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Rose Cuison Villazor

*University of California at Davis School of Law*

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# CITIZENSHIP FOR THE GUEST WORKERS OF THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

ROSE CUISON VILLAZOR\*

## INTRODUCTION

Much of the opposition to the passage of comprehensive immigration reform centers on provisions that would have provided undocumented immigrants with a path to citizenship.<sup>1</sup> Senate Bill 744 (S. 744), the bipartisan bill that passed the U.S. Senate in June 2013,<sup>2</sup> for example, included a provision that would have enabled millions of eligible undocumented immigrants to apply for Registered Provisional Immigrant (RPI) status. Immigrants with this status would eventually, albeit after a significantly long time, be able to apply for naturalization.<sup>3</sup> Many opposed to S. 744 contended that the bill should not be passed because it rewards those who came to the United States illegally. As Senator Ted Cruz commented, “I think a path to citizenship for those who are here illegally is profoundly unfair to the millions of legal immigrants who followed the rules . . . .”<sup>4</sup>

\* Professor of Law, University of California at Davis School of Law. I want to thank Frank Valdes, Tayyab Mahmud, Pedro Malavet, and Ediberto Roman for their helpful comments and suggestions to earlier versions of this Essay. I am extremely grateful to my research assistants, Andrew Alfonso ('15), Sarah Chi ('15), Anna Pifer-Foote ('16), and Chanpreet Singh ('14) for their excellent research and editing assistance. Finally, I thank the editors of the CHICAGO-KENT LAW REVIEW for their suggestions and feedback. I dedicate this Essay to my parents, Pablo Cuison and Carol Cuison Smith, who were among the thousands of low-wage Filipino guest workers who moved to the Commonwealth of the Northern Mariana Islands in the 1980s in search of a better life for our family.

1. See Kevin R. Johnson, *Ten Guiding Principles for Truly Comprehensive Immigration Reform: A Blueprint*, 55 WAYNE L. REV. 1599, 1601 (2009); Bill Ong Hing, *Asian Americans and Immigration Reform*, 17 ASIAN AM. L.J. 83, 84 (2010); Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387, 414 (2007); see also David Welna, *Meet the Virginian Shaping the House GOP's Immigration Plan*, NPR (Feb. 21, 2013, 3:03 AM), <http://www.npr.org/blogs/itsallpolitics/2013/02/21/172535159/meet-the-virginian-shaping-the-house-gops-immigration-plan>.

2. Border Security, Economic Opportunity, and Immigration Modernization Act, S. 744, 113th Cong. (2013).

3. See *id.* §§ 2101–2102.

4. Benjamin Bell, *Ted Cruz Dismisses Talk of 2016 Presidential Bid While in Iowa*, ABC NEWS (July 21, 2013, 9:21 AM), <http://abcnews.go.com/blogs/politics/2013/07/ted-cruz-dismisses-talk-of-2016-presidential-bid-while-in-iowa/>.

In the Commonwealth of the Northern Mariana Islands (CNMI), a U.S. territory<sup>5</sup> located thousands of miles away from the U.S. mainland, a different type of criticism against S. 744 took place. This opposition was distinct because it centered on a relatively unknown provision of S. 744 that would have similarly granted a path to lawful permanent immigration status to non-citizens, except these non-citizens already have documented status. In particular, Section 2109 of S. 744 would have granted individuals on temporary non-immigrant worker or guest workers in the CNMI the ability to apply for CNMI-only status, which would enable them to later apply for lawful permanent residency and U.S. citizenship.<sup>6</sup>

Section 2109 may be unfamiliar to many in the United States, but the issue was quite contentious in the CNMI. On one end of the spectrum are those that supported Section 2109 because it offered an improved immigration status for guest workers and path to citizenship. As one advocate stated:

A vast majority of the nonresident workers have lived and worked in the CNMI for over five years, many for most of their adult lives. They literally built the CNMI. They keep the economy strong, yet they remain disenfranchised with uncertain futures and no pathway to citizenship. Of all of the categories of immigrants in the U.S. immigration reform debate, perhaps the most deserving of a pathway to citizenship must be the CNMI's legal, long-term nonresidents.<sup>7</sup>

On the other end of the spectrum are those that opposed the conferral of a path to lawful permanent residency to the guest workers.<sup>8</sup> In November

5. In 1976, the Commonwealth of the Northern Mariana Islands (CNMI) entered into a political agreement with the United States and became a U.S. commonwealth. See Act of Mar. 24, 1976, Pub. L. No. 94-241, 90 Stat. 263 (codified as 48 U.S.C. § 1801 (1986)) (enacting the Covenant to Establish the Commonwealth of the Northern Mariana Islands in Political Relationship With and Under the Sovereignty of the United States). In this Essay, I use the terms "commonwealth" and "territory" interchangeably for ease of reference only. Further, although the CNMI is designated a commonwealth, it is technically a U.S. territory except that the political agreement that it entered into with the United States confers it with greater autonomy over its internal affairs than other U.S. territories. See Gretchen Kirschenheiter, *Resolving the Hostility: Which Laws Apply to the Commonwealth of the Northern Mariana Islands When Federal and Local Laws Conflict*, 21 U. HAW. L. REV. 237, 241-46 (1999).

6. See S. 744 § 2109; see also *Common Hope, Peace, Justice, and Opportunity for All*, SAIPAN TRIB., Dec. 12, 2013, <http://www.saipantribune.com/index.php/c2789571-1dfb-11e4-aedf-250bc8c9958e/> (explaining that legal foreign workers in the CNMI since 2003 would be eligible to apply for a green card). Although these guest workers entered the CNMI on temporary non-immigrant visas, many of them have been residing in the territory for decades and thus they were effectively long-term yet non-permanent residents of the CNMI. See *infra* Part I. In this Essay, I use the terms "guest workers," "contract workers" and "non-citizen workers" interchangeably.

7. *The CNMI's Nonresidents' Immigration Progress: One Step Forward, Two Steps Backward*, UNHEARD NO MORE! (Sept. 15, 2014), <http://unheardnomore.blogspot.com/2014/09/the-cnmis-nonresidents-immigration.html> [hereinafter *Immigration Progress*].

