

Cyber-Coolies and Techno-Braceros: Race and Commodification of Indian Information Technology Guest Workers in the United States

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Coolie is a word that . . . has no established etymology: some place it from the Tamil *kuli* (“hire”), others find it in use in sixteenth-century Portugal as *Koli*, after the name of a Gujarati community, still others notice that it sounds like the Chinese *ku-li* (“bitter labor”) or like the Fijian *kuli* meaning “dog.” One way or another, to be called a coolie is to be denigrated, and to be considered at best as a laborer with no other social markers or desires.¹

Introduction

IN RESPONSE TO SUSAN SONTAG’S celebration of English-speaking Indians’ abilities to somehow magically, on their own volition, insert themselves in the global economy as call center workers, Harish Trivedi coined the term “cyber-coolie.” Indian call center workers, Trivedi noted, were “cyber-coolies of our global age, working not on sugar plantations but on flickering screens, and lashed into submission through vigilant and punitive monitoring, each slip in accent or lapse in pretence meaning a cut in wages.”² I use the terms cyber-coolie and techno-braceros to describe the large numbers of Indian information technology workers in the United States.³ These techno-

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1. VIJAY PRASHAD, EVERYBODY WAS KUNG-FU FIGHTING: AFRO-ASIAN CONNECTIONS AND THE MYTH OF CULTURAL PURITY 71–72 (2001).

2. Harish Trivedi, Letter to the Editor, *Cyber-Coolies, Hindi and English*, TIMES LITERARY SUPPLEMENT (London), June 27, 2003, at 17.

3. The term techno-bracero was used by Lawrence Richards, founder of the Software Professionals’ Political Action Committee, and other critics of the H-1B visa program while lobbying for immigration reform in 1995. William Branigin, *White Collar Visas: Importing*

braceros, like the Mexican braceros and Indian and Chinese coolies before them, are guest workers in this country, deployed for capital's benefit and expunged from the nation when the need dissipates.

The terms techno-bracero and cyber-coolie are used here not in a derogatory sense, but rather in a descriptive manner. These terms gesture at the legal conditions of work, which partially shape the work experiences of these high-tech guest workers in the United States. The terms also elaborate on the anxieties expressed by Max Frisch, who famously commented on Switzerland's experience with guest workers: "It has called for workers, and has been given human beings."⁴ Guest worker programs that bring Mexicans, Chinese, Central Americans, or Indians into the United States do not want people with their historical, cultural, and social complexities; instead, the intentions of these programs are to import, for a short period of time, abstract workers who are divorced from everything that makes them human. All that is wanted is their capacity to work—a working body that can be plugged in and un-problematically unplugged out of production processes, with no life outside the shop floor.

While cognizant of the fact that racial formations affect Indian immigrants quite differently than they affect Mexican newcomers, I still hold on to the terms techno-braceros and cyber-coolies because it allows me to examine the legal terms of racialized labor incorporation in the United States. I suggest that the *culture of labor* can help draw linkages between these seemingly disparate racial groups and open up new ways of thinking about racialized labor in the United States.

Foreign labor procurement in the Americas has had racial dimensions from slavery to the present. Examining the rise of multiculturalism in the United States, Asian American scholar Lisa Lowe posited that as a nation-state the United States is concerned with maintaining a national citizenry bound by race, language, and culture, whereas capitalism requires only "abstract labor."⁵ In a similar vein, this Essay argues that guest worker programs that bring Chinese, Central Americans, or Indians to the United States resolve the tensions around the importation of foreign workers to serve labor market needs and the incorporation of these "unassimilables" into the national body. These

Needed Skills or Cheap Labor?, WASH. POST, Oct. 21, 1995, at A1; see also Ali Mir, Biju Mathew & Raza Mir, *The Codes of Migration: Contours of the Global Software Labor Market*, 12 CULTURAL DYNAMICS 5, 24 (2000) (referring to foreign software workers in the United States as "techno-braceros" and "techno-coolies").

4. MAX FRISCH, SKETCHBOOK 1966–1971, at 8 (Geoffrey Skelton trans., Harcourt Brace Jovanovich 1974) (1971).

5. LISA LOWE, IMMIGRANT ACTS: ON ASIAN AMERICAN CULTURAL POLITICS 13 (1996).

programs are structured to render inconsequential much of what makes workers human; that is, their historical, cultural, and social complexities. The nation-state balances this importation of labor with its own need for a homogenous citizenry by focusing on the social productions of “difference”—of restrictive particularity and illegitimacy marked by race, nation, geographical origins, and gender. Through its policies, the United States has created, preserved, and reproduced the specifically racialized and gendered character of labor power.

This Essay examines how guest worker programs in the United States have pushed non-white workers into commodity status, further disempowering them, while simultaneously benefiting capital. Part I reviews guest worker programs in the United States, identifying the legal similarities between non-white migrant workers, regardless of national origins. Part II reasons that labor is not inherently a commodity and examines the processes involved in encouraging workers to sell their labor. Part III examines the United States nation-state’s role in pushing non-white guest workers’ labor into commodity form through its racialized guest worker programs.

I. Labor Procurement and Race

From slavery to the present H-1B Program, foreign labor procurement in the Americas has had racial dimensions. Under slavery, individual men and women became property and were bought, sold, and bartered on the market, their human uniqueness pegged with an exchange value. Their uniqueness mattered, but only so far as what and how much could be harvested from their individual bodies. As political theorist Achille Mbembe notes, the slave condition resulted “from a triple loss: loss of ‘home,’ loss of rights over his or her body, and loss of political status. This triple loss [was] identical with absolute domination, natal alienation, and social death (expulsion from humanity altogether).”⁶

The slave ships that brought Africans to the New World were the same ships used to bring Asian coolies to the sugar plantations of the Caribbean.⁷ Although coolies were not slaves and not treated as goods to be exchanged on the market, the terms of their recruitment and employment pushed their labor to purer a commodity status.

6. Achille Mbembe, *Necropolitics*, 15 *PUB. CULTURE* 11, 21 (2003).

7. Lisa Yun & Ricardo Rene Laremont, *Chinese Coolies and African Slaves in Cuba, 1847–1874*, 4 *J. ASIAN AM. STUD.* 99, 111–12 (2001).

