the Labor Supplemental Annex of the NAFTA, see Katherine A. Hagen, *Fundamentals of Labor Issues and NAFTA*, 27 U.C. DAVIS. L. REV. 917 (1994).

183. NAFTA TEXT, *supra* note 6, at 775.

184. One example of how this translates to the working conditions of field workers is field sanitation regulations. Although sanitation facilities are required, the Occupational Safety and Health Administration's method for ensuring grower compliance is not uniform in its application. 29 C.F.R. § 1928.110 (1989). For a general overview on the relationship between state law and the Agreement, see, e.g., Sarah M. Vogel, *The Effects of NAFTA Upon North Dakota State Law*, 70 N.D. L. REV. 485 (1994); Lance Compa, *Labor Rights and Labor Standards in International Trade*, 25 LAW & POL'Y INT'L BUS. 165 (1993).

185. NAFTA TEXT, *supra* note 6, at 775.

vided.¹⁸⁶ Where meaningful standards and functional definitions are provided, they contradict the stated purpose of the Agreement's goals.¹⁸⁷

NAFTA's adjudicatory procedures, moreover, emphasize other troubling features related to agricultural workers. For example, its implementing regulations establish an informal dispute mechanism composed of commissions to serve as "impartial and independent tribunals to review, consult, examine, reconvene and file complaints."¹⁸⁸ Proponents of informal mechanisms contend that they are more beneficial to the disadvantaged in comparison to traditional and formal methods of resolving disputes.

Evidence comparing informal and formal mechanisms, however, sharply contradicts these assertions.¹⁸⁹ Informal adjudicatory procedures have not permitted fair and objective hearings for people of color. Critics maintain that the move towards "deformalization" may increase the risk of class-based prejudice.¹⁹⁰ Traditional jurisprudence has served to place agricultural workers outside the realm of legal remedy.¹⁹¹

In essence, NAFTA ensures the economic segregation of field workers of Mexican descent, and deprives them of the benefits the Agreement affords other segments of agriculture. This suggests a disturbing trend of privileging and enriching a select few within the agricultural sector at the expense of those at the bottom. The granting of an "unconditional, substantive, and enduring [federal] benefit to a select few," without an examination of its distributional effects on those at the bottom of the socioeconomic ladder, discourages equality.¹⁹²

186. Even where strong labor principles theoretically apply, federal agencies, responsible for regulating field workers, provide less protection to these employers than that supplied to others. See, e.g., *FARMWORKERS FACE GAPS IN PROTECTION AND BARRIERS TO BENEFITS*, *supra* note 92. To cap this process, the Agreement, moreover, protects potential violators of labor standards. Article 43 provides: "No Party may provide for a right of action under its domestic law against any other Party on the ground that another Party has acted in a manner inconsistent with this Agreement." NAFTA TEXT, *supra* note 6, at 793. This restraint permits instances of harmful conditions for U.S. farmworkers to remain unchallenged.

187. Annex 1 purportedly allows "guiding principles:"

Parties are committed to promote, subject to each Party's domestic law, but do not establish common minimum standards for their domestic law. They indicate broad areas of concern where the Parties have developed, each in its own way, laws, regulations, procedures and practices that protect the rights and interests of their respective workforces.

NAFTA TEXT, *supra* note 6, at 796.

188. *Id.* The time required to file complaints is not easily available for field workers who cannot afford to leave the fields for the filing of administrative complaints. For a discussion of NAFTA's dispute resolution mechanism and its side accords on labor and the environment, see, e.g., Jack I. Garvey, *Trade Law and Quality of Life—Dispute Resolution Under the NAFTA Side Accords on Labor and the Environment*, 89 AM. J. INT'L. L. 439 (1995).

189. Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359 (1985).

190. *Id.* See also Thomas Geoghegan, *Unsettling Disputes, Employees May Be the Losers in Arbitration Process*, CHI. TRIB. NOV. 27, 1994, at 1; THOMAS GEOGHEGAN, *WHICH SIDE ARE YOU ON: TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK* (1994).

191. See *supra* text accompanying notes 91-183.

192. Delgado, *supra* note 13, at 101 states:

Unless we recognize the government's power to enrich A, while ignoring B, can cause inequality between A and B just as surely as its power to impoverish B directly we risk repeating the error of the universal story's herdsman whose goats were stolen while he attended to another danger.

If one of NAFTA's primary goals is to benefit the nation's agricultural sector, the Agreement has ignored rural workers, who have contributed significantly to this sector's economic success. Their labor in the fields and food processing plants has comprised an essential element in the nation's "cheap food policy."¹⁹³ Alternative strategies in promoting international agreements, however, are feasible, and would promote the potential for change. The basis of this premise is examined in the following section.

IV. STRUCTURE AND BARRIERS TO THE FARMING ENTERPRISE

A. Corporate Ownership and the Agricultural Industry

Production agriculture in the Western World is now entering the last phase of industrialization—the integration of each step in the food production system. The production segment is rapidly becoming part of an industrialized food system.¹⁹⁴

In direct contradiction to the stated goals of agricultural policy, protecting farming in the country,¹⁹⁵ federal legislation has expedited the growth of larger and more highly integrated farming operations¹⁹⁶ and

193. 7 U.S.C. § 1282 (1988) (allowing consumers an "adequate and steady supply of . . . commodities at fair prices").

194. Thomas N. Urban, *Agricultural Industrialization: It's Inevitable*, CHOICES, 4th Quarter 1991. Industrialization within the agricultural sector involves the concentration, increased technical advancement and ongoing integration with input and marketing sectors of larger sized agricultural interests. Neil D. Hamilton, *Who Owns Dinner: Evolving Legal Mechanisms for Ownership of Plant Genetic Resources*, 28 TULSA L.J. 587, 643 (1993). See also MARTY STRANGE, FAMILY FARMING: A NEW ECONOMIC VISION 32-39 (1988) (defining an industrial agribusiness system as one producing an "industrially organized farm, that [is] financed for growth, large scale, concentrated, specialized, management centered, capital-intensive, at an advantage in controlled markets, standardized in [its] production processes, resource consumptive and farmed as a business"). Professor Hamilton finds that developments affecting changing structures within the agricultural sector are as follows: movement toward contract production of swine; ongoing trends towards larger, confined animal feeding facilities; commercialization of biotechnology; increased development of markets and technology for producing "industrial" crops; and food processors and marketers increased concentration in the food processing industry. Neil D. Hamilton, *supra* at 643. See also Neil O. Hamilton, *Agriculture Without Farmers? Is Industrialization Restructuring American Food Production and Threatening the Future of Sustainable Agriculture?*, 14 U. ILL. L. REV. 613 (1994).