8. I do not mean to suggest that all indigenous individuals are opposed to the guest workers acquiring a path to lawful permanent residency. Indeed, in the last few years, there have been prominent

2013, for example, members of the CNMI House of Representatives passed Resolution 18-34, which expressed opposition to Section 2109.<sup>9</sup> The resolution contended that the passage of Section 2109 would have an adverse impact on the indigenous peoples of the CNMI. Specifically, Resolution 18-34 provided,

Whereas, the enactment of Section 2109 . . . of S. 744, and/or any similar Act by Congress, will dramatically change the social, economic, and political landscape in the Commonwealth to the advantage of the thousands of alien workers, their families and people of other ethnic origin or race upon them becoming U.S. citizens. . . . It will give birth to a new form of foreign domination on the indigenous peoples once again . . . .<sup>10</sup>

This Essay analyzes the contested claim to citizenship for the CNMI guest workers and explores its broader implications for our normative understanding of justifications for membership to the U.S. polity. Albeit taking place thousands of miles away from the U.S. mainland, this debate about the guest workers' political membership to the United States is worthy of examination for at least three reasons. First, it raises important questions of institutional design of immigration law and the integration of non-citizens into the American polity.<sup>11</sup> As Dean Kevin Johnson has noted, the integration of non-citizens into the "American society is a valid and important policy goal."<sup>12</sup> Immigration law, by enabling non-citizens to become lawful permanent residents (LPR) and U.S. citizens, provides a critical avenue for political integration of non-citizens.<sup>13</sup> Yet, the paths to acquiring LPR status are limited primarily to those with preferred family

local individuals who favored a path to citizenship for these workers. See Emmanuel T. Erediano, *Kilili Moves Forward*, MARIANAS VARIETY, Oct. 6, 2011,

<http://www.mvariety.com/cnmi/cnmi-news/local/40737-kilili-bill-moves-forward> (stating that Congressman Gregorio Kilili Camacho Sablan, the CNMI delegate to the U.S. House of Representative, has sponsored a bill that would confer a CNMI-only residency status to guest workers who are married to U.S. citizens and have U.S. citizen children); *Sablan Backs Permanent Residency, Path to U.S. Citizenship for Long Term Guest Workers*, SAIPAN TRIB., June 4, 2009, <http://www.saipantribune.com/index.php/b44c8e63-1dfb-11e4-aedf-250bc8c9958e/> (reporting that CNMI House of Representatives, Tina Sablan, submitted a statement to the U.S. House of Representatives Subcommittee on Insular Affairs, Oceans and Wildlife to ensure that the guest workers gain a path to citizenship).

9. 113 CONG. REC. S653 (daily ed. Jan. 30, 2014).

10. *Id.* at S654.

11. See Johnson, *supra* note 1, at 1634 (suggesting that comprehensive immigration reform could help the "integration of non-citizens into the mainstream"); see also Steven W. Bender, *Compassionate Immigration Reform*, 38 FORDHAM URB. L.J. 107, 122 (2010); Stella Burch Elias, *Comprehensive Immigration Reform(s): Immigration Regulation Beyond our Borders*, 39 YALE J. INT'L L. 37, 83 (2014). Another institutional design, which this Essay alludes to but cannot fully explore, could focus on what a fair guest worker program could look like. For a discussion of factors to consider in designing a guest worker program, see Hiroshi Motomura, *Designing Temporary Worker Programs*, 80 U. CHI. L. REV. 263 (2013).

12. See Johnson, *supra* note 1, at 1634.

13. See 8 U.S.C. § 1427 (2012) (enabling lawful permanent residents to apply for naturalization).

relationships<sup>14</sup> or have certain high-level job skills.<sup>15</sup> This leaves countless non-citizens on lawful temporary work visas, including guest workers, without meaningful recourse to eventually gain political membership.<sup>16</sup> What conditions or theory would justify providing documented temporary workers who are currently not eligible for green cards with a path to becoming members of the United States?

Second, the question of whether the CNMI guest workers should be conferred with a path to citizenship provides a valuable opportunity to explore underexamined issues about Congressional delegation of immigration powers. Scholars have long called for innovations in immigration law regulation,<sup>17</sup> including “immigration regionalism,”<sup>18</sup> which would allow sub-federal entities to have some level of control over immigration. Congress has never delegated its complete federal immigration powers to a state but it has expressly given these powers to the CNMI and American Samoa in the past.<sup>19</sup> As this Article explains *infra*, Congress allowed the CNMI to control immigration to the commonwealth beginning in 1978 but then revoked it in 2009.<sup>20</sup> The dispute about citizenship for the CNMI guest workers constitutes an unresolved issue that resulted from the Congressional revocation of the CNMI’s immigration authority.<sup>21</sup> A closer examination of such experimentation with immigration law may reveal important insights

14. See *id.* § 1154(a)(1)(A) (allowing U.S. citizens to sponsor their children, spouses, parents, and certain “immediate relatives” in the visa application process); *id.* § 1154(a)(1)(B) (allowing lawful permanent residents to sponsor their children and spouses in the visa application process).

15. See *id.* § 1153(b) (making a limited class of priority workers, which includes aliens with extraordinary ability, outstanding professors and researchers, and certain multinational executives, and non-citizens who are members of professions who hold advanced degrees or have exceptional ability, and skilled workers, professionals or unskilled workers whose jobs are not temporary, to apply for employment-based visas). Non-citizens may also apply for an employment-based visa by investing or creating new jobs in the United States. See *id.*

16. There are at least two other ways that a non-citizen may apply to become a lawful permanent resident. See *id.* § 1153(c) (diversity-visa admissions program); *id.* § 1157 (refugee and humanitarian admissions program).

17. See Johnson, *supra* note 1, at 1600–10; see, e.g., Bender, *supra* note 11; Margaret Hu, *Reverse-Commandeering*, 46 U.C. DAVIS L. REV. 535 (2012); David S. Rubenstein, *Immigration Structuralism: A Return to Form*, 8 DUKE J. CONST. L. & PUB. POL’Y 81 (2013).

18. See Keith Aoki & John Shuford, *Welcome to Amerizona—Immigrants Out!: Assessing “Dystopian Dreams” and “Usable Futures” of Immigration Reform, and Considering Whether “Immigration Regionalism” is an Idea Whose Time has Come*, 38 FORDHAM URB. L.J. 1, 6 (2010).

19. ARNOLD H. LEIBOWITZ, *DEFINING STATUS: A COMPREHENSIVE ANALYSIS OF UNITED STATES TERRITORIAL RELATIONS* 94 (1989) (explaining that American Samoa controls its own immigration).

20. See *infra* Part I. Today, American Samoa continues to have authority over its own immigration to that territory. See AM. SAMOA CODE ANN. § 41.0201 (2004) (explaining that American Samoa has the power to restrict the entry of non-American Samoans into American Samoa).

21. See *infra* Part I.

into the advantages and drawbacks of sub-federalization of immigration powers.

Third, the issue of whether Congress should confer a path to citizenship to the CNMI guest workers highlights nuanced questions about the relationship between immigration law, citizenship law and anti-subordination principles.<sup>22</sup> Scholars have examined the anti-subordination principle in the context of immigration and citizenship laws to reveal the ways in which these laws facilitate and perpetuate the inferior and powerless status of non-citizens and people of color.<sup>23</sup> How might the anti-subordination principle apply to an issue in which groups of color on opposite ends of the question are each advocating for a remedy that might disadvantage the other? Advocates for non-citizen workers argue that the failure to provide the workers with “green cards” or lawful permanent residency will facilitate their ongoing legal subordination in the CNMI. Advocates for indigenous individuals counter that the granting of lawful permanent residency to the guest workers will lead to a new form of colonialism. Thus, how might anti-subordination principles attend to a situation in which one racialized group seeks resolution to an issue that could perpetuate the inferior legal position of another non-white group (guest workers) or potentially create a subordinated political status of indigenous peoples in the CNMI?