While working toward abolishing the transatlantic slave trade, the British were concomitantly establishing the trafficking of Indian and Chinese coolies in the Pacific and Indian Ocean basin in destinations such as Malaysia, East Africa, Cuba, Guyana, Trinidad, and Jamaica.⁸ Between 1840 and 1875, nearly a quarter million Chinese were shipped to the New World as coolie labor,⁹ and between 1838 and 1917 more than half a million Asian Indians worked as coolie laborers in the Caribbean.¹⁰ While it is popularly believed that coolies replaced slaves, new research shows that slaves and coolies worked simultaneously; coolie imports in Cuba increased after 1847, but concomitantly, slave imports also increased.¹¹

The next large-scale, systematic importation of workers into the United States was the Bracero Program that operated from 1942 to 1964.¹² The program was a series of agreements between the governments of Mexico and the United States to bring in temporary guest workers from Mexico as a means to address the ostensible labor scarcity in the United States resulting from its World War II mobilization, and subsequently, the Korean War.¹³ Through the program, more than 4.6 million contracts were issued to Mexican workers, with approximately 400,000 men brought over from Mexico each year.¹⁴

8. *Id.* at 102.

9. *Id.* at 103.

10. Tayyab Mahmud, *Migration, Identity, & the Colonial Encounter*, 76 OR. L. REV. 633, 645 (1997).

11. LISA YUN, *THE COOLIE SPEAKS: CHINESE INDENTURED LABORERS AND AFRICAN SLAVES IN CUBA* 7 (2008).

12. See RICHARD CRAIG, *THE BRACERO PROGRAM: INTEREST GROUPS AND FOREIGN POLICY* 4 (1971) (stating there were various governmental authorities for the program until it was formally authorized in 1951 by the Amendment to the Agricultural Act of 1949, Pub. L. No. 82-78, 65 Stat. 119 (1951)).

13. *Id.* at 8–9.

14. James Sandos & Harry Cross, *National Development and International Labour Migration: Mexico 1940–1965*, 18 J. CONTEMP. HIST. 43, 54 (1983) (“During the life of the Bracero programme, more than 4.6 million contracts were issued legally to Mexicans to work in the United States.”). It is estimated that between 350,000 and 450,000 Mexicans worked as braceros each year. See MIRIAM J. WELLS, *STRAWBERRY FIELDS: POLITICS, CLASS, AND WORK IN CALIFORNIA AGRICULTURE* 57 (1996) (stating the number of braceros coming into the United States was “as many as 450,000 annually during its peak in the late 1950s”); cf. TONY PAYAN, *THE THREE U.S.-MEXICO BORDER WARS: DRUGS, IMMIGRATION AND HOMELAND SECURITY* 55 (2006) (noting “[i]n 1956, [t]he *El Paso-Herald Post* wrote, ‘More than 80,000 braceros pass through the El Paso Center annually. They’re part of an army of 350,000 or more that marches across the border each year to help plant, cultivate, and harvest cotton and other crops throughout the United States.’” (footnote omitted)).

While the Bracero Program was still in operation, the Immigration and Nationality Act of 1952¹⁵ authorized another guest worker program, the H-2 Program, which also included agricultural workers. Whereas the Bracero Program served the American West, workers under the H-2 Program, primarily from the Caribbean, served sugar cane plantations in Florida and apple farms in the Northeast.¹⁶ The 1943 H-2 Program was modified by the Immigration Reform and Control Act of 1986,¹⁷ which divided the program into the H-2A Program, which gives temporary work visas to agricultural guest workers, and the H-2B Program, which targets low-wage non-agricultural workers.¹⁸ H-2B workers tend to work in landscaping and construction, as well as seasonal industries.¹⁹

While the guest worker programs implemented up to the mid-twentieth century tended to be bilateral agreements with specific nation-states, the late twentieth century guest worker programs are open-ended on the question of national origins. That is, these programs are not specific arrangements between two nation-states, as was the Bracero Program in the United States or the Gastarbeiter Program in Germany.²⁰ Instead, current guest worker programs are open to workers from various regions of the world.²¹

15. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

16. Philip Martin, *Guest Worker Programs for the 21st Century*, BACKGROUND (Ctr. for Immigrations Studies, Wash., D.C.), Apr. 2000, at 2; see also U.S. GEN. ACCT. OFF., REPORT TO CONG. COMMITTEES, H-2A AGRICULTURAL GUESTWORKER PROGRAM CHANGES COULD IMPROVE SERVICES TO EMPLOYERS AND BETTER PROTECT WORKERS 19 (1997), available at <http://www.gao.gov/archive/1998/he98020.pdf> (“[T]he H-2 program was . . . primarily used by agricultural employers in the east to contract with Caribbean workers.”).

17. Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (codified as amended in scattered sections of 8 U.S.C.).

18. *Id.* § 301(a) (amending 8 U.S.C. § 1101(a)(15)(H) (1994)); see also U.S. GEN. ACCT. OFF., REPORT TO CONG. COMMITTEES, *supra* note 16, at 19 (discussing the H-2A program in-depth).

19. U.S. CITIZEN AND IMMIGR. SERV., U.S. DEP’T OF HOMELAND SECURITY, UPDATE, USCIS TO ACCEPT NEW H-2B FISCAL YEAR 2009 PETITIONS (2009), available at <http://www.uscis.gov/> (follow “News” tab; then follow “USCIS to Accept New H-2B Fiscal Year 2009 Petitions” hyperlink under “August, 2009”; then follow “Update” hyperlink under “Related Files”).

20. See Veysel Oezcan, *Germany: Immigration in Transition*, MIGRATION POL’Y INST., July 2004, <http://www.migrationinformation.org/Profiles/display.cfm?ID=235> (discussing a series of bilateral recruitment agreements Germany signed with Italy, Spain, Greece, Turkey, Portugal, and then Yugoslavia in the 1960s).

21. See, e.g., Philip Martin, *Guest Worker Policies for the 21st Century*, 23 NEW COMMUNITY 483, 484–89 (1997) (describing the changes in Germany’s guest worker programs from the bilateral agreements of the 1950s to the more open regional agreements of the current programs).