195. See *infra* note 198 and accompanying text.

196. An excellent example is the growth of agricultural cooperatives. Anti-trust legislation purportedly promotes competitive market forces. In promoting competition, the competitive marketplace should "yield the best allocation of resources." *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1, 4-5 (1958). Notwithstanding the value placed on competition, monopolies are disfavored. Yet agricultural cooperatives are exempt from antitrust legislation. Clayton Act of 1914, 15 U.S.C. § 17 (1985); Capper-Volstead Act of 1922, 7 U.S.C. §§ 291-292 (1988); Cooperative Marketing Act of 1927, 7 U.S.C. §§ 451-457 (1988); Agricultural Adjustment and Agricultural Marketing Agreement Act of 1937, 7 U.S.C. § 608(a) (1988); Robinson-Patman Act of 1939, 15 U.S.C. § 13b (1988). While there are many definitions of cooperatives, Justice Brandeis, in a well-known dissent, *Frost v. Corporation Comm'n*, 278 U.S. 515 (1929) stated:

The farmers seek through both [stock and nonstock cooperatives] to secure a more efficient system of production and distribution and a more equitable allocation of benefits. But this is not their only purpose. Besides promoting the financial ad-

has ensured greater dependence on food imports into the United States.¹⁹⁷ This single focus of federal intervention has perpetuated the decline of smaller and moderate-sized farm operations unable to compete with large scale operations and corporate holdings.¹⁹⁸ This decline has led to a less diverse and healthy farm sector.¹⁹⁹

Agricultural legislation in the United States provides preferential treatment to select segments of the agricultural sector on the grounds of advancing a "cheap food policy." One aim of agricultural legislation, moreover, demonstrates the pursuit of economies of scale as a primary goal. This focus is premised on the presumption that larger-based operations are more efficient. In this country, "efficiency is equated with profitability."²⁰⁰

vantages of the participating farmers, they seek through cooperation to socialize their interests—to require an equitable assumption of responsibilities while assuring and equitable distribution of benefits. Their aim is economic democracy on lines of liberty, equality and fraternity.

Id. at 536-37. Several cases defining the contours of agriculture's immunity from antitrust legislation include, *inter alia*, *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978); *Treasure Valley Potato Bargaining Ass'n v. Ore-Ida Foods, Inc.*, 497 F.2d 203, *cert. denied*, 410 U.S. 999 (1974); *Case-Swayne Co., Inc. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1968); *Maryland and Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458 (1960); *United States v. Borden Co.*, 308 U.S. 188 (1939). See also Carla Tolbert Cook, *Antitrust Action Against Milk Marketing Cooperatives—Shaking Up The Milk Industry*, 34 DRAKE L. REV. 493 (1984-1985) (historical examination of agricultural cooperatives and antitrust legislation as applied to the milk industry). For an examination of agricultural cooperatives, see Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809 (1995); *United States v. Rock Royal Co-op*, 307 U.S. 533, 563 (1939); *Industrial Comm'n v. United Fruit Growers Ass'n*, 103 P.2d 15, 17 (1940).

197. See, e.g., *Runsten & Archibald*, *supra* note 164.

198. It appears the beneficiaries of governmental entitlements are a select few. By way of example, beneficiaries of large governmental awards, known as deficiency payments, are concentrated among relatively few farms. Approximately 54 percent of all 1993 deficiency payments were awarded to approximately ten percent of the 989,000 farms receiving such payments. U.S. GEN. ACCOUNTING OFFICE, GAO/T-RCED-95-133, *FARM PROGRAMS, DISTRIBUTION OF USDA INCOME SUPPORT PAYMENTS 1* (1995). Although Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d, prohibits discrimination in federally assisted programs, the regulations fail to insure existing regulations do not perpetuate disparate impact on groups outside its framework. For an elaboration of the emphasis in the environmental context, see Torres, *supra* note 11, at 449. ("A few statutes—state or federal—require agency officials to consider the racial or distributional effects of an environmental decision or action"). Moreover, as reported in a recent report, federal beneficiary payments are awarded to larger enterprises comprising corporate entities. See, e.g., ENVIRONMENTAL WORKING GROUP, CITY SLICKERS: FARM SUBSIDY RECIPIENTS IN AMERICA'S BIG CITIES (1995). In El Paso, beneficiaries of federal payments received \$13.4 million. *Id.* This emphasis detracts and, consequently, prevents the growth of a viable, diverse, rural economy in the region.

199. In 1930, the rural population comprised 53.8 million (43.7 percent of the total population). RURAL DEVELOPMENT PROFILE OF RURAL AREAS, *supra* note 19. In 1990, the rural population was 61.7 million (25% of the total population). In 1980, 31% more of the total U.S. population lived on farms than in 1990, when approximately 3.9 million people (1.6%) lived on farms; this trend continues. For example, the total number of farms dropped 12% from 2.4 million farms in 1981 to 2.1 million farms in 1990. *Id.* Reflecting the diminished place of the "family farm," the federal government announced it would no longer survey farm residents. See Barbara Vobejda, *Agriculture No Longer Counts in a Milestone of Sorts, U.S. to Drop Farm Resident Census*, WASH. POST, Oct. 9, 1993, at A1. See also Jon Margolis, *Small Town America Caught in Farm Crunch*, CHI. TRIB., Oct. 20, 1994, at A1 ("Kansas actually has a larger 'frontier' today than it did in 1890").

200. VOGELER, *supra* note 180, at 9. Proponents of agribusiness measure agricultural efficiency with productivity. See generally STATUS OF THE FARM SECTOR, *supra* note 5. Vogeler asserts that efficiency and greater production are not necessarily achieving economies of scale. Vogeler points

To ensure the protection and efficiency of the agricultural industry, agribusiness has drawn public entitlements²⁰¹ from farm credits, improved technology,²⁰² and subsidized commodity prices and farm income.²⁰³ The basic thrust of federal agricultural intervention has induced dramatic

out that large-scale farmers produce more agricultural goods and higher yields per worker. Large-scale farmers seem more efficient, he asserts, but actually only produce more in quantity and value with fewer workers and more land. In contrast, Class II farms achieved economies of size. VOGELER, *supra* note 180. Other studies report that production cost do not vary much from 300 to 3,000 acres. RONALD L. ROSMAN, *THIS LAND IS YOUR LAND*, AM. FARMLAND TRUST 14, 15 (1992); JIM HIGHTOWER, *EAT YOUR HEART OUT; FOOD PROFITEERING IN AMERICA* (1975).

201. For the historical foundation of agricultural subsidies and background specifics leading to the promulgation of the Agricultural Adjustment Act of 1938 (AAA), see generally MACDONALD, *supra* note 1, ("the sole aim and object of this act is to raise farm prices"). See also U.S. GEN. ACCOUNTING OFFICE, GAO/GGD-94-14, *FARM CREDIT SYSTEM: FARM CREDIT ADMINISTRATION EFFECTIVELY ADDRESSES IDENTIFIED PROBLEMS* (1994); Jeffrey R. Kayl, Comment, *Farm Credit Amendments Act of 1985: Congressional Intent, FCA Implementation and Court's Interpretation (And the Effect of Subsequent Legislation on the 1985 Act)*, 37 *DRAKE L. REV.* 271 (1987-1988) (background on network of federal farm lending practices and institutions).

202. Morrill Act, ch. 130, 12 Stat. 503 (1862) (codified as amended at 7 U.S.C. §§ 301-305, 307, 308 (1988)). The role of high-tech crops and the development of sophisticated farm equipment demonstrate this concept. See, e.g., Keith Parr, *Developments in Agricultural Biotechnology*, 19 *WM. MITCHELL L. REV.* 457 (1993). But see *Critics Try to Delay OK of Altered Tomato*, CHI. TRIB., Apr. 9, 1994, at Business 1; *California Agrarian Action Project v. University of Calif.*, 258 Cal. Rptr. 769 (Ct. App. 1989).