This Essay explores the answers to the foregoing questions by conducting a close analysis of the debate over citizenship for the CNMI guest workers. Overall, this Essay argues that the CNMI’s immigration regulation and ensuing federal immigration control resulted in the establishment of what is essentially a permanent and inferior class of non-citizens without political representation and ability to become members of the polity. The creation of this population raises a serious democratic deficit that justifies conferring the workers with a permanent and stable immigration status, which could lead to U.S. citizenship. Such result is warranted not only to

22. The anti-subordination principle is an approach to analyzing the validity of a law or policy by examining its role in the facilitation, perpetuation or recreation of the subordinated or inferior status of historically disadvantaged groups. See Barbara J. Flagg, *Enduring Principle: On Race, Process, and Constitutional Law*, 82 CAL. L. REV. 935, 960 (1994) (“[T]he antisubordination principle contends that certain groups should not occupy socially, culturally, or materially subordinate positions in society. . . . [U]nder this conception of equality, government action would be held constitutionally acceptable only to the extent that it did not create, reinforce, or perpetuate those groups’ subordinate status”).

23. See e.g., Raquel E. Aldana, *Introduction: The Subordination and Anti-Subordination Story of the U.S. Immigrant Experience in the 21st Century*, 7 NEV. L.J. 713, 715–16 (2007) (applying anti-subordination theory to immigrants protesting against harsh immigration laws); Victor C. Romero, *Rethinking Minority Coalition Building: Valuing Self-Sacrifice, Stewardship, and Anti-Subordination*, 50 VILL. L. REV. 823, 831–32 (2005) (showing how anti-subordination theory may help resolve policy conflicts among citizen and non-citizen minority groups).

correct the current political inequity in the CNMI but also because of the guest workers' social, cultural and economic contributions to the commonwealth. Yet, this Essay also contends that the indigenous peoples' fears about losing meaningful control over their own islands is an important factor that Congress should consider when crafting legislation that would resolve the debate about citizenship for the CNMI guest workers.

The Essay proceeds in four parts. Part I briefly situates the conflicting claims to citizenship within the broader historical context. This Part reveals the role that immigration powers played in redressing the historical colonization of the indigenous peoples of the CNMI. That is, through the congressionally delegated immigration authority in the CNMI, the commonwealth achieved meaningful control over who was able to enter, remain and exit in the territory. Part II discusses the impact of local immigration regulation and creation of a guest worker program in the CNMI. As this Part explains, the exercise of local immigration regulation legally constructed an inferior class of non-citizens that became subject to exploitation and legal powerlessness for decades. Although Congress eventually revoked the CNMI's immigration powers, it failed to address the status of the long-term guest workers who had been residing and continue to live in the CNMI.

Next, Part III explores the debate over whether Congress should grant to CNMI guest workers a path to lawful permanent residency and U.S. citizenship. Using Professor Eric Yamamoto's work on interracial justice,<sup>24</sup> this Part frames the contested claim in the CNMI about membership as a "color-on-color" conflict between non-white racialized groups.<sup>25</sup> In so doing, it reveals the complexity of interracial justice tensions that are distinct from those involving whites and people of color. Importantly, this Part illustrates the shared subordination status of both guest workers and indigenous groups and the need for them to work towards interracial collaboration. Ultimately, this Part contends that Congress's failure to provide the CNMI guest workers with the opportunity to adjust to a more permanent status would be devastating to the entire commonwealth.

24. See Eric K. Yamamoto, *Conflict and Complicity: Justice Among Communities of Color*, 2 HARV. LATINO L. REV. 495 (1997) (theorizing situations involving intergroup conflicts and solutions) [hereinafter Yamamoto, *Conflict and Complicity*]; Eric K. Yamamoto, *Critical Race Praxis: Race Theory and Political Lawyering Practice in Post-Civil Rights America*, 95 MICH. L. REV. 821 (1997) (examining interracial group complaints and possible approaches) [hereinafter Yamamoto, *Critical Race Praxis*].

25. See Yamamoto, *Conflict and Complicity*, *supra* note 24, at 495 (examining interracial group claims against each other); Yamamoto, *Critical Race Praxis*, *supra* note 24, at 828.

Part IV recommends that the CNMI guest workers be given a path to lawful permanent residence and U.S. citizenship.<sup>26</sup> As a normative matter, Part IV.A argues that such result is warranted because of the workers' contributions to the CNMI. In making this claim, Part IV.A builds on the work of Professor Ayelet Shachar on *jus nexi*,<sup>27</sup> which argues for the conferral of membership based on an individual's connections and contributions to the United States. Part IV.B contends that such legislation is not unprecedented. Specifically, in the 1970s, the U.S. Virgin Islands also had a guest worker program, which similarly led to the creation of a large population of non-citizen workers who were excluded from the political process in the territory. Congress eventually eliminated the territory's guest worker program and conferred the non-citizen workers with a path to lawful permanent residency. Part V concludes.

### I. HISTORICAL BACKGROUND

To fully understand how the CNMI guest worker immigration issue developed in the CNMI, it is important to situate it within the proper historical and political context. The Mariana Islands underwent four colonial regimes before becoming a self-governing U.S. commonwealth.<sup>28</sup> From 1521 to 1899, the Islands were ruled by Spain; then by Germany until 1914; then Japan until 1944; and then by the U.S. until 1986 as a trust territory under a U.N. mandate.<sup>29</sup> In 1986, the Mariana Islands became a U.S. commonwealth and gained—after more than 300 years—the right to self-govern.<sup>30</sup>

The people of the Marianas sought the right of self-government for many years. When the U.S. administered the islands as a trust territory, part of its obligation was to support the Marianas peoples' desire to exercise their right of self-determination.<sup>31</sup> In exercising this right, the people of the

26. At least one other commentator has similarly prescribed the same approach. See Robert J. Misulich, *A Lesser-Known Immigration Crisis: Federal Immigration Law in the Commonwealth of the Northern Mariana Islands*, 20 PAC. RIM L. & POL'Y J. 211, 216 (2011). Our assessments and analyses of the CNMI guest worker status issue, however, differ in that my approach engages theoretical frameworks such as the anti-subordination principle and *jus nexi* principle.

27. See Ayelet Shachar, *Earned Citizenship: Property Lessons for Immigration Reform*, 23 YALE J.L. & HUMAN. 110, 121–41 (2011).

28. See Marie Rios-Martinez, *Congressional Colonialism in the Pacific: The Case of the Northern Mariana Islands and its Covenant with the United States*, 3 SCHOLAR 41, 46–47 (2000) (discussing the four colonial regimes prior to the CNMI's commonwealth status).

29. See *id.* at 46.

30. See Marybeth Herald, *The Northern Mariana Islands: A Change in Course under Its Covenant with the United States*, 71 OR. L. REV. 127, 136 (1992).