The H-2 Programs, similar to late twentieth century guest worker programs in other parts of the world, are open to any non-immigrant worker, from any part of the world, who will work in the United States temporarily to fill its labor needs. However, the H-2 Programs have de facto racial ramifications. While these programs might bring in ski instructors and such from Europe, the bulk of the guest workers are from various parts of Latin America, the Caribbean, and the Philippines.²²

The other guest worker program, causing as much consternation as the H-2 Program, is the H-1B Program. The precursor to this guest worker program was the Immigration and Nationality Act of 1952,²³ which conferred H-1 visas to temporary foreign workers with exceptional abilities who had been sponsored for employment by American firms.²⁴ By the 1970s, Congress allowed H-1 visa recipients to apply for permanent positions in the United States, and companies began to rely on the program more heavily to bring in foreign workers.²⁵ The Immigration Act of 1990²⁶ capped the number of H-1B visas to 65,000 per year, to be awarded to persons with at least a Bachelor's degree in a specific specialty.²⁷

Firms could now hire guest workers under the following conditions: (1) there was a shortage of qualified citizen workers; (2) foreign workers were not displacing citizen workers; and (3) foreigners were employed on the same terms as American employees.²⁸ Workers receive visas for up to three years once sponsored by an employer, and the visas are renewable for another three-year term if the employer desires.²⁹ Unlike other guest worker programs, however, the H-1B Program offers its recruits an advantage; these guest workers can obtain permanent residency in the United States if sponsored by the

22. See OFF. OF IMMIGR. STAT., U.S. DEP'T OF HOMELAND SEC., 2008 YEARBOOK OF IMMIGRATION STATISTICS 84-87 tbl.32.

23. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended in scattered sections of 8 U.S.C.).

24. *Id.* § 101(a)(15)(H) (codified as amended at 8 U.S.C. § 1101(a)(15)(H)(i) (2006)).

25. Julie Watts, *The H-1B Visa: Free Market Solutions for Business and Labor*, 20 POPULATION RES. & POL'Y REV. 143, 144 (2001).

26. Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (codified as amended in scattered sections of 8, 26, 29, & 42 U.S.C.).

27. *Id.* § 205 (amending 8 U.S.C. §§ 1184(g)-(i) (1988)).

28. *Id.* (amending 8 U.S.C. § 1182 (1988)).

29. See 8 C.F.R. § 214.2(h)(15)(ii)(b)(1) (2009); see also 8 U.S.C. § 1184(g)(4) (2006) (limiting the term of authorized admission to six years).

employing firm.³⁰ During this period, the guest worker's permanent residency application depends on maintaining a sponsoring employer; that is, the guest worker is essentially obligated to work for his sponsor.³¹

By the end of the 1990s, the number of H-1Bs awarded had increased dramatically. The American Competitiveness and Workforce Improvement Act of 1998³² raised the H-1B visa cap to 115,000 workers for the years 1999 and 2000, and 107,500 for 2001 but then decreased the number back to the original 65,000 in 2002.³³ Although the number of available visas was increased during this period, this was not enough to meet the demand. For example, by March 2000, the 115,000 visa quota was already reached.³⁴ Under pressure from industry, the American Competitiveness in the Twenty-first Century Act of 2000³⁵ was passed, which raised the number of temporary worker visas to 195,000 per year for the years 2001 through 2003.³⁶ In 2003, 231,030 H-1B petitions were filed with the Citizenship and Immigration Services for both initial and continuing employment.³⁷ Of these, 105,314 were approved for first time employment, and 112,026 were approved for continuing employment.³⁸ Since 2004, H-1B visa

30. See Immigration Act of 1990, Pub. L. No. 101-609, § 205(b)(2), 104 Stat. 4978, 5020 (codified as amended at 8 U.S.C. § 1184(h) (1994)); see also 8 U.S.C. § 1154(a)(1)(F) (2006) (stating an employer desiring and intending to employ an alien qualifying for classification under section 1153 may petition for the alien's grant of immigrant status). Employer sponsorship is the most typical manner in which H-1B visa holders obtain legal permanent resident status. See Norm Matloff, *On the Need for Reform of the H-1B Non-Immigrant Work Visa in Computer-Related Occupations*, 36 U. MICH. J.L. REFORM 815, 815 (2003).

31. See Matloff, *supra* note 30, at 864-69 (describing H-1B visa holders' dependency on their employers for permanent residency as de facto indentured servitude).

32. Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277, § 411(a), 112 Stat. 2681, 2681-2642 (1998).

33. *Id.*

34. See U.S. DEP'T OF JUSTICE, IMMIGR. AND NATURALIZATION SERV., QUESTIONS AND ANSWERS, FISCAL YEAR 2000 H-1B CAP (2000), available at http://www.uscis.gov/files/press-release/FY00H-1BCap_032800.pdf.

35. American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, § 102, 114 Stat. 1251, 1251 (codified as amended at 8 U.S.C. § 1184(g)(1)(A) (2000)).

36. *Id.*

37. See U.S. CITIZENSHIP AND IMMIGR. SERV., H-1B PETITIONS FILED AND APPROVED BY TYPE OF PETITION: FYs 2000-03 (2004), available at http://www.uscis.gov/files/press-release/h1bcap_FS.pdf.

38. See U.S. CITIZENSHIP AND IMMIGR. SERV., H-1B PETITIONS RECEIVED AND APPROVED IN FY 2003 (2003), available at <http://www.uscis.gov/files/article/H1-BFY2003.pdf>. This adds up to more than 22,000 visas above the cap because nearly all workers approved for continuing employment are not subject to the Congress mandated cap under the H-1B program stipulations; hence, the limit of 195,000 was calculated as not having been reached. See *id.* (identifying certain classes of workers not included in the H-1B visa cap).

quotas have gone down to their original 65,000, but politicians face constant pressure from the industry to push the numbers to higher levels.

Like other late-twentieth century guest worker programs, the H-1B Program is not racially specific or single-nation oriented, yet a large number of these temporary work visas have gone to Indian men. By the late 1990s, over forty percent of all H-1B visas were issued to Indian software workers.³⁹ In 1998 and 1999, for example, Indians received 47.5% of the H-1B visas, followed by the Chinese at 9.3%.⁴⁰ Computer-related and engineering occupations accounted for seventy percent of the H-1B visas, and of these, nearly seventy-four percent of the systems analysts and programmers were born in India.⁴¹ Though the H-1B Program is not a race-based labor procurement program, like the H-2 Programs, it has become a de facto racialized program.