203. For example, income support payments known as deficiency payments have long protected producers' incomes when crop payments fall below set price levels. *FARM PROGRAMS, DISTRIBUTION OF USDA INCOME SUPPORT PAYMENTS*, *supra* note 198, at 1. These payments support incomes of producers and ensure that they receive a "minimum return from their crops." The deficiency payment rate is the difference between a legislatively established target price and either the national average market price or the loan rate. The USDA supports certain commodity prices through its nonrecourse loan program, where producers obtain loans and repay either directly or by forfeiting their crops to the CCC. *Id.* Yet another example of agricultural legislation protecting commodities is the sugar program which includes loans that support sugar prices and import quotas. These quotas restrict the supply of foreign sugar and ultimately protect producers from lower world sugar prices. U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-84, *SUGAR PROGRAM: CHANGING DOMESTIC AND INTERNATIONAL CONDITIONS REQUIRE PROGRAM CHANGES* (1993). Federal benefits are distributed among a relatively small number of farms: 42 percent of sugar grower benefits are awarded to 1 percent of farms; 17 cane farms received about 58 percent of the benefits; and 33 farms received over \$1 million during the 1991 crop year. Federal benefits awarded to sugar growers keep sweetener prices higher and cost users an average of \$1.4 billion annually. The above benefits are not unique to sugar growers and producers. For a review of the distribution of government price supports in other commodities, see generally U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-18, *PEANUT PROGRAM: CHANGES ARE NEEDED TO MAKE THE PROGRAM RESPONSIVE TO MARKET FORCES* (1993) (less than 25 percent of growers holding over 80 percent of available peanuts produced with award program between \$314 million and \$513 million added to cost of peanuts annually; other benefits included about \$234 per ton above the average cost of producing peanuts); U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-94-88, *RICE PROGRAM: GOVERNMENT SUPPORT NEEDS TO BE REASSESSED* (1994) (federal costs averaged \$863 million between 1986 and 1992, increased the percentage of producer income, and concentrated benefits among 15 percent of rice farms receiving 52 percent of deficiency payments). Approximately \$8 billion of support went towards particular commodities, such as corn, wheat, rice, and cotton. Indirect support, through supply restrictions, also awards benefits to the sector. Criticism over the expansive nature of federal payments generated some changes in the Federal Agricultural Improvement Act of 1996. H.R. CONF. REP. NO. 2854, 104th Cong., 2d Sess. (1996). After a contentious political battle, the Act changed the target price deficiency payment system. Sugar, tobacco, and peanut programs sustained modest changes. *Id.* Capped payments change other agricultural programs, but after a seven-year period the former system is re-initiated if the new one fails. *Id.* For a critical examination of the equities of farm programs, see Christopher R. Kelley, *Rethinking the Equities of Federal Farm Programs*, 14 *U. ILL. L. REV.* 659 (1994).

changes in the structure of food production in the United States.²⁰⁴ Since 1935, the number of farms in the United States has declined while ownership and control of farm assets have increasingly become concentrated in large commercial farming enterprises.²⁰⁵ Between 1935 and 1992, the number of farms in the nation declined from 6.8 million to 1.9 million.²⁰⁶ The shift towards greater corporate ownership promotes two costly consequences.

The first consequence is a steady decline in the total number and diversity of agricultural farming operations.²⁰⁷ The second is the increasing difficulty of new operator entry into the sector.²⁰⁸ Individuals interested in starting agricultural operations face difficult hurdles in obtaining financing to cover operating costs and the cost of acquiring land.²⁰⁹ During the mid-1980s, the number of new entrants declined approximately twenty-five percent annually, with no indication of abating.²¹⁰

204. Federal agricultural intervention has affected the size of farm operations; the degree of specialization used; the class of business organization used; the ease of entry into the farming; the ease of exiting from the farming; whether transfer of the operation is transferable and the degree of difficulty; whether government intervention in the market and the structure of the market hinders farming; whether farms are labor or capital intensive; type of land use patterns; and ownership of productive resources. Neil D. Hamilton, *Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 213-20 (1993).

205. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1992 CENSUS OF AGRICULTURE, TABLE 16, TENURE AND CHARACTERISTICS AND TYPE OF ORGANIZATIONS 22 (1995). The Census designates a farm as any place which sold or normally would have sold \$1,000.00 or more of agricultural products during the census year. *Id.* The agricultural census discloses a total of 1.93 million farms in the U.S. in 1992, down from 2.09 million in 1987. This constitutes a decline of about 32,500 farms per year. As of 1977, farms with over \$40,000 in gross sales controlled over 52 percent of the total farm assets, yet they accounted for only 19 percent of the total number of farms. Real estate and machinery also increased while livestock, crops, and financial assets declined. *Id.* See also Neil O. Hamilton, *Agriculture Without Farmers*, *supra* note 194 (effect of biotechnology on agriculture).

206. 1992 CENSUS OF AGRICULTURE, *supra* note 205. See also U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-40FS, RURAL DEVELOPMENT PROFILE OF RURAL AREAS (1993).

207. See U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-93-95, FARM FINANCE: NUMBER OF NEW FARMERS IS DECLINING 2 (1993). In the United States, the farm population is heavily overrepresented by the dominant population. Out of all farm operators, those of Spanish origin equaled 20,956 individuals. Those not of Spanish origin, as defined by the U.S. Census, equaled 12,394,690. U.S. DEP'T OF COMMERCE, 1992 CENSUS OF AGRICULTURE, U.S. DATA (1995).

208. THE NUMBER OF NEW FARMERS DECLINING, *supra* note 207, at 5. See also Jeff Kurowski, *Starting Dairy Operation Takes Toll*, SOUTH BEND TRIB., Jan. 7, 1995, at D10. The declining number of new farmers has induced Congress to help ease the entry of people into farming. The decline is also attributable to economic conditions in the agricultural sector that have made farming less financially desirable. *Id.*

209. See FARM FINANCE: NUMBER OF NEW FARMERS DECLINING, *supra* note 207, at 1.

210. During the 1982-1987 period, the number of new farm entrants—those who began operations on their current farm within a given year of the studied period—averaged about 25,000 fewer people on an annual basis. The number of new farmers, moreover, continues to decline. See FARM FINANCE: NUMBER OF NEW FARMERS IS DECLINING, *supra* note 207. From mid-1992, sixteen out of twenty key farm states and eleven of twelve agricultural states sponsoring beginning farmer programs reported that over the past five years the number of individuals entering farming declined by at least ten percent. States such as Texas and Ohio yielded numbers greater than 50%. *Id.* at 2-3. Estimates, however, may not be precise because of limitations in census data. For example, while the data included experienced farmers who had changed farms, it did not account for farmers entering and exiting between the census period. *Id.* Formidable transactional costs in the El Paso area, from the lowering of trade barriers and NAFTA, will also exact tremendous pressures on smaller operations.