31. See Rios-Martinez, *supra* note 28, at 48–49.



Marianas decided that they wanted to become a U.S. commonwealth.<sup>32</sup> Negotiations between the Marianas people and the U.S. began in the early 1970s to determine the scope of their relationship.<sup>33</sup> What emerged from these negotiations was a political agreement called the Covenant to Establish the Commonwealth of the Northern Mariana Islands in Political Union with the U.S. (Covenant).<sup>34</sup> The Covenant recognized U.S. sovereignty over the islands but imposed limits on the exercise of that territory.<sup>35</sup> It contained a number of provisions designed to ease the commonwealth into the U.S. polity, encourage its political and economic development, and protect the cultural traditions of the islanders.<sup>36</sup>

Section 503 of the Covenant exemplifies one such provision. Section 503 expressly exempted the CNMI from the application of the Immigration and Nationality Act (INA), the federal immigration law, except that it recognized U.S. birthright citizenship for those persons born on the islands.<sup>37</sup> During negotiations, the parties agreed that it would be in the best interests of the CNMI for it to have the authority to regulate their own immigration laws.<sup>38</sup> Accordingly, Section 503 provided for local immigration regulation and exempted the CNMI from federal immigration law, “except in the manner and to the extent made applicable to them by the Congress . . . .”<sup>39</sup> Thus, beginning in 1978, when this provision of the Covenant became effective, the people of the Northern Mariana Islands regulated the entry and exclusion of noncitizens within their jurisdiction.<sup>40</sup>

Aside from the CNMI, the only other territory to have such broad immigration powers is American Samoa.<sup>41</sup> Both Puerto Rico and Guam unsuccessfully lobbied to acquire authority or meaningful control over immigration to the territory.<sup>42</sup> Congress’s delegation of federal immigration

32. See Rose Cuison Villazor, *Blood Quantum Land Laws and the Race versus Political Identity Dilemma*, 96 CAL. L. REV. 801, 836 (2008).

33. See 48 U.S.C. § 1801 (1986); Rios-Martinez, *supra* note 28.

34. See § 1801.

35. See *id.*

36. See *id.*

37. See *id.* (§ 503).

38. See *id.*

39. See *id.*; see also *CNMI Immigration: Myth or Fact*, U.S. CITIZENSHIP & IMMIGRATION SERVS.,

<http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnnextoid=bc01088dbb8f2310VgnVCM100000082ca60aRCRD&vgnnextchannel=4d3314dd2b635210VgnVCM100000082ca60aRCRD> (last updated Oct. 12, 2011).

40. See § 1801 (§ 503).

41. See LEIBOWITZ, *supra* note 19, at 94.

42. See Arnold Leibowitz, *The Commonwealth of Puerto Rico: Trying to Gain Dignity and Maintain Culture*, 17 REV. JUR. U.P.R. 1, 35 (1982) (discussing that Puerto Rico sought to gain some

powers to the CNMI constitutes an exception to the general rule that the federal government has the authority to determine who may be admitted and removed from the United States.<sup>43</sup> Indeed, one of the contentious immigration issues of our day focuses on whether states should have a role in regulating immigration law.<sup>44</sup> Although states are able to participate in enforcing some parts of immigration law,<sup>45</sup> they have not been conferred with the power to admit, exclude and remove, which the CNMI and American Samoa have been able to exercise for some time.<sup>46</sup>

## II. LOCAL IMMIGRATION REGULATION

In the 1980s, Alejo Doctor and Justina Bernardo-Doctor moved to the island of Saipan, the capital of the CNMI.<sup>47</sup> As citizens of the Philippines, they entered the CNMI as guest workers<sup>48</sup> under the CNMI's local immigration law's guest worker provision.<sup>49</sup> Although Alejo and Justina had temporary employment contracts in the CNMI, their employers renewed their contracts regularly with the consistent approval of the CNMI government.<sup>50</sup> Over time, they "put down their roots and established homes" on

control over immigration to their territory); Robert Rogers, *Guam's Quest for Political Identity*, 12 PAC. STUD. 55–66 (1988) (unsuccessfully lobbied to gain immigration control of their territory).

43. See Gabriel J. Chin, *Regulating Race: Asian Exclusion and the Administrative State*, 37 HARV. C.R.-C.L. L. REV. 1 12–13 (2002); see also *Chae Chan Ping v. United States* (The Chinese Exclusion Case), 130 U.S. 581, 609 (1889) ("The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties").

44. See Aoki & Shuford, *supra* note 18, at 15–27 (2010); see also Chin, *supra* note 43, at 11–13 (discussing the historical roots of this debate).

45. See *Arizona v. United States*, 132 S. Ct. 2492, 2507–10 (2012) (upholding an Arizona law obliging state police to check the immigration status of any person they stop, detain, or arrest on some other legitimate basis).

46. The CNMI and American Samoa's immigration powers thus offer exceptional examples of localized immigration regulation that should be examined further in legal literature.

47. See *Hazel Doctor to Testify at Hearing via Videoconference*, UNHEARD NO MORE! (July 6, 2011), <http://unheardnomore.blogspot.com/2011/07/hazel-doctor-to-testify-at-hearing-via.html> (citing an August 9, 2009, statement given by Hazel Doctor to members of Congress visiting the CNMI). Alejo and Justina's daughter, Hazel Doctor, testified before Congress in 2011 and shared her parents' story with the congressional delegate that visited the CNMI. See *id.*

48. See *id.*

49. Facebook message from Justina Bernardo-Doctor, to Rose Cuison Villazor, Professor of Law, Univ. of Cal., Davis Sch. of Law (Oct. 14, 2012, 12:04 AM) (on file with author).

50. *Id.*

Saipan.<sup>51</sup> They had two daughters who were born on Saipan and, therefore, U.S. citizens by birth under federal law.<sup>52</sup>

It was not until more than twenty-five years later that Alejo and Justina finally adjusted their status from CNMI guest workers to lawful permanent residents of the United States.<sup>53</sup> Their oldest daughter, after turning 21 years old, petitioned for them to adjust their status.<sup>54</sup> For years prior to becoming “green card” holders, they were guest workers. Like thousands of other guest workers, they were never able to participate in the political or judicial process during their entire residency in the CNMI. Despite these inequities, many guest workers consider the CNMI their home.<sup>55</sup> Unlike Alejo and Justina, who had the opportunity to adjust their status and thus remain in the CNMI, thousands of other guest workers’ ability to continue residing in the CNMI has been called into question as a result of changes to immigration law in the CNMI. Specifically, Congress revoked the CNMI’s local immigration powers in 2009 when it enacted the Consolidated Natural Resources Act of 2008 (CNRA).<sup>56</sup> In so doing, Congress applied the INA and primarily aimed to “orderly phas[e] out of the [CNMI’s] nonresident contract worker program” by December 31, 2014.<sup>57</sup>

As scholars call for more experimentation with delegated immigration powers, it would be useful to examine the CNMI’s experience with local immigration authority, including its guest worker program. Accordingly, the following Part explores the CNMI’s exercise and eventual loss of local immigration powers. It also discusses the ensuing litigation about the CNRA and the volatile status of guest workers today. Overall, as this Part highlights, Congress’s devolution of its immigration powers to the CNMI created a population of guest workers without political representation and without the possibility of becoming full members of the American polity.