The Chinese and Indian coolies of the nineteenth century, the Mexican braceros of the mid-twentieth century, the Latino/a H-2A and H-2B workers, and the Indian H-1B techno-braceros were or are racialized into United States society in radically different ways. However, their status as guest workers results in labor situations that are legally analogous. Regardless of the specific details of each labor procurement program, the fact that these individuals are guest workers, itinerant laborers, and sojourners from the perspective of the law means they all face similar issues regarding their employers' capacity to impose work place discipline and their own ability to exercise any control over the production process.

II. The Labor Exchange

A. The Fable that Labor Is Commodity

Adam Smith famously claimed that, "the demand for men, like that of any other commodity, necessarily regulates the production of men."⁴² Though individuals agree to work for wages, labor cannot be classified as a commodity because it is attached to humans who have complicated social lives, and it gives rise to characteristics unique to each specific worker. First, labor's uniqueness lies in the fact it pro-

39. See U.S. IMMIGR. AND NATURALIZATION SERV., CHARACTERISTICS OF SPECIALTY OCCUPATION WORKERS (H-1B), MAY 1998 TO JULY 1999, at 1-2 (1999), available at <http://www.uscis.gov/files/article/report1.pdf>.

40. *Id.* at 1.

41. *Id.* at 2.

42. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 82 (C.J. Bullock ed., P.F. Collier & Son 1909) (1776).

duces goods and individuals.⁴³ Second, it is impossible to divorce labor from its social context. As Jane Collins notes, “[w]henver workers enter into production, they bring with them their needs for subsistence, the needs of their families, their commitments to affairs outside the workplace, and their ideas of what is right and fair.”⁴⁴ Social rules of interaction, habits, racial valuation, and gendered expectations shape the employer-worker relationship. Collins notes that, “[l]abor markets are deeply rooted in local institutions and practices. The labor contract is a social contract, which contains tacit expectations and is based on trust,”⁴⁵ where moral economies of the workplace provide the basis of interactions. Labor markets are “not closed and immutable systems but open, communicative frameworks susceptible to innovations of many kinds” by both the sellers and buyers of labor power.⁴⁶

Third, unlike corn, gasoline, or car parts, labor cannot be stored or its production and reproduction calibrated to suit market demands.

[T]o confuse labor with true commodities means adopting the following incorrect assumptions: the worker is the same as the objects of work; production is a purely technical exercise, a system of machinery that workers do not in any sense direct or contribute to. . . . The production process is devoid of social relations and social life that affect worker behaviour . . . [and] children are raised solely for the purpose of becoming workers for hire⁴⁷

Finally, to believe that labor is like any other commodity is to miss the fact that the sale of labor is a contested social exchange. The labor contract only guarantees that labor *power* is sold and does not transfer the ownership of the worker; that is, the individual worker continues to own her body. In purchasing labor power, the employer contracts to pay a wage and the worker agrees to submit to the disciplinary regime of the firm for a given period of time. Work activity is distinct from the contractual process, and the owner must enlist the worker’s consent or utilize subtle forms of coercion to harvest her labor power.

43. See generally KARL MARX, ECONOMIC AND PHILOSOPHICAL MANUSCRIPTS OF 1844 (Martin Milligan trans., Int’l Publishers 1964) (1932) (claiming that labor is unlike any other commodity because it not only produces goods, but also gives rise to human consciousness through exerting oneself against nature and producing things). For a sustained discussion on the link between human nature and labor, see BRUNO GULLI, LABOR OF FIRE: THE ONTOLOGY OF LABOR BETWEEN ECONOMY AND CULTURE (2005).

44. JANE L. COLLINS, THREADS: GENDER, LABOR, AND POWER IN THE GLOBAL APPAREL INDUSTRY 151 (2003).

45. *Id.* at 13.

46. *Id.*

47. JAMIE PECK, WORK PLACE: THE SOCIAL REGULATION OF LABOR MARKETS 25 (1996) (internal citations omitted).

Thus, the work process is a continually negotiated process, with the worker seeking to exercise autonomy over the pace of, or manner in which, work is conducted. On the other hand, it is in the employer's interest to control labor so that they may retain full control over the production process. This results in a continually contested labor "exchange."

Conditions of endogenous enforcement exist in most exchanges of a capitalist economy. Such exchanges "give rise to a well-defined set of power-relations among voluntarily participating agents even in the absence of collusion or other obstacles to perfect competition."⁴⁸ The endogenous conditions in labor exchanges are that employers have far greater power than do workers, because the latter can threaten the former with demotion, or worse, with being laid off.

Hence, because of these reasons, labor is a fictive commodity; it "is only another name for human activity which goes with life itself . . . [it] is not produced for sale" ⁴⁹

B. Negotiating the Labor Exchange

Labor exchanges are often believed to be a relationship solely between an employer who buys labor and a worker who sells her labor. Yet, this exchange is mediated by much more. Labor market theorists show us that these markets are socio-political constructions that require a state's active involvement in facilitating the creation of supply, demand, surplus, and scarcity of labor within its boundaries. As a result policies are enacted to support a worker's entry into the marketplace and to keep the worker in the workplace. Scholar Jamie Peck explains there are four processes involved in getting individuals to become willing participants in a labor market: (1) the incorporation of individuals into the labor market; (2) the allocation of individuals to various jobs; (3) the imperative for controlling workers so that their labor may be harvested efficiently; and (4) the reproduction of a work force that can replenish the labor market.⁵⁰

1. Incorporating Labor

A common understanding is that individuals enter the labor market to sell their labor because they need jobs, and someone will buy

48. Samuel Bowles & Herbert Gintis, *Contested Exchange: New Microfoundations for the Political Economy of Capitalism*, 18 POL. & SOC'Y 165, 167 (1990) (emphasis omitted).