Corporate ownership, furthermore, raises troubling questions. Specifically, how should land and other natural assets be owned and distributed, and who should be allowed to farm? One aspect of this dilemma is that Chicana/o agricultural workers who seek ownership of farming operations rarely have the opportunity either to access or qualify for farm ownership.²¹¹ If federally derived NAFTA and global restructuring are to offer opportunities for United States agriculture, then agricultural workers, as an essential component of the sector, merit consideration.

B. Environmental Concerns

The decline of new and small farm acquisition is not simply the result of inevitable and neutral global processes. The nation's present agricultural policies and legislation have failed to address or enhance Chicana/o farm ownership. The increased emphasis on foreign exports, in conjunction with a federal emphasis on "economies of scale," encourages greater concentration of holdings. The entry of the maquila industry into food processing,²¹² as an example, encourages vertical integration and consolidation of farm operations.²¹³ This raises questions about definitional standards over the nature of agricultural operations and farming.

211. The self-policing aspect of agriculture presents further obstacles to those outside the center of agricultural power. The Agricultural Stabilization and Conservation Service and elected county committee members or appointed state committee members are composed of public employees. Committee members serving out their elected positions determine which individual farmers qualify for agricultural subsidies. See, e.g., 7 C.F.R. §§ 7.1-.38 (1995). The implementing regulations provide details as to the eligibility and compliance of federal recipients. The federal regulatory framework permits farmers to vote on the determination of subsidy awards for their given areas. This process raises ethical considerations. Farmers receiving the subsidies hold positions with county officers of the Agricultural Stabilization and Conservation Service and/or are employed in part time positions as elected county committee members or appointed state committee members. While the programs were not directly designed to exclude field workers, the scarcity of Chicana/o owner operators and opportunities to initiate farming enterprises preclude opportunities to serve on committees. See, e.g., Greg Gordon, *Farm Program Criticized for Self-Policing Policy*, STAR TRIB., June 29, 1995, at B1 (citing Environmental Work Group, *FOX IN THE HENHOUSE REPORT* (1995) which criticizes the process permitting subsidized farmers' determination of enforcement and eligibility ruling as leaving federal programs "vulnerable to cronyism and corruption"). Between 1985 and 1994, about 13,000 state and county employees earned salaries from the Agriculture Department and received \$1.1 billion in farm subsidies.

212. See, e.g., *National Broiler Mktg. Ass' v. United States*, 436 U.S. 816 (1978). In attracting consolidation efforts, the vertical integration of farm markets is expedited. See *id.* One area providing an excellent example is the poultry industry and disappearance of smaller farm poultry operations. See *id.* Even outside the NAFTA framework, however, new alternatives in how land is used and regulated are required. See, e.g., *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 864 (Blackmun, J., dissenting) (1987) ("[t]he land use problems this country faces requires creative solutions").

213. NAFTA is projected to boost U.S. total agricultural exports by an expected 2 to 2½ billion dollars. *NAFTA White House Briefing, Moderator, Doris Matsui*, FED. NEWS SERV., July 27, 1993. Operators of smaller agricultural interests located near the border region will find competition with agribusiness in both countries. See Jennifer Dixon, *Texas Farms Head South, NAFTA Expected to Accelerate Drain of Jobs to Mexico*, S.F. EXAMINER, Oct. 5, 1992, at D1. Companies are drawn by wage differentials and environmental differences in Mexico. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/T-RCED-93-9, PESTICIDES, U.S. AND MEXICAN FRUIT AND VEGETABLE PESTICIDE PROGRAMS DIFFER (1993). An expressed consideration is the impact of industrialization on small corn farmers in Mexico. See, e.g., Anthony DePalma, *Mexicans Fear For Corn, Imperiled By Free Trade*, N.Y. TIMES, July 12, 1993, at A3; June Nash, *The Challenge of Trade Liberalization To Cultural Survival On The Southern Frontier of Mexico*, 1 IND. J. GLOBAL LEGAL STUD. 367 (1994). Corn

Policies which enhance the increase in vertical corporate entities²¹⁴ and threaten the survival of small and moderate-sized holdings,²¹⁵ fail to address issues of equality, farm preservation,²¹⁶ and the quality of food and life in the nation.²¹⁷ Consumers are increasingly demanding pesticide-free fruits and vegetables, thereby encouraging alternative methods of commodity production in order to boost the health and safety of the food supply. Global restructuring presents a means of removing barriers for those trying to remain in, or seek entry into, farming.

production, the main dietary staple of Mexico has deep cultural and historical importance for the country, but its production is perceived as inefficient and is traditionally protected by tariffs. In contrast to the highly sophisticated corn industry in the United States, Mexican farmers will be unable to compete. See, e.g., FED. DOC. CLEARING HOUSE CONG. TESTIMONY, Karen Lehman, The Institute For Agriculture and Trade Policy House Government Operations, Mexican Agriculture Policies, Oct. 28, 1993. Small and/or moderate sized farming operators on the Mexican side of the border, for example, will also experience competition from rising interest rates and NAFTA's farm policies. See, e.g., FED. DOC. CLEARING HOUSE CONG. TESTIMONY, Collin C. Peterson, Chairman, House Government Operations Mexican Agriculture Policies, Oct. 28, 1993. Predictors reveal the probable displacement of a large number of subsistence farmers, some of whom will find work with labor-intensive commodities for export. See, e.g., Maggie Rivas, *Mexico Growers Brace For Change*, DALLAS MORNING NEWS, May 26, 1991, at H1 (citing study finding two-thirds of all arable land in Mexico is held in plots of less than twelve acres, much of which is used to grow corn, rice or beans for the family's subsistence). On January 1, 1994, the day NAFTA entered into force, the Zapatista National Liberation Army revolted against the Mexican government and its policies directed towards the privatization of small communal farms and alleged human rights violations. See, e.g., Alejandro Sobarzo, *NAFTA and Human Rights in Mexico*, 27 U.C. DAVIS L. REV. 865 (1994); Kevin R. Johnson, *Free Trade and Closed Borders: NAFTA and Mexican Immigration to the United States*, 27 U.C. DAVIS L. REV. 937 (1994). Although the uprising allegedly "shocked" the United States, many human rights activists had long warned officials as to the violations occurring in the region. See, e.g., Linda Diebel, *Revolution Just Beginning*, TORONTO STAR, Jan. 9, 1994, at A1 (estimated 6,000 Oaxaca Indians arrested and/or jailed for protesting repression and privatization of land).

214. Professor Fred Morrison explains the process of vertical integration as one "in which individual farms would disappear or become mere operating units of large, integrated agribusinesses, which owned the means of production and controlled agriculture from the planting of the seed to the marketing of the processed product." Fred L. Morrison, *State Corporate Farm Legislation*, 7 U. TOL. L. REV. 992-97 (1976).

215. See, e.g., Charles Lunan, *NAFTA Could Cost 100,000 Farm Jobs, Debate Centers On Whether Jobs Should Be Saved*, SUN SENTINEL, Oct. 31, 1993, at H1.