51. *Hazel Doctor to Testify at Hearing via Videoconference*, *supra* note 47.

52. *See* 48 U.S.C. § 1801 (1986) (§§ 301–304) (conferring citizenship to persons born in the Northern Mariana Islands).

53. Facebook message from Justina Bernardo-Doctor, to Rose Cuison Villazor, Professor of Law, Univ. of Cal., Davis Sch. of Law (Oct. 17, 2014, 7:38 PM) (on file with author).

54. *Id.* Under the INA, a U.S. citizen who is 21 years old may petition for her parents to become lawful permanent residents. *See* 8 U.S.C. § 1154(a)(1)(A)(i) (2012).

55. *See* Geoffrey Heeren, *Persons Who Are Not the People: The Changing Rights of Immigrants in the United States*, 44 COLUM. HUM. RTS. L. REV. 367, 395 (2013) (discussing the limited rights of non-citizens to participate in the political process and receive certain public benefits).

56. Consolidated Natural Resources Act of 2008, Pub. L. No. 110-229, § 702, 122 Stat. 754, 854 (codified as amended at 48 U.S.C. § 1806 (2009)).

57. *See id.* § 701(a)(1)(A).

### A. CNMI Guest Worker Program

The CNMI experienced tremendous growth in the early 1980s and the 1990s because of the garment and tourist industries.<sup>58</sup> In 1983, the CNMI passed its immigration law, including the Nonresident Workers Act (NWA),<sup>59</sup> which created a guest worker program.<sup>60</sup> Under the NWA, the CNMI government allowed employers to recruit thousands of non-citizens workers to work in the CNMI. Such recruitment was deemed necessary—the local population lacked the numbers and skills necessary to work in the burgeoning garment and tourist industries.<sup>61</sup> The population increased significantly as a result of noncitizens migrating to the CNMI because of the growing industries. Between 1970 and 1980, the population nearly doubled to 16,780.<sup>62</sup> By 1990, the population more than doubled again to 43,345 with more than half composed of contract workers.<sup>63</sup>

Many of the non-citizens working in these industries were contract or guest workers.<sup>64</sup> They were provided one-year contracts that were renewable every year based on job availability and willingness of both parties to continue working together.<sup>65</sup> Eventually, many of these workers' contracts were renewed regularly such that the workers resided in the CNMI for ten to fifteen years or longer. Critically, these workers did not have a meaningful opportunity to become lawful permanent residents of the CNMI or the United States. The types of jobs that the workers had—construction workers, farmers, domestic workers, hotel workers, and entertainers—would not qualify for an employment-based immigrant visa under the INA.<sup>66</sup>

Most of the workers in the CNMI (including local workers) worked far below minimum wage mainly because U.S. minimum wage laws were also exempted.<sup>67</sup> In the early 1990s, the CNMI became the subject of much criticism because of allegations of worker exploitation in the garment in-

58. See Misulich, *supra* note 26, at 216.

59. Dorothy E. Hill, *Guest Worker Programs Are No Fix for Our Broken Immigration System: Evidence from the Northern Mariana Islands*, 41 N.M. L. REV. 131, 163 (2011) (explaining that the CNMI government enacted its immigration law).

60. See *id.* at 163; Misulich, *supra* note 26, at 215–16.

61. Greg Holloway, *The Effort to Stop Abuse of Foreign Workers in the U.S. Commonwealth of the Northern Mariana Islands*, 6 PAC. RIM L. & POL'Y J. 391, 397 (1997).

62. HOWARD P. WILLENS & DEANNE C. SIEMER, AN HONORABLE ACCORD: THE COVENANT BETWEEN THE NORTHERN MARIANA ISLANDS AND THE UNITED STATES 361 (2002).

63. *Id.*

64. Hill, *supra* note 59, at 164.

65. *Id.*

66. Cf. 8 U.S.C. § 1153(b) (2006).

67. See Misulich, *supra* note 26, at 215–16.

dustry.<sup>68</sup> Congress began to discuss passing a law that would apply both the INA and U.S. minimum wage laws in the CNMI.<sup>69</sup>

CNMI guest workers and their advocates also lobbied for the implementation of the INA. They strongly believed that under federal law, these guest workers—who by now had been residing in the CNMI for many years and had established families there—should be entitled to permanent residency status.<sup>70</sup> They were successful in lobbying for this position as earlier versions of a bill that sought to implement the INA on the CNMI included a provision that would have granted the noncitizen workers a path to become legal permanent residents.<sup>71</sup> Yet, as discussed next, the CNRA ultimately did not contain such a provision.

### B. The CNRA

On May 8, 2008, Congress exercised its plenary power over immigration law by enacting the CNRA and making the INA effective in the CNMI.<sup>72</sup> Although the CNRA became effective on June 1, 2009, the federal government delayed its implementation until November 28, 2009.<sup>73</sup> The implementation of the CNRA meant that various provisions of the INA, including those addressing the ability of U.S. citizens to sponsor the admission of certain family members to become lawful permanent residents<sup>74</sup> and employers to sponsor non-citizens to work on a temporary basis,<sup>75</sup> would be applicable. Congress elected not to implement the INA in its entirety, however.<sup>76</sup> Instead, it created a transition period during which some provisions of the INA would not be fully implemented until five years after the passage of the CNRA.<sup>77</sup>

Importantly, despite the lobbying efforts of advocates for guest workers, the CNRA did not include a provision that would have automatically

68. See Robert S. Florke, *Castaways on Gilligan's Island: The Plight of the Alien Worker in the Northern Mariana Islands*, 13 TEMP. INT'L & COMP. L.J. 381, 382–83 (1999); Kirschenheiter, *supra* note 5, at 246–50; Misulich, *supra* note 26, at 216–17.

69. Misulich, *supra* note 26, at 219–20.

70. *Id.* at 228.

71. *Id.* at 231.

72. See 8 U.S.C. § 1182(a)(1) (2009).

73. See Misulich, *supra* note 26, at 93–94.

74. *Cf.* § 1154(a)(1)(A) (allowing U.S. citizens to sponsor their children, spouses, parents, and certain “immediate relatives” in the visa application process); *id.* § 1154(a)(1)(B) (allowing lawful permanent residents to sponsor their children and spouses in the visa application process).

75. *Cf. id.* § 1153(b) (making a limited class of highly-skilled alien workers eligible to apply for employment-based visas).