49. KARL POLYANI, *THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME* 75 (2d ed. 2001).

50. PECK, *supra* note 47, at 24-40.

their labor at a fair price. But, “contrary to the canons of neoclassical economics, the labor supply is not simply regulated by the market, but instead is shaped by relatively autonomous social forces such as state policies, ideological norms, and family structures.”⁵¹ People need to feel the urge to work. Along with economic necessity, the desire to engage in waged work is shaped by socialization processes; that is, notions of masculinity regarding breadwinner status and pride in particular kinds of jobs. To be an adult (especially a man) and not be employed is often deemed shameful.⁵²

State policies also play a crucial role in incorporating individuals into the labor market. The withdrawal or provision of childcare, vocational training, and educational subsidies show the vested interest states have in their citizens becoming productive workers. In addition to incorporating individuals into the labor market, the state also shapes the conditions under which individuals enter the labor market. Wage structures, working conditions, and workers’ rights are not driven solely by the market; instead, they are shaped by state policies and laws. States regulate the conditions under which citizens and non-citizens are incorporated into the labor market.

2. Allocating Labor

The second aspect to structuring labor markets is the allocation of particular workers into particular jobs. This too is a sociological process; for example, women tend to work in feminized jobs, such as nursing and childcare, while men tend to work in masculinized jobs, such as truck driving and the construction industry. A person’s actual characteristics, such as training or experience, do not dictate their distribution in jobs; rather, employment is often determined by their attributed or ascribed characteristics, such as gender or race. Society deems young mothers, students, and older workers, for example, as having a weaker attachment to the labor market. That is, they are seen as opting out of jobs because of young children, schoolwork, or health

51. *Id.* at 27.

52. Political theorist Judith Shklar writes:

To be a recognized and active citizen at all [a person] must be an equal member of the polity, a voter, but he must also be . . . an “earner,” a free remunerated worker, one who is rewarded for the actual work he has done, neither more nor less. He cannot be a slave or an aristocrat.

JUDITH SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 64 (1991). These ideal citizens have historically tended to be working white men, who entered into the market as independent sellers of labor power. The loss of employment is seen as loss of social position that “is itself felt as a loss of competency, which is inevitably enhanced when the unemployed person must seek help from others.” *Id.* at 94.

issues compel them to quit. The belief is that their lifestyle demands are such that they have tenuous ties to their jobs, therefore resulting in their devaluation in the labor market. Ascribed characteristics of certain individuals automatically put them at a disadvantage in the labor market.⁵³ Irrespective of individual abilities, “members of these groups are treated by employers, unions, and state agencies alike *as if* they have a weak attachment to the labor market.”⁵⁴

3. Controlling Labor

The extraction of labor power from the worker on the shop floor is a contested exchange marked by unequal power relations. In order to realize their workers’ capacity to work, employers must either subtly coerce or garner the consent of their workers. Thus, production on the shop floor is a political process rather than a simple exchange of wages for labor power. It is in the employers’ interests to hire compliant workers who consent to work discipline. Suitable workers are not simply those who have the right skill set, but are also those who display good worker attributes such “as reliability, creativity, sociability, initiative, deference to authority, and adaptability. These traits, and their unpredictability, follow from the fact that labor is not a commodity but a set of capacities borne by *people*.”⁵⁵ Employers can never know workers’ attributes beforehand, so they attempt to minimize risk by looking for indicators in potential workers that signal such characteristics. Indicators might be class status (that is, the belief that middle class workers might be more compliant), immigration status, or gender (as evinced by sweat shops that hire only women).

4. Reproducing Labor

Finally, labor markets need to be replenished with new workers. This involves not only biological procreation and caring for children, but also educating, training, developing skill sets, and nurturing ideo-

53. An example of such ascription is the notion that highly educated, high-achieving women in the present-day United States are quitting careers to follow the “mommy track.” The prevailing belief is that these women find motherhood so much more fulfilling than jobs, and therefore have weaker attachments to their workplace than do their male colleagues. Contradicting such popular beliefs, sociologist Pamela Stone argues that women do not necessarily opt out of the labor market; instead, they are being pushed out as they find themselves marginalized in the work place, or their jobs are structured in such a way that their gendered responsibilities as mothers are not accommodated. PAMELA STONE, *OPTING OUT: WHY WOMEN REALLY QUIT CAREERS AND HEAD HOME* 18–19 (2007).

54. PECK, *supra* note 47, at 31.

55. *Id.* at 34 (footnote omitted).

logical orientations in individuals, all of which are anchored in families, neighborhoods, and nation-states. The state incurs costs in reproducing labor, which can run especially high both in economic and political terms when potential workers cannot be incorporated into the labor market.⁵⁶

Thus, for all these reasons—the challenges inherent in incorporating, allocating, controlling, and reproducing labor—the notion of a self-regulating, economically-driven labor market is a myth, argues Peck.⁵⁷ States face the constant challenge of regulating labor markets; “state intervention in the labor market is perhaps best characterized as a continuous process of regulatory experimentation and learning,” involving legislative or institutional reform, welfare, or training policy.⁵⁸

The convergence of labor and labor markets to pure commodity form does not occur automatically; instead, labor markets are sociopolitical constructions, with states actively facilitating the creation of supply, demand, surplus, and scarcity within national boundaries.⁵⁹ The state, through various policies and laws, attempts to regulate the supply of labor and deems the very sociality of labor processes as secondary to production needs. State processes regarding immigration, workers’ rights, access to citizenship, and processes of racialization all push the labor of certain individuals into resembling purer commodity forms. One very effective way by which states attempt to regulate labor markets is through racialized guest worker programs.

56. Workers who cannot be incorporated need to be supported either through households (which presumes other members have adequate employment), or unemployment benefits and other forms of social welfare (which are costly for the state). *See, e.g.*, DIV. OF FISCAL AND ACTUARIAL SERVS., OFF. OF WORKFORCE SEC., UNEMPLOYMENT INSURANCE OUTLOOK, FISCAL YEAR 2010, at 2 (2009), *available at* http://workforsecsecurity.doleta.gov/unemploy/pdf/prez_budget.pdf (estimating the total amount paid in unemployment benefits for all programs to be \$102.9 billion). Additionally, job losses also result in citizens’ disenchantment with the state. *See, e.g.*, Neil Irwin, Lori Montgomery & Michael A. Fletcher, *White House Faces Pressure on Jobs: Despite Stimulus Successes, More Action Sought*, WASH. POST, Oct. 9, 2009, at A1 (noting political analysts claim Democrats may lose control of the lower house if they fail to develop an effective plan for creating jobs).