216. See, e.g., HIGHTOWER, *supra* note 200, at 3; JOSEPH N. BELDEN, *DIRT RICH, DIRT POOR: AMERICA'S FOOD AND FARM CRISIS* (1986). Many economists adopt the belief that the less efficient and smaller farm units must disappear before farmers can expect financial improvement." Irving Kovarsky, *Congress and Migrant Labor*, 9 ST. LOUIS U. L.J. 293, 348 (1965). Other industries have followed this parallel construction. See, e.g., FREDERICK CLAIRMONTE & JOHN CAVANAGH, *THE WORLD IN THEIR WEB: DYNAMICS OF TEXTILE MULTINATIONALS* (1981) (analysis of policies and strategies enabling a handful of monopolies to dominate the textile industry); DAVID MONTGOMERY, *WORKERS CONTROL IN AMERICA* (1979) (impact of industrialization irreconcilable with New Deal legislation written to stabilize labor).

217. See, e.g., Charles E. Little, *Has the Land Ethic Failed in America? An Essay on the Legacy of Aldo Leopold*, 1986 U. ILL. L. REV. 313 (1986). One aspect of this is the fragmented implementation of regulations specific to pesticide usage implicit within the Federal Food, Drug, and Cosmetic Act (FFDCA) and differences in the regulatory framework of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Characterized as the Delaney Dilemma, "pesticides that have been found to cause cancer may be used on some foods but not on others, and the benefits of using pesticides, such as increased crop yields, may be considered in some, but not all, regulatory decisions." See, e.g., U.S. GEN. ACCOUNTING OFFICE, *PESTICIDES: OPTIONS TO ACHIEVE A SINGLE REGULATORY STANDARD* (1994).

The NAFTA debate emphasized the degradation of the environment along the international border.²¹⁸ It demonstrated the wasteful and unhealthy environmental impact of current agricultural policy and the need to reform the supervision of the country's natural resources.²¹⁹ The supervision of natural resources directly impacts issues of food safety.²²⁰ The debates regarding NAFTA's impact on the quality of life at the border drew attention away from farmland preservation onto other environmental imperatives.²²¹ Both issues, however, instrumentally affect the present and future of the nation's agricultural workers.

218. See generally Alan R. Jenkins, Comment, *NAFTA: Is the Environmental Cost of Free Trade Too High?* 19 N.C. J. INT'L L. & COM. REG. 143 (1993); James E. Bailey, *Free Trade and the Environment—Can NAFTA Reconcile the Irreconcilable?* 8 AM. U.J. INT'L L. & POL'Y 839 (1993); Richard B. Stewart, *The NAFTA: Trade, Competition, Environmental Protection*, 27 INT'L LAW 751 (1993); Peter L. Lallas, *NAFTA and Evolving Approaches to Identify and Address "Indirect" Environmental Impacts of International Trade*, 5 GEO. INT'L ENVTL. L. REV. 519 (1993); Robert Housman & Durwood Zaelke, *Trade, Environment, and Sustainable Development: A Primer*, 15 HASTINGS INT'L & COMP. L. REV. 535 (1992); Michael Scott Feeley & Elizabeth Knier, *Environmental Considerations of the Emerging United States-Mexico Free Trade Agreement*, 2 DUKE J. COMP. & INT'L L. 259 (1992); James A. Funt, *The North American Free Trade Agreement and the Integrated Environmental Border Plan: Feasible Solutions to U.S.-Mexico Border Pollution?* 12 TEMP. ENVTL. L. & TECH. J. 77 (1993).

219. Concern over the environment encompasses a "rich mixture of ethics, economics, and public interest issues—all related to a common goal of ensuring protection of human health and the environment from harmful effects of pollution." WILLIAM M. TABB & LINDA A. MALONE, *ENVIRONMENTAL LAW: CASES AND MATERIALS* (1992). Federal legislation, promulgated to control the environment, has increased. See, e.g., National Environmental Policy Act of 1969, 42 U.S.C. § 4321 (1988) (federal agencies required to consider environmental values in planning and decisionmaking process as well as to engage public opinion on proposed projects); Clean Air Act of 1970, 42 U.S.C. §§ 7401-7671 (amended in 1970 & 1990) (1988 & Supp. 1990) (establishes national standards seeking to control air pollution); Federal Water Pollution Control Act of 1972, 33 U.S.C. §§ 1251-1387 (1988) (transferred primary state authority for water quality to federal government in seeking national standards); Toxic Substances Control Act, 15 U.S.C. § 2601 (1988) (labels and tests chemical substances); Federal Insecticide, Fungicide & Rodenticide Act, 7 U.S.C. §§ 136-136y (1988) (registration of agricultural pesticides); the Resource Conservation and Recovery Act of 1976, 42 U.S.C. § 6901 (1988); Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §§ 6901-6987, 9001-9010 (1988) (identifies and tracks hazardous waste from its creation to its ultimately disposal). On the state level, various laws, while limited in their remedial scope, also seek to control environmental harm. See, e.g., Richard Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U.L. REV. 787 (1992). But see N. William Hines, *The Land Ethic and American Agriculture*, 27 LOY. L.A. L. REV. 841 (1994) (sound agricultural practices and responsible stewardship of natural resources have always been the norm).

220. See, e.g., PESTICIDES, U.S. AND MEXICAN FRUIT AND VEGETABLE PESTICIDE PROGRAMS DIFFER, *supra* note 213; U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-94-57, PESTICIDES, OPTIONS TO ACHIEVE A SINGLE REGULATORY STANDARD (1994).

221. Farmland preservation scholarship seeks to abate the loss of agricultural farmland. Its literature is vast partly because the perception that protecting existing cropland is beneficial and is deemed a legitimate enterprise. See generally Teri E. Popp, *A Survey of Governmental Response to the Farmland Crisis: States' Application of Agricultural Zoning*, 11 U. ARK. LITTLE ROCK L.J. 515 (1988-89); Myrl L. Duncan, *Agriculture as a Resource: Statewide Land Use Programs for the Preservation of Farmland*, 14 ECOLOGY L.Q. 401 (1987); Jacqueline P. Hand, *Right-to-Farm Laws: Breaking New Ground in the Preservation of Farmland*, 45 U. PITT. L. REV. 289 (1984) (defenses against nuisance actions resulting from urbanization); Bernard H. Siegan, *Conserving and Developing the Land*, 27 S.D. L. REV. 279 (1990); Julian Conrad Juergensmeyer, *Farmland Preservation: A Vital Agricultural Law Issue for the 1980's*, 21 WASHBURN L.J. 443 (1982); Note, *Taxation Affecting Agricultural Land Use*, 50 IOWA L. REV. 600 (1965). Development rights permit the governmental purchase of easements for the development of the property. See Sandra A. Hoffmann, *Farmland and Open Space Preservation in Michigan: An Empirical Analysis*, 19 U. MICH. J.L. REF. 1107

Alternative agricultural legislation and policy providing for equal treatment of the agricultural worker would enhance the safety of this country's food supply and facilitate food exports, as well as protect small- and moderate-sized agricultural interests from dislocation.²²² It would also induce new entrants into farming. The next section examines legislation and other efforts to protect the country's eroding cropland base.