76. See § 1182(a)(7) (providing that asylum law is inapplicable in the CNMI).

77. § 1182(a)(2) (discussing the transition period).

provided the workers with a path to lawful permanent residency. To acquire such status, long-term guest workers would have to apply under the traditional path for acquiring a green card, which in this case would be through the family<sup>78</sup> or employment categories.<sup>79</sup> However, as previously explained, most CNMI guest workers are low-skilled workers and thus do not qualify for either permanent or temporary employment visas available under the INA.<sup>80</sup> Thus, those who are ineligible for any of the employment-based visas would need to be sponsored by a U.S. citizen or lawful permanent resident family member to petition for them in order for them to get green cards.<sup>81</sup>

Congress was well aware of the potential removal of the guest workers and the likely impact that the implementation of the CNRA would have, not only on the economy but also on workers' families and employers.<sup>82</sup> Accordingly, Congress prohibited the Department of Homeland Security from removing non-citizens from the CNMI during a limited period. In particular, foreign workers and their families who were lawfully present in the CNMI would not be removed for being in violation of INA Section 212(a)(6)(A) (aliens "without admission or parole")<sup>83</sup> until either the "completion of the period of the alien's admission under the immigration laws of the CNMI" or two years from the transition effective date, whichever is earlier.<sup>84</sup> In other words, they may continue working until their CNMI work permits expire or two years after the CNRA's effective date.<sup>85</sup>

Critically, these workers may seek to adjust their status to a new visa category—the Commonwealth Only Transitional Worker<sup>86</sup> (CW-1 visa).

78. § 1154(a)(1)(A)-(B).

79. *See id.* § 1153(b).

80. *See* Misulich, *supra* note 26, at 212.

81. *See* Robert L. Adair, *Closing a Loophole in the Pacific: Applying the Immigration and Nationality Act to the Commonwealth of the Northern Mariana Islands*, 16 *ASIAN PAC. AM. L.J.* 74, 84 (2011) (discussing the possibility of deportation for immigrants in the CNMI with work permits).

82. *See* Misulich, *supra* note 26, at 222.

83. *See* § 1182(a)(6)(A) (2009).

84. *See* 48 U.S.C. § 1806(e)(1)(A) (2009).

85. *See id.* § 1806(e)(2).

86. *See id.* § 1806(d). There are other non-citizens in the CNMI who are residing in the territory but may not qualify for CW-1 status but were also able to stay temporarily in the CNMI by receiving parole status from the federal government. These include persons who were born in the Northern Mariana Islands between January 1, 1974 and January 9, 1978, who, despite their birth in the territory, continue to be classified as non-citizens and therefore require authorized immigration status to remain in the CNMI. *See Parole for Immediate Relatives of U.S. Citizens and Certain Stateless Individuals*, U.S. CITIZENSHIP & IMMIGRATION SERVS.,

<http://www.uscis.gov/laws/immigration-commonwealth-northern-mariana-islands-cnmi/parole-immediate-relatives-us-citizens-and-certain-stateless-individuals> (last updated Dec. 9, 2011). Time constraints prohibit the ability of this Essay to conduct an in-depth analysis of their compelling situations.

Non-citizens under this visa are able to continue working and residing in the CNMI but may not be admitted to the United States.<sup>87</sup> Further, the CW-1 visa category is only available during the transition period. Specifically, the CNRA provides that the allocation of CW-1 permits for such workers should be reduced on an annual basis to zero until December 31, 2014, unless extended by the federal government.<sup>88</sup> The CNRA authorizes the Department of Labor (DOL), in consultation with other agencies, to extend the CW-1 visa program if “necessary to ensure an adequate number of workers will be available for legitimate businesses in the” CNMI.<sup>89</sup>

### *C. Northern Mariana Islands v. United States*

Aiming to prevent the implementation of the INA in the CNMI, the local government sued the United States.<sup>90</sup> It argued that passage of the CNRA violated Section 103 of the Covenant, which protects the right of the CNMI government to govern itself with respect to internal affairs.<sup>91</sup> Additionally, the CNMI government argued that the CNRA violated Section 105 of the Covenant because it changed the fundamental provision of Article I, which may be modified only with the mutual consent of both the CNMI and the U.S. governments.<sup>92</sup>

The CNMI’s arguments provided unavailing in *Northern Mariana Islands v. United States*.<sup>93</sup> Relying on the Covenant, the court held that Section 503(a) of the Covenant provided that federal immigration laws would not apply “except in the manner and to the extent made applicable to them by the Congress by law . . . .”<sup>94</sup> In other words, the Covenant itself established that Congress would have the authority to implement the INA.<sup>95</sup> In reaching this conclusion, the court rejected the CNMI’s argument that the implementation of the CNRA would infringe on the CNMI’s right to govern internal affairs with respect to local labor and employment matters.<sup>96</sup> In particular, the court explained that federal immigration regulation, at its core, involved the regulation of the admission and employment of non-

87. *See id.* § 1806(d)(3).

88. *See id.* § 1806(d)(2).

89. *See id.* § 1806(d)(5)(A).

90. *Northern Mariana Islands v. United States*, 670 F. Supp. 2d 65, 73–74 (D.D.C. 2009).

91. *Id.* at 77.

92. *Id.* at 81.

93. *Id.* at 91.

94. *Id.* at 82–83.

95. *Id.* at 83.

96. *Id.* at 84.

citizen workers.<sup>97</sup> Without doubt, these immigration laws would have a “significant impact on labor markets and practices.”<sup>98</sup>

In the alternative, the court held that, even assuming that the CNRA was not clearly authorized by the Covenant, it would still nevertheless be upheld.<sup>99</sup> Relying on a balancing approach implemented by *Richards v. Guerrero*,<sup>100</sup> the court held that the U.S. government’s interest in exercising its authority to control U.S. borders outweighed the interests of the CNMI government in non-intrusion into their local labor affairs.<sup>101</sup> The court explained that the border security included both protecting the “border” and ensuring that those persons within the “border” complied with federal immigration laws.<sup>102</sup> Notably, the court emphasized that “it would be rather harsh to secure the CNMI’s borders by expelling these [guest workers] immediately.”<sup>103</sup> Accordingly, Congress fashioned a

third-way approach to border security: it regulates not only those who may seek to enter the CNMI in the future, but also those who already have entered the CNMI and would have had to comply with federal immigration laws upon entry if only they had sought entry at a later date.<sup>104</sup>

Moreover, the court rejected the CNMI government’s argument that the United States did not have security interests in the CNMI given its remote location from the United States.<sup>105</sup> Additionally, the court explained that just as the CNMI reserved for itself the right of self-government, the federal government also reserved for itself ultimate sovereignty in different areas, including immigration law.<sup>106</sup>

#### D. CW-1 Program Extended

Thus, the *Northern Mariana Islands v. United States* case resolved the validity of the CNRA and application of the INA to the CNMI. Indeed, the CNRA has now been effective for five years.<sup>107</sup> Recently, the DOL, in consultation with various federal agencies and the CNMI government, decided to extend the transitional period of the CW-1 program for another five-

97. *Id.*

98. *Id.* at 85.

99. *Id.*

100. *Id.* at 86.

101. *Id.* at 90.

102. *Id.* at 88.

103. *Id.*

104. *Id.*

105. *Id.* at 88–89.

106. *Id.* at 89.