57. PECK, *supra* note 47, at 16.

58. *Id.* at 42–43.

59. Another way by which states control labor is through policies that instill rules regarding “quality control” over the production of labor. To attract global capital, regional governments provide tax breaks, subsidize the factors of production, and crucially, ease up labor regulations and welfare policies that were central to social reproduction. These policies also contribute to the increasing commodification of labor, but their discussion is outside the scope of this Essay.

III. Regulating Labor Markets Through Guest Worker Programs

The incorporation, allocation, control, and reproduction of workers can be more finely manipulated by the state through bringing in foreigners—almost always racial others—to work in front of computer screens, on agricultural fields, and on construction sites for a stipulated period of time. Because guest workers can be brought in when states face rapid economic expansion and have labor “shortages” or sent out of the country during economic downturns, guest workers are very much like corn, gasoline, and car parts. That is, they can be deployed in the market much like goods. Work visas and permits can be increased or decreased, carefully calculated to suit market demands and political expediencies.

Ostensibly, American citizen workers are protected by guest worker legislation. For example, the Bracero Program limited the hiring of braceros only to areas where there was an officially recognized shortage of domestic farm workers, or when braceros did not adversely affect the wages and working conditions of citizen workers.⁶⁰ Similarly, the H-1B Program stipulates that firms can hire technobraceros only if there is a shortage of qualified Americans and these itinerant workers are employed on the same terms as citizens.⁶¹ However, the concept of a labor shortage is a political construct. While employers often claim a labor shortage exists, labor organizations emphasize that labor *is* available. There seems to be a shortage in workers, labor advocates note, *only* because citizen workers may not be willing to work on the terms employers offer; thus, employers deem these workers “unavailable.”⁶² One way to get suitable workers, who

60. Amendment to the Agricultural Act of 1949, Pub. L. No. 82-78, § 503, 65 Stat. 119. In addition, employers had to first attempt to hire Americans, and if they did not find any who would work at the wages and hours offered to Mexicans, then they could import braceros. *Id.*

61. See 8 U.S.C. § 1182(n) (2006).

62. See, e.g., Moira Herbst, *Labor Shortages: Myth and Reality*, BUS. WEEK, Aug. 21, 2007, http://www.businessweek.com/bwdaily/dnflash/content/aug2007/db20070821_451283.htm (quoting Kim Berry, the president of the Programmers Guild, “We don’t believe that there is a labor shortage. . . . [Y]ou’ll attract the best and brightest [U.S. workers] if the price is right.”); William J. Holstein, *Give Us Your Wired, Your Highly Skilled*, U.S. NEWS & WORLD REP., Oct. 5, 1998, at 53 (citing claims by the labor group Communications Workers of America that telecom companies had laid off 142,000 workers in 1998, yet the companies complained they could not find enough workers); Aaron Zitner, *Foreign Worker Bill Approved*, BOSTON GLOBE, Sept. 25, 1998, at C1 (reporting that, during the high-tech boom, labor groups opposed any increases in visas because employers could draw more American workers if they simply raised wages).

are willing to work on an employer's terms, labor advocates argue, is to import them from poorer nations where standards of living are lower, and the costs associated with everyday life are lower.⁶³

The contested nature of labor "shortages" was apparent in the American information technology industry in the late 1990s and early 2000s. Firms complained to politicians that they did not have enough workers and that the H-1B Program had to be expanded to bring in more foreign workers.⁶⁴ However, labor and professional organizations maintained that there was no shortage of high-tech workers in the United States.⁶⁵ Nevertheless, as discussed *supra* Part I, the legislature increased the influx of foreign workers by expanding the H-1B Program.

The expansion of guest worker programs may have several devastating effects for citizen and non-citizen workers. First, guest worker programs can be used to discipline citizen workers. The Bracero Pro-

63. See, e.g., Patrick J. McDonnell & Julie Pitta, "Brain Gain" or Threat to U.S. Jobs?, L.A. TIMES, July 15, 1996, at A1 (reporting critics of visa expansion, including labor groups, viewed employers' lobbying efforts to increase the H-1B visa program as a strategy to exploit "foreign help and hire a relatively cheap, readily available and easily discardable work force . . ."); Julia Preston, *White House Moves to Ease Guest Worker Program*, N.Y. TIMES, Feb. 7, 2008, at A22 (citing the concerns of farm worker advocates regarding proposed changes to the H-2A guest worker program, "We're concerned this proposal will allow thousands of agricultural employees to bring in cheap foreign labor from poor countries and undermine the standards of farm workers in this country . . .").

64. See, e.g., Holstein, *supra* note 62 (citing the claims of high-tech industry employers in 1998 that nearly 400,000 tech jobs were going vacant as a result of the labor shortage); Zitner, *supra* note 62 (reporting on the high-tech industry's lobbying of Congress for expansion of the H-1B visa program in response to the claimed labor shortage in the high-tech industry in 1998). More recently, Bill Gates argued the current limit of 65,000 H-1B visas had led to disruptions in the flow of talented science, technology, engineering, and math graduates to American companies. See Jim Abrams, *Bill Gates Presses for More Work Visas*, BOSTON GLOBE, Mar. 13, 2008, http://www.boston.com/news/education/higher/articles/2008/03/13/bill_gates_presses_for_more_work_visas/. Microsoft and other firms had apparently been compelled to locate staff in countries, notably Canada, that were open to skilled foreign workers. *Id.* In 2007, Microsoft was unable to obtain H-1B visas for one-third of the qualified foreign-born job candidates it wanted to hire. *Id.* It wanted these non-citizen candidates because the firm believed there were no qualified citizen workers available. *Id.*

65. See Holstein, *supra* note 62; Zitner, *supra* note 62; see also Matloff, *supra* note 30, at 823 (stating the United States affiliate of the Institute for Electrical and Electronic Engineers publicly criticized the information technology industry's claims of a labor shortage in the late 1990s). In addition, in more recent years, job losses in the high-tech industry were high even when the nation was experiencing an economic recovery. Between March 2001 and March 2004, the IT industry eliminated approximately 402,800 jobs, more than half of which were shed during a time when the nation was officially experiencing an economic recovery, starting in November 2001. SNIGDHA SRIVASTAVA & NIK THEODORE, CTR. FOR URBAN ECON. DEV., UNIV. OF ILL. AT CHI., INFORMATION TECHNOLOGY LABOR MARKETS: REBOUNDING, BUT SLOWLY I (2006).