C. Farmland Preservation Legislation

Throughout the country, productive cropland has been replaced by shopping centers, discount centers, paved roads, and unmanageable metropolitan growth.²²³ Developers are particularly attracted to flat and well-drained farm land for commercial, industrial, and residential purposes.²²⁴ In El Paso, the construction industry reflects a "boom period" as expensive developments and rural slums displace former open spaces.²²⁵ In areas outside the border region, the United States Department of Agriculture (USDA) and the Council on Environmental Quality (CEQ) confirmed the fears that rural cropland and open spaces were rapidly

(1986); Sam Sheronick, Note, *The Accretion of Cement and Steel Onto Prime Iowa Farmland: A Proposal for a Comprehensive State Agricultural Zoning Plan*, 76 IOWA L. REV. 583 (1991); CLIFFORD L. WEAVER & RICHARD F. BABCOCK, CITY ZONING, THE ONCE AND FUTURE FRONTIER (1979); Anita P. Miller et al., *Report of the Subcommittee on Innovative Growth Management Measures: Preservation of Agricultural Land and Open Space*, 21 URB. LAW 821 (1991); Anne E. Mudge, *Impact Fees for Conversion of Agricultural Land: A Resource Based Development Policy for California's Cities and Counties*, 19 ECOLOGY L.Q. 63 (1992); K. Layne Morrill, *Politics, Purpose, and Principle in Taxation of Agricultural Property*, 30 ARIZ. ATT'Y 14 (1994). The efforts of the American Farmland Trust, a private, nonprofit, conservation organization dedicated to preserving agricultural land, is also well-documented. See, e.g., AMERICAN FARMLAND TRUST, DOES FARMLAND PROTECTION PAY? THE COST OF COMMUNITY SERVICES IN THREE MASSACHUSETTS TOWNS (1992). Right-to-farm statutes provide a measure of defense for agricultural operations against nuisance lawsuits. See, e.g., ALA. CODE § 6-5-127 (Supp. 1994); N.D. CENT. CODE § 42-04-02 (Supp. 1993); Gerald Torres, *Helping Farmers and Saving Farmland*, 37 OKLA. L. REV. 31 (1984). For a criticism and analysis of the alleged failure of the Arizona statute to protect farmers from public nuisance actions, see Comment, *The Arizona Agricultural Nuisance Act*, 1982 ARIZ. ST. L.J. 689 (1982).

222. See, e.g., FARM FINANCE: NUMBER OF NEW FARMERS IS DECLINING, *supra* note 207, at 2.

223. This trend is ongoing. See U.S. BUREAU OF THE CENSUS, 1992 AGRICULTURAL CENSUS (1995). Encroaching urban land use results in nuisance lawsuits by residents against farmers. Complaints center on incidents attendant to farming operations such as odors, flies, animal control problems, noise, dust, and chemical spraying. Other residents lobby for local ordinances that would restrict farming operations. In response, states passed "right-to-farm" laws. Right-to-farm laws codify the "coming to the nuisance defense" that protected agricultural operations in place before residential development. See *Laux v. Chopin Land Assoc.*, 550 N.E.2d 100 (Ind. Ct. App. 1990) (odor generated by hog raising operation was basis of the nuisance complaint); *Woods v. Khan*, 420 N.E. 2d 1028 (Ill. App. Ct. 1981) (odors and insect problems from poultry business were sufficiently bothersome to justify injunctive relief unless steps taken to eliminate accumulation of manure upheld); *Arbor Theatre Corp. v. Campbell Soup Co.*, 296 N.E. 2d 11 (Ill. App. Ct. 1973) (court determined manure composting operation on mushroom farm in rural area, which began in 1947, was not a nuisance to outdoor theater, which was started in 1961 with knowledge of odors); *Shatto v. McNulty*, 509 N.E.2d 897 (Ind. Ct. App. 1987) (hog operation is not a common law nuisance).

224. TABB & MALONE, *supra* note 219.

225. This also includes the replacement of agricultural operations. Whether by intention or by design, the agricultural area of El Paso County has escaped scrutiny. See, e.g., *Farms For The Future Act of 1990*, 7 U.S.C. § 4201 (Supp. 1990) (focusing on Vermont farming community).

disappearing.²²⁶ The report ignited long, contentious debates, alarmed many, and intensified the national discussion over farmland preservation issues.²²⁷

Pointing to inadequacies in the methodology and data, some critics charged that the National Agricultural Land Study was misleading. Others assailed the findings as romantic and misguided,²²⁸ playing on public perceptions of losing the "family farm" to "factories in the fields."²²⁹ Notwithstanding the criticism, farm operators are still, nonetheless, pressured to sell their acreage on the edge of metropolitan areas. In an attempt at compromise, Congress promulgated the Farmland Protection Policy Act of 1981 (The Act),²³⁰ which acknowledged in its statement of findings that the country faced a cropland shortage. The Act, however, possesses shortcomings, such as ineffective enforcement mechanisms and procedures for accomplishing its stated goal.²³¹

Consequently, the task of balancing farmland preservation with urban growth is left to state and local governments.²³² An array of efforts to protect farmland includes property tax relief,²³³ zoning mechanisms,²³⁴ land trusts,²³⁵ anti-corporate farming statutes,²³⁶ impact fees,²³⁷ conser-

226.

By the year 2000, most if not all of the nation's 540 million acre cropland base is likely to be in cultivation

The United States has been converting agricultural land to non-agricultural uses at the rate of about three million acres per year—of which about one million acres is from the cropland base. This land has been paved over, built on, or permanently flooded, i.e., converted to nonagricultural uses. For practical purposes, the loss of this resource to U.S. agriculture is irreversible

The cumulative loss of cropland, in conjunction with other stresses on the U.S. agricultural system such as the growing demand for exports and rising energy costs, could seriously increase the economic and environmental costs of producing food and fiber in the United States during the next 20 years.

Id. at v-vi. U.S. DEP'T. AGRIC., NATIONAL AGRICULTURAL LANDS STUDY, FINAL REPORT (1981) [hereinafter NALS].

227. Corwin W. Johnson & Valerie M. Fogleman, *The Farmland Protection Policy Act: Stillbirth of a Policy?* 1986 U. ILL. L. REV. 563 (1986); Vivian Quinn, *Preserving Farmland with Conservation Easements: Public Benefit or Burden?*, 1992/1993 ANN. SURV. AM. L. 235 (1994).

228. See JOHN FRASER HART, *THE LAND THAT FEEDS US* 376 (1991).

229. CAREY MCWILLIAMS, *Factories in the Field, The Story of Migratory Farm Labor in California* (1971).

230. 7 U.S.C §§ 4201-4209 (1988).

231. Johnson & Fogleman, *supra* note 227, at 566-67.

232. See, e.g., TABB & MALONE, *supra* note 219, at 825-52.

233. Examples include, *inter alia*, differential assessments, tax credits, and special assessments. Challenges, based on the uniformity clause in state constitutions, caused some states to pass constitutional amendments permitting differential assessment programs. Other challenges have been brought on equal protection grounds. See, e.g., *Hoffman v. Clark*, 372 N.E.2d 74 (Ill. 1977).