107. Secretary of Labor Extends the Transition Period of the Commonwealth of the Northern Mariana Islands—Only Transitional Worker Program, 79 Fed. Reg. 31,988 (June 3, 2014).



years—until the year 2019.<sup>108</sup> Unless Congress provides the guest workers with the opportunity to adjust to a more permanent status, they would have to leave the CNMI at the expiration of the transition period in 2019. This could lead to the removal of thousands of guest workers, the precise number of which is unclear. The U.S. Department of Interior reported that as of January 2010, the “best available estimated numbers” for guest workers was 16,304.<sup>109</sup> According to the 2010 census, there were approximately 53,883 people residing in the CNMI and 23,184 were non-citizens.<sup>110</sup> Approximately half of the population is of Asian descent, with Filipinos accounting for 33.75 percent and Chinese accounting for 11.65 percent.<sup>111</sup> About 12,274 entered between 2000 and March 2010 and 10,910 entered before 2000, which demonstrates how long many of these guest workers have lived in the commonwealth under temporary immigration status.<sup>112</sup> Consequently, a significant number of guest workers will have to leave the CNMI if they are not granted a path to lawful permanent status.

Notably, the extension of the CW-1 program did not address the question of a permanent immigrant status for the guest workers in the CNMI. The failure to address this question is problematic in light of the lengthy period of residence of many of these workers. A 2010 report by the Department of Interior stated that of the 20,859 noncitizens residing in the CNMI, about 14,816 individuals had been residing in the commonwealth for 5 or more years.<sup>113</sup> About 2,221 guest workers had been residing in the CNMI between 3 to 5 years.<sup>114</sup>

108. *See id.*

109. *See* U.S. SEC’Y OF THE INTERIOR, REPORT ON THE ALIEN WORKER POPULATION IN THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS ii (2010), *available at* <http://www.doi.gov/oia/reports/upload/2010-Report-on-the-Alien-Worker-Population-in-CNMI.pdf> [hereinafter DOI 2010 REPORT].

110. *See* 2010 Census Island Areas, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/news/press-kits/island-areas/island-areas.html> (last visited Feb. 19, 2015).

111. Florke, *supra* note 68, at 410 n.27.

112. *See id.*

113. *See id.* The total population of the CNMI in 2010 was 53,883. *See* CNMI DEP’T OF COMMERCE, 2010 CNMI CENSUS STATISTICS, *available at* <http://commerce.gov.mp/wp-content/uploads/2012/12/2010-Census-Demographics-Profile-Summary-by-District.pdf> (last visited Feb. 19, 2015) [hereinafter CNMI 2010 CENSUS].

114. DOI 2010 REPORT, *supra* note 109, at 15.

### III. INTERRACIAL JUSTICE ANALYSIS OF THE CONFLICT ABOUT CITIZENSHIP FOR THE CNMI GUEST WORKERS

[A] racial group can be simultaneously oppressed in one relationship and complicitous in oppression in another.<sup>115</sup>

Critical race legal scholars have long called for a deeper interrogation of conflicts and tensions among interracial groups.<sup>116</sup> As Professor Yamamoto stated, “[w]hile white on black and white on color relationships are integral to every discussion of racial justice, color on color relationships are also salient.”<sup>117</sup> Examining these interracial group conflicts requires analyzing their struggles beyond the traditional analytical framing of racial justice issues, which are generally framed along a white-on-black paradigm.<sup>118</sup> These interracial struggles are different from white-black relations for a number of reasons, including the group’s unique historical experiences with white subordination, prescribed place within racial hierarchy, and different social and economic circumstances.<sup>119</sup> Taking into account the unique situations of each group when analyzing their interracial conflicts leads to a more meaningful understanding of their specific claims and grievances against each other.

Critically, it is important to locate the struggles of each minority group within the “larger context of historical domination.”<sup>120</sup> Such broader examination of racial justice conflicts among interracial groups within the framework of white supremacy may reveal their own roles in the subordination of the other<sup>121</sup> but could also importantly result in interracial coalitions.

115. See Yamamoto, *Conflict and Complicity*, *supra* note 24, at 495.

116. See Harvey Gee, *A Review of Frank Wu’s Renegotiating America’s Multi-Colored Lines Color Lines: Affirmative Action, Immigration and Civil Rights Options for America*, 5 N.Y. CITY L. REV. 203, (2002); Lisa C. Ikemoto, *Traces of the Master Narrative in the Story of African American/Korean American Conflict: How We Constructed “Los Angeles”*, 66 S. CAL. L. REV. 1581 (1993); Kevin R. Johnson, *The Struggle for Civil Rights: The Need for, and Impediments to, Political Coalitions Among and Within Minority Groups*, 63 LA. L. REV. 759, (2003); Yamamoto, *Critical Race Praxis*, *supra* note 24, at 852–56.

117. See Yamamoto, *Critical Race Praxis*, *supra* note 24, at 853 (examining conflicts among interracial groups); see also Leslie Espinoza & Angela P. Harris, *Afterword: Embracing the Tar-Baby—Laterit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1604 (1997) (noting the need to examine tensions among non-white groups).

118. See Yamamoto, *Critical Race Praxis*, *supra* note 24, at 852–56; see also Espinoza & Harris, *supra* note 117, at 1604 (commenting on the need to develop a multidimensional race theory); Juan F. Perea, *The Black/White Binary Paradigm of Race: The “Normal Science” of American Racial Thought*, 85 CAL. L. REV. 1213, 1219–32 (1997) (reviewing the history of the Black/White “binary”). A discussion of the framing of antidiscrimination along a white/black binary is beyond the scope of this Article.

119. See Yamamoto, *Critical Race Praxis*, *supra* note 24, at 854.

120. *Id.*

121. See *id.*

121. See Yamamoto, *Conflict and Complicity*, *supra* note 24, at 495.

tion building and healing.<sup>122</sup> Importantly, a deeper understanding of these color-on-color conflicts may lead to collaboration and racial healing.

Accordingly, this Part uses an interracial justice approach to analyze the divergent positions regarding the proposal to confer a path to citizenship to the CNMI guest workers. The debate about a path to membership for the CNMI guest workers reflects a conflict between two interracial groups—guest workers, composed of mainly Filipinos and Chinese<sup>123</sup>—and indigenous Pacific Islanders, primarily Chamorros and Carolinians.<sup>124</sup> Framing the issue as a “color-on-color” conflict, this Part aims to reveal both groups’ compelling experiences of oppression and the legal and moral contexts animating their opposing positions. Importantly, this Part seeks to show their shared collective subordination and argues that the perceived “us vs. them” conflict detracts from the opportunity to engage in intergroup collaboration that would benefit both groups.

#### *A. Arguments in Favor of Lawful Permanent Status for the CNMI Workers*

Advocates for the CNMI guest workers have provided several reasons as to why guest workers should be conferred a path to citizenship. Congress’s failure to do so, from their perspective, will further the guest workers’ legally oppressed status in the CNMI as a permanent class of temporary workers who lack political rights. For decades under the CNMI’s immigration system, guest workers were excluded not only from the political process but also in becoming full members of the CNMI. As non-citizens, they lacked certain rights attendant to citizenship, including the right to vote and the right to serve on a jury. Commenting on the limited rights of guest workers, advocate Wendy Doromal remarked that guest workers were a “disenfranchised [group] with uncertain futures and no pathway to citizenship.”<sup>125</sup>

Additionally, the guest workers have established ties in the CNMI by building homes and having families. Thus, their advocates have underscored the need to grant guest workers a path to lawful permanent status so that they may remain in the CNMI with their loved ones.<sup>126</sup> Many guest

122. See *id.* at 829–30.

123. See DOI 2010 REPORT, *supra* note 109, at 11 (reporting the nationality of guest workers in the CNMI).

124. See Holloway, *supra* note 61, at 393 (noting that the principal indigenous groups of the CNMI are Chamorros and Carolinians).