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gram, scholars have noted, was used to break the American Federation of Labor affiliated National Farm Labor Union's ("NFLU") efforts at unionizing workers in California's agricultural sector.⁶⁶ In two major instances, the DiGiorgio and the Imperial Valley strikes of 1948 and 1951, braceros were used to replace striking workers and undermine the impacts of the strikes.⁶⁷ The NFLU attempted to use a citizen's arrest to enforce statutes on employers, but local courts ruled against them, and the Immigration and Naturalization Services refused to remove braceros from the fields, as had been stipulated under legislation.⁶⁸ Thus, guest worker programs can be used to break citizen workers' unionizing efforts.

Second, the costs of labor production—such as education, the development of skills, and reproduction—are borne by the sending nations such as Mexico, Turkey, and India. The United States bears no expenses for the training of these workers. Third, countries such as the United States that receive guest workers do not need to provide unemployment benefits for these non-citizen workers. Guest workers can be sent back to their countries if they lose their jobs due to economic downturns (as in the construction industry), the seasonal nature of work (as in agriculture), or project-driven cycles of work (as in the case of information technology jobs). For example, if an information technology guest worker loses her job, she legally only has ten days to find another job and H-1B visa sponsor; if she is unable to do so, then she becomes an "illegal alien."⁶⁹ For the nation-state using

66. J. Craig Jenkins & Charles Perrow, *Insurgency of the Powerless: Farm Worker Movements (1946–1972)*, 42 AM. SOC. REV. 249, 356 (1977).

67. *Id.*

68. *Id.*

69. See 8 C.F.R. § 214.2(h)(11) (2009) (stating an employer must notify the director who approved the H-1B petition if there is a change in employment and that termination of employment is grounds for revocation of the petition); *id.* § 214.2(h)(13)(i)(A) (declaring the visa beneficiary has ten days to remain in the United States after the validity period of the visa ends). The current downturn in the economy has led to a mad scramble for jobs and new employers among non-citizen workers on H-1B visas. See Lornet Turnbull, *Downturn Dilemma: Foreign Professionals and Worker Visas*, SEATTLE TIMES, Feb. 15, 2009, http://seattletimes.nwsourc.com/html/localnews/2008746256_h1bvisas15m0.html (noting that with soaring joblessness, employers are under pressure to cut their foreign work force first). Turnbull reports on the dire implications of job loss:

The implications of job loss are even more dire for those on their way to obtaining permanent residency—a natural transition from the H-1B. After waiting many years for a green card to become available, some who can't find a new job may have to scrap it all and go home. For many, that means unearthing deep roots. "They are integrated into the economy," said Robert Foley, a Seattle immigration attorney. "They have spouses here, kids in school. They bought homes here. All of a sudden they are out of a job, and all of that is at risk."

guest workers, the economic and political expense of maintaining an unemployed work force is eliminated. The costs of maintaining non-productive workers are exported out of the country. Simultaneously, the political costs of maintaining an unemployed workforce are exported out. The labor of these foreign workers reaches purer commodity form because its supply is regulated by the receiving nation-state through immigration laws. By stipulating the length of stay and limiting citizenship rights, receiving nations can effectively disregard the social lives of these workers by transferring them out and replacing them with new foreign workers when needed.

Fourth, it is in the interest of an employer to hire compliant workers,⁷⁰ and guest worker programs condition arriving foreigners to be compliant workers. For guest workers, the renewal of labor contracts is dependent on employer goodwill. If their employers are displeased with them, not only do they risk losing their jobs, but they may also be forced to leave the country. As a result, workers are less likely to complain about low wages and less than ideal work conditions because they have an interest in maintaining their contracts and legal status in the United States. They are also less likely to unionize. Thus, their status as guest workers minimizes the risks for employers because, along with the appropriate skills, guest workers display the much admired worker attributes of compliance with authority and adaptability to long hours or lower wages.

Concededly, this situation is quite similar to what most workers in the American economy face, regardless of their citizenship or residency status. However, this problem is exacerbated for foreign guest workers because the state facilitates their deeper disempowerment by denying them the rights associated with citizenship.⁷¹ If they are overworked or underpaid, they are unable to leave because the law binds them to the company that sponsored their employment. In addition, if these workers are fired, they potentially lose their legal status in the United States and become “illegals” since guest workers have a limited period of time to find another job and an employer to sponsor their work permit.⁷²

The one advantage techno-braceros/cyber-coolies have over other guest workers is their potential to convert their guest worker

Id.

70. See *supra* Part II.B.3.

71. The citizenship rights of the U.S. Constitution are guaranteed only to *citizens*—“persons born or naturalized in the United States. . . .” U.S. CONST. amend. XIV, § 1.

72. See *supra* note 69.

status into permanent residency. That is, American citizenship is within their reach.⁷³ However, permanent residency is available only if their employer sponsors their paperwork. Some cyber-coolies/techno-braceros continue working for the same employer, even if working conditions are less than ideal, because they hope their employer will sponsor their permanent residency. Switching to more favorable jobs can delay the residency application process, leaving the foreign workers vulnerable to employer goodwill for a much longer period.⁷⁴

This situation is exacerbated by the fact that sections 201 and 202 of the Immigration and Nationality Act (“INA”) set limits on the number of permanent residencies.⁷⁵ There is a limit on the number of people who can be granted permanent residence status in any given year. This quota is calculated on two things: the employment-based category or the family-based category, and the per country limits; which means that every country, regardless of how large or small it is, is given the same percent of the worldwide quota.⁷⁶ As a result, countries like China and India with large populations are subject to longer waiting times than a person born in Germany or Austria. For the year 2009, the family-sponsored preference limit was set at 226,000, and the employment-based preference limit was at least 140,000.⁷⁷ Section 202 of the INA prescribes that the per-country limit for preference immigrants is set at seven percent, which is 25,620 overall, and allots 9800 slots for employment-based immigration.⁷⁸ Thus, Indian H-1B workers are at a disadvantage.