234. Five primary zoning practices are used in the agricultural sector: exclusive or nonexclusive; conditional use zones; large-lot zoning; fixed area-based allocation zones; and sliding-scale area-based allocations. See, e.g., *Boundary Drive Assoc. v. Shrewsbury Township*, 491 A.2d 86 (Pa. 1985) (sliding scale zoning scheme); Thomas G. Buchanan, *Zoning and Planning—Innovative Zoning for the Presentation of Agricultural Land—Boundary Drive Associates v. Shrewsbury Township Board of Supervisors*, 59 TEMP. L.Q. 861 (1986); Popp, *supra* note 221; Sheronick *supra* note 221; Neil Hamilton, *Freedom to Farm: Understanding the Agricultural Exemption to County Zoning in Iowa*, 31 DRAKE L. REV. 565 (1982).

235. In the United States over 800 land trusts are reported to exist. Quinn, *supra* note 227.

236. Anti-corporate farm legislation is promulgated to preserve the existing family farm system.

vation easements,²³⁸ development rights programs,²³⁹ and agricultural districting. States' enactment of statewide or regional comprehensive land use control measures,²⁴⁰ differential assessments,²⁴¹ and right-to-farm laws²⁴² also enhance farmland preservation. Limited in their scope, however, they are primarily local and short-term efforts to control the food supply rather than the adoption of long-range plans.²⁴³

Farmland preservation is critical for ensuring domestic food needs, as well as facilitating the export of agricultural commodities. Expedited by federal legislation, globalization of the agricultural economy should discourage the advanced consolidation of smaller operations while favoring larger and capital intensive operations. Preservation programs aimed at protecting smaller and moderate-sized agricultural businesses and programs which encourage new entrants into the agriculture industry exist and are recognized in legislation as positive goals.²⁴⁴ Yet these programs have

236. Anti-corporate farm legislation is promulgated to preserve the existing family farm system. This form of legislation protects against vertical integration. Vertical integration absorbs smaller farm operations into larger integrated agribusiness. For examples of anti-corporate farm legislation, see MINN. STAT. ANN. § 500.24 (1995); N.D. CENT. CODE ANN. §§ 10-06-01 to -06 (1993); see also Brian F. Stayton, *A Legislative Experiment in Rural Culture: The Anti-Corporate Farming Statutes*, 59 UMKC L. REV. 679 (1991); *State ex rel Webster v. Lehnendorff Geneva Inc.*, 744 S.W.2d 801 (Mo. 1988) (upholding constitutionality of anti-corporate farm legislation). The loss of small poultry farmers to agribusiness is an example of the harm anti-corporate legislation targets. See, e.g., *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) (White, J., dissenting) ("The market for broilers is oligopsonistic, dominated by large retail chains such as A & P, Kroger and Safeway and institutional food outlets such as Kentucky Fried Chicken.") (citation omitted).

237. See, e.g., *Twain Harte Assoc. v. County of Tuolumne*, 265 Cal. Rptr. 737, 742 (Ct. App. 1990).

238. See, e.g., Neil D. Hamilton, *Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief*, 35 DRAKE L. REV. 477 (1985-1986); Quinn, *supra* note 227, at 235.

239. Linda A. Malone, *The Future of Transferable Development Rights in the Supreme Court*, 73 Ky. L.J. 759 (1985); Craig E. Peterson & Claire McCarthy, *Farmland Preservation by Purchase of Development Rights: The Long Island Experiment*, 26 DEPAUL L. REV. 447 (1977).

240. Duncan, *supra* note 221.

241. See, e.g., *Board of Educ. v. Board of Revision of Lake County*, 386 N.E.2d 1113 (Ohio 1979).

242. For a review of the status of right-to-farm laws of each state, see Neil D. Hamilton & David Bolte, *Nuisance Law and Livestock Production in the United States: A Fifty State Analysis*, 10 J. AGRIC. TAX'N & L. 99 (1988); see also Margaret Rosso Grossman & Thomas G. Fischer, *Protecting the Right to Farm: Statutory Limits on Nuisance Actions Against the Farmer*, 1983 Wis. L. REV. 95 (1983); Hand, *supra* note 221; Randall Wayne Hanna, Comment, "Right to Farm" Statutes—The Newest Tool in Agricultural Land Preservation, 10 FLA. ST. U. L. REV. 415 (1982); *Laux v. Chopin Land Assoc.*, 550 N.E.2d 100 (Ind. Ct. App. 1990); *Shatto v. McNulty*, 509 N.E.2d 897 (Ind. Ct. App. 1987).

243. See, e.g., KEITH G. MEYER ET AL., *AGRICULTURAL LAW, CASES AND MATERIALS* 984 (1985). Texas has promulgated farmland preservation measures. TEX. AGRIC. CODE tit. 8 § 251.001 (1993) (Protection and Preservation of Agricultural Operations, Effect of Nuisance Actions and Government Requirements on Preexisting Agricultural Operations). The statute, however, suffers from similar deficiencies as provided under federal statutory norms. Finally, the decline of federal support hinders reviving rural economies. See, e.g., U.S. GEN. ACCOUNTING OFFICE, GAO/HRD-91-14, *DISTRESSED COMMUNITIES WERE POSTPONED IN TEXAS AS LOCAL ECONOMIES WEAKENED* (1991).

244. See, e.g., *Farmland Protection Policy*, 7 U.S.C. § 4201 (1990) (for emphasis on Vermont, see 7 C.F.R. § 1980.918 (1995); 7 C.F.R. § 1941.15 (1995) (beginning farmer or rancher loan assistance)).

failed to include rural workers of Mexican background or to curtail "oligopsonistic ownership."²⁴⁵

*D. A Proposed Alternative: "Has Anyone Seen Mom and Pop?"*²⁴⁶

United States farming has long functioned under an implied "agricultural ladder," in which field labor was considered the first rung on the ladder, an entry level position to farm ownership: the agricultural "American Dream." According to this view, the creation of conditions promoting new economic opportunities in the region, assisting field workers, adding to the diversity of the rural environment and protecting the environment by curtailing controlled growth in the region would enhance longstanding agricultural policies and would promote equal treatment of field workers. Alternative forms of sustainable economic development would expand opportunities to protect existing cropland and the rural spaces of major border areas.

Within the context of global restructuring of the agricultural marketplace, the creation of a federal framework by way of land trusts would permit workers a return to their former properties as landowners.²⁴⁷ The value of Chicana/os as operators is seen through (a) their historical roots in agricultural enterprises and (b) their use of alternative forms of sustainable agriculture. Land trusts are accomplished when a landowner transfers property to a trustee or appoints himself as the trustee of the property. Establishing land trusts would assist potential entrants into the agricultural sector,²⁴⁸ permitting the establishment of small or moderate-sized farm operations.²⁴⁹ Land trusts would offer field workers access to

245. *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 843 (1978) (White, J., dissenting) ("The market for broilers is oligopsonistic, dominated by large retail chains such as A&P, Kroger, and Safeway and institutional food outlets such as Kentucky Fried Chicken.").

246. HIGHTOWER, *supra* note 200, at 3 (criticizing consolidation of small or moderate-sized farm holdings into larger units and accompanying myth that "bigger is better").

247. Functional definitions as to what constitutes farming are subject to debate. See, e.g., *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) (producer of broiler chickens precluded from qualifying as a "farmer" within meaning of Capper Volstead Act when it employs an independent contractor to tend the chickens during "grow-out" phase); *Farmegg Products v. Humboldt County*, 190 N.W.2d 454 (Iowa 1971); *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-63 (1949) (agriculture placed into "primary" and "secondary" categories). The value of Chicanos and Chicanas, as operators of the farming enterprise, shows that they engage in low input farming methods, as well as in introducing alternative sustainable forms of agriculture. See generally Pena & Rivera, *supra* note 15; DEVON PEÑA, *AGROECOLOGY OF A CHICANO FAMILY FARM* (1977) (publication forthcoming).

248. See, e.g., Itzchak E. Kornfeld, *Conserving Natural Resources and Open Spaces: A Primer on Individual Giving Options*, 23 ENVTL. L. 185 (1993). Land trusts have been in existence since the mid-1800s. *Id.* at 202.

249. A host of federal regulations are directly linked to agricultural policy and thus serve as precedent. See MEYER ET AL., *supra* note 243. The evidence connecting law and agricultural policy is found in an extensive array of farm aid programs and institutional support. See Chen, *supra* note 69 (identifying the U.S. Constitution as first agrarian legislation benefitting farmers). But see Donald E. Voth, *A Brief History and Assessment of Federal Rural Development Programs and Policies*, 25 U. MEM. L. REV. 1265, 1266 (1995) (rural policy and legislation dating back to the establishment of land grant colleges in 1862). The role of agricultural programs established to assist the industry while simultaneously excluding field workers, emphasizes this point. Program funds, moreover, could derive from the proceeds of United States property sold in foreign countries.

economic incentives provided under current agricultural legislation and would allow their direct participation to the regulatory structure.²⁵⁰ Presently, under the NAFTA the conditions of agricultural workers is limited to the labor construct. The notable absence of people of color in the class of agricultural owners deserves attention from the drafters of international agreements and the agricultural agenda.²⁵¹ Encouraging agricultural ownership for farm workers would facilitate their equal treatment in the new global environment and introduce diversity into the agricultural sector.

By demonstrating economic disadvantage, farmworkers could qualify for participation and eventually ownership status. Anti-corporate farming legislation would shape the contours and parameters of this structure to encourage smaller family-sized operations,²⁵² encourage farmworkers to achieve landowning status, improve their economic standing²⁵³ and ultimately protect potential cropland and open spaces in the long run.

CONCLUSION

The decline of new and small farm acquisition is not simply the result of inevitable, neutral global processes; the nation's present agricultural policies and legislation have failed to address and enhance diversity in farm ownership. The increased emphasis on foreign exports, in conjunction

250. While efforts to improve the terms and working conditions of field workers is a recognized goal, the full purview of the issue remains outside the scope of this Article. Yet during the negotiation of international agreements, as called for in this Article, increasing the diversity of the rural sector calls for, at a minimum, balanced contemplation and appraisal that reaches outside the labor arena for the field population. Potential financing from other federal programs could be accessed to assist field workers in the establishment of land trusts: for example, re-directing federal financing presently directed to land grant colleges. See *California Agrarian Action Project v. Regents of the University of Calif.*, 258 Cal. Rptr. 769 (1989) (codifying the parties' contentions).

251. The immediate purpose of this proposal is to include agricultural workers within the framework of international agreements. The precise contours are beyond the scope of this Article and remain the subject of further study. In the short form, however, this proposal seeks to counter the ever expansive legal treatment and or representation on agricultural workers, is consistent with the stated goals of global restructuring, recognizes that economic benefits come about as a result of federal legislation, and places field workers in the forefront of efforts to increase their equal treatment.

252. Several legislative statutes exist to restrict corporate forms of ownership. The stated goal is to protect smaller, independent farming operations. See, e.g., MINN. STAT. ANN. § 500.24 (West 1995). Other legislative action to protect farmland can be found in Kansas, Michigan, Missouri, Iowa, Nebraska, North Dakota, Oklahoma and South Dakota. See KEITH G. MEYER, *AGRICULTURAL LAW*, 44 n.* (1995). See also Fred L. Morrison, *State Corporate Farm Legislation*, 7 U. TOL. L. REV. 961 (1976). The Minnesota statute, by way of example, provides as its basic purpose the following: The legislature finds that it is in the interests of the state to encourage and protect the family farm as a basic economic unit, to insure it as the most socially desirable mode of agricultural production, and to enhance and promote the stability and well-being of rural society in Minnesota and the nuclear family. MINN. STAT. ANN. § 500.24, subd. 1 (West 1995).

253. Legal efforts to achieve equality continue to the present time, but even those who have encouraged participatory and democratic ideals, not unlike affirmative action, have had limited application. Current law imposes difficult intent requirements for a plaintiff seeking to sustain burden of proof standards in a discrimination cases. Recent attacks targeting affirmative action have had similar debilitating effects on legal struggles to achieve equality. See, e.g., *Adarand Constr., Inc. v. Peña*, 115 S. Ct. 2097 (1995). Within the agricultural marketplace, the federal regulatory system ensures the granting of governmental benefits to a select few while failing to measure the distributional impact on those holding a marginal status within the dominant culture.

with a federal emphasis on "economies of scale," encourages greater concentration of holdings, with some states aggressively promoting consolidation and entry of the maquila industry into food processing. This encourages further consolidation of farm operations and raises questions about definitional standards as to the nature of agricultural operations and farming. Policies enhancing the increase of vertical corporate entities threaten the survival of small and moderate-sized holdings and fail to address issues of equality, farm preservation, and the quality of food and life in the nation. Global restructuring presents opportunities that would remove barriers for those trying to remain in, or to seek entry into, farming and enhance diversity within agricultural policy.

Alternative agricultural legislation should target the development of a class of small farmers from the large and disadvantaged populations which merge in the El Paso region.²⁵⁴ The region provides a community of young potential farmers a major basis for agricultural legislation, is the site of long-neglected rural slums whose poor conditions have been accentuated by international agreements, and comprises a key region impacted by international agreements.

If one of the stated goals of NAFTA is to benefit this country's agricultural sector, the labor force must be included in the realm of agricultural law and not simply viewed as temporary and expendable workers. Historically colonized by formal annexation, former owner operators were reduced to poverty, their descendants consistently excluded from the protection and benefits of agricultural law. The NAFTA, subject to periodic review, and other international agreements should incorporate farm preservation at localities impacted by trade liberalization agreements. Establishing a mechanism to encourage alternative forms of sustainable agriculture, by setting aside land trusts in key regions, would encourage and facilitate entry into small farm ownership. It would ultimately encourage equal treatment and diversity in the farm sector, assist the recognized goals of farmland preservation statutes, encourage other rural development, and advance the goals of international agreements. The role of federal legislation in determining farming operations is long established and deemed a beneficial enterprise, with farm preservation meeting difficult standards of proof required by modern day reinterpretations. Its attendant consequences, thus, offer a valuable opportunity to shift the status of agricultural underdogs within the rural economy.

254. Field workers residing outside of the City of El Paso's jurisdictional boundaries, in colonias, are disenfranchised and, thus, lack a political voice. See, e.g., *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).