73. See *supra* note 30 and accompanying text.

74. See *supra* notes 30–31 and accompanying text. Section 105 of the American Competitiveness in the Twenty-first Century Act of 2000 increased the portability of H-1B visa holders in the last stages of the permanent residency application process by providing authorization “to accept new employment upon the filing of the prospective employer of a new petition on behalf of such nonimmigrant. . . . Employment authorization shall continue for such alien until the new petition is adjudicated. If the new petition is denied, such authorization shall cease.” American Competitiveness in the Twenty-first Century Act of 2000, Pub. L. No. 106-313, § 105, 114 Stat. 1251, 1253 (codified as amended at 8 U.S.C. § 1184(n)(1) (2006)). Although this may, in theory, somewhat ease the permanent residency process for H-1B visa holders, “the process still takes several years, during which the H-1B still remains ‘loyal’ to the employer.” Matloff, *supra* note 30, at 868.

75. Immigration and Naturalization Act of 1952, Pub. L. No. 82-414, §§ 201–202, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1151–1152 (2006)). The Immigration Act of 1990, Pub. L. No. 101-649, §§ 101–102, 104 Stat. 4980–85 (current versions at 8 U.S.C. §§ 1151–1152 (2006)), significantly amended the calculations of these quotas.

76. See 8 U.S.C. §§ 1151–1152 (2006).

77. See U.S. DEP’T OF STATE, VISA BULLETIN OCTOBER 2009, http://travel.state.gov/visa/frvi/bulletin/bulletin_4575.html?css.

78. See *id.* A minimum of 140,000 *employee* applicants (not family-based) are awarded permanent residency every year. See 8 U.S.C. § 1151(d)(1)(A) (2006). Each country is

Indians are overrepresented in the H-1B visa category because, as discussed *supra* Part I, they have consistently received the largest number of these work visas since the program was initiated. Simultaneously, and this is partially because of their overrepresentation as guest workers, citizenship is less accessible to them because of retrogression.⁷⁹ Even when employers want to sponsor their permanent residency, Indians (along with mainland-born Chinese, Mexicans, and Filipinos/as) have much longer waits because their “green card” quota might already be filled.

The state presumes that employers act in good faith; that they would never overwork or otherwise exploit guest workers. In contrast, guest workers are suspected of arbitrarily switching jobs, or *exploiting* employers to gain access into the United States. Guest workers are not allowed to move jobs without also losing access to permanent residency and, concomitantly, more secure worker rights. Thus, guest workers are probationary Americans.⁸⁰ Through its immigration laws the American state pushes workers into commodity status, further disempowering them while simultaneously benefiting capital.

Conclusion

Theoretically, in a racially homogenous nation, the needs of capital and the needs of the state complement each other. Yet in a racially differentiated state such as the United States, capital and state imperatives may be contradictory. Capital, with its needs for ostensibly “abstract” labor, is said by Marx to be unconcerned by the “origins” of its

given a seven percent quota, resulting in 9800 slots for permanent residency. These 9800 slots are further divided into employment-based categories: (1) priority workers, who are persons with extraordinary abilities—very few workers qualify for this category, and thus this particular quota (approximately 2800) never fills up; (2) professionals with advanced degrees or exceptional abilities; (3) skilled workers, the quota for which almost always fills up; (4) certain special immigrants; and (5) employment creation, or investors in a targeted rural or high unemployment area. See 8 U.S.C. § 1153(b) (2006). Oversubscribed countries such as India and China have an overabundance of workers in the third category. See, e.g., U.S. DEP’T OF STATE, *supra* note 77 (charting the oversubscription of India and China in the third category).

79. See U.S. CITIZENSHIP & IMMIGR. SERVICES, VISA AVAILABILITY & PRIORITY DATES (2009), <http://www.uscis.gov/portal/site/uscis/> (search “visa retrogression”; then follow “Visa Availability & Priority Dates” hyperlink) (Visa retrogression “occurs when more people apply for a visa in a particular category than there are visas available for that month. Visa retrogression most often occurs when the annual limit has been reached.”).

80. See generally EDWARD J.W. PARK & JOHN S.W. PARK, PROBATIONARY AMERICANS: CONTEMPORARY IMMIGRATION POLICIES AND THE SHAPING OF ASIAN AMERICAN COMMUNITIES (2005) (examining guest workers within the framework of American immigration policy and dubbing these guest workers “probationary Americans”).

labor force. Contrarily, the nation-state needs an “abstract citizen,” who has a specific form of culture. Thus, a nation-state’s concern is “to maintain a national citizenry bound by race, language, and culture.”⁸¹

The liberal American state is built on two foundational ideals: individual freedom and political equality. Individual freedom ensures that citizens exercise their autonomy by purchasing commodities and selling their labor on terms that they are free to set. Political equality is ostensibly achieved through exercising the political rights associated with citizenship, such as voting and standing for office. Guest workers—coolies, braceros, and cyber-coolies—do not have access to individual freedom and political equality. As guest workers, they are unable to set the terms of employment. If unhappy with their work, they can leave their place of employment, but they must also leave the United States. Thus, they have no freedom. And they have no political equality because, as temporary workers, they cannot access citizenship rights.

The situation of these guest workers is illustrative of American liberalism. Asian American scholar Lisa Lowe eloquently argues:

[I]n the history of the United States, capital has maximized its profits not through rendering labor “abstract” but precisely through the social productions of “difference,” of restrictive particularity and illegitimacy marked by race, nation, geographical origins, and gender. The law of value has operated, instead, by creating, preserving, and reproducing the specifically racialized and gendered character of labor power.⁸²

Guest worker programs resolve the tensions the American state faces in nation-building. The needs of capital drive the demand for labor, pulling in non-white workers from various parts of the world, but the nation is built on the abstract citizen—a white (male) person. Although the needs of the nation and the needs of capital are diametrically opposed, these contradictory needs are resolved through guest worker programs. These programs keep labor transaction costs low, but, by denying non-white workers citizenship, also expunge guest workers from the national body. As “guests,” non-white workers are seen solely as value-adding, labor-bearing bodies to be deployed when needed for capital’s benefit. Their human qualities and concrete social lives matter little; they are seen as inherently non-existent.

81. LOWE, *supra* note 5, at 13.

82. *Id.* at 27–28.