125. See *Immigration Progress*, *supra* note 7.

126. See Misulich, *supra* note 26, at 235 (explaining the importance of keeping guest workers and their children together).

workers have children who were born in the CNMI and are thus U.S. citizens.<sup>127</sup> At least one report has estimated that 4,728 children born in the CNMI have guest worker parents.<sup>128</sup> These workers do not want to be forced to leave their children behind or bring them back to their home countries because of the better opportunities available for their children in the CNMI.

Further, advocates for guest workers argue that a path to lawful permanent residency is justified because the guest workers have contributed significantly to the CNMI. As Doromal has stated recently, “A vast majority of the nonresident workers have lived and worked in the CNMI for over five years, many for most of their adult lives. They literally built the CNMI.”<sup>129</sup> Finally, advocates contend that the guest workers are deserving of citizenship because they have been law-abiding individuals. They point out that, unlike the approximately 11 million non-citizens in the United States who would benefit from the passage of comprehensive immigration reform, the guest workers in the CNMI are documented and have consistently complied with immigration law. In other words, from their perspective, the denial of a path to citizenship unfairly places them with the same group as those who have failed to comply with immigration laws. Rabby Syed, President of United Worker Movement, an advocacy group for guest workers, has stated, “If the president can help those who have been considered illegal, I don’t see why he can’t help those who came to the CNMI legally and have lawfully contributed to the CNMI economy for a number of years . . . .”<sup>130</sup> Indeed, compliance with the law is viewed as a critical basis for acquiring a path to citizenship. As Doromal further states, “Of all of the categories of immigrants in the U.S. immigration reform debate, perhaps the *most* deserving of a pathway to citizenship must be the CNMI’s legal, long-term nonresidents.”<sup>131</sup>

Overall, as the foregoing arguments seek to make clear, the guest workers claim that their residency in the CNMI under temporary work visas has subjected them to years of political and legal subordination. Their lack of a direct path to lawful permanent residency under the CNMI-controlled immigration system, despite their lengthy stay in the territory, shows the effective permanency of their temporary status. They may have

127. See *id.* at 229.

128. See Misulich, *supra* note 26, at 229 (discussing the number of U.S. citizen children in the CNMI whose parents are guest workers).

129. See *Immigration Progress*, *supra* note 7.

130. Haidee V. Eugenio, *New U.S. Immigration Policy Results in Mixed Reactions for CNMI*, SAIPAN TRIB., June 19, 2012, <http://pidp.eastwestcenter.org/pireport/2012/June/06-19-09.htm>.

131. See *Immigration Progress*, *supra* note 7.

been classified as guest workers but they were effectively long-term residents who have considered the CNMI their home. Yet, as lesser-skilled workers they did not have reasonable opportunity to adjust their status to a permanent one under the CNMI-controlled immigration system and they still do not have the ability to do so under the INA. The fact that the CNMI guest workers resided and worked for decades without meaningful opportunity to engage in the political process further illustrates the democratic deficit created by the CNMI's exercise of immigration powers. Thus, advocates of guest workers claim that without a path to permanent membership at the end of the extension period of the CNRA, the guest workers will be forced to leave the CNMI. In other words, conferring the guest workers with lawful permanent residency and eventual citizenship status would constitute an appropriate anti-subordination remedy to their current inferior status.

Certainly, the CNMI guest workers have put forth a compelling moral case for membership. Significantly, their claim to citizenship may be located within a larger conversation about the political disenfranchisement and differential legal treatment of non-citizens. Unfortunately, courts have long accepted the view that non-citizens—because they are not yet formal members of the American polity—may be treated differently from citizens.<sup>132</sup> Indeed, non-citizens residing in the fifty states, similar to the CNMI guest workers, are not able to vote or serve on juries.<sup>133</sup> Additionally, like the CNMI guest workers, temporary non-citizen workers in the United States have also experienced subordination and exploitation in the workplace.<sup>134</sup> To be sure, the CNMI guest workers' situation is distinguishable from oth-

132. For example, non-citizens have been denied the right to vote. See *Sugarman v. Dougall*, 413 U.S. 634, 648–49 (1973) (“This Court has never held that aliens have a constitutional right to vote or to hold high public office under the Equal Protection Clause. Indeed, implicit in many of this Court’s voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights.”); *Kafatia v. Adams*, No. CV 09-7119-CJC SP, 2013 WL 489831, at \*11 (C.D. Cal. Jan. 3, 2013) (holding, “Subsequently, the Supreme Court stated that ‘a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions. Similar considerations support a legislative determination to exclude aliens from jury service.’” (citing *Foley v. Connelie*, 435 U.S. 291, 296 (1978))).

133. See *Foley*, 435 U.S. at 296. As legal scholars have argued, however, it was not always the case that one had to be a citizen in order to exercise rights that have been limited to citizens. See Pratheepan Gulasekaram, *Aliens with Guns: Equal Protection, Federal Power, and the Second Amendment*, 92 IOWA L. REV. 891, 904–05 (2007) (explaining that historically states allowed non-citizens the right to bear arms); Jamin B. Raskin, *Legal Aliens, Local Citizens: The Historical, Constitutional and Theoretical Meanings of Alien Suffrage*, 141 U. PA. L. REV. 1391, 1417 (1993) (explaining that historically states did not restrict rights like voting to citizens).

134. For a discussion of guest workers and how the nature of their temporary work status leads to subordination, see Andrew J. Elmore, *Egalitarianism and Exclusion: U.S. Guest Worker Programs and a Non-Subordination Approach to the Labor-Based Admission of Nonprofessional Foreign Nationals*, 21 GEO. IMMIGR. L.J. 521, 556–68 (2007).

er authorized temporary workers in the United States that are under periodic contracts.<sup>135</sup> In particular, as discussed above, under the CNMI immigration system, the guest workers' jobs were not cyclical in nature. Rather, their employment contracts were renewed annually such that the guest workers ended up residing in the CNMI for many years under the same temporary immigration status. Consequently, over time, the guest workers established families and personal connections to the CNMI. Nevertheless, the point is that from a broader anti-subordination perspective, the CNMI guest workers have much in common with other temporary non-citizen workers in the United States because of the current normative principle that non-citizens may be accorded lesser rights than citizens.

Indeed, the guest workers' fear of being removed from the CNMI at the end of the CNRA's extension period and being separated from their loved ones is an important concern that not only shows their subordinated position but also their connections with other non-citizens in the United States. Family unification, after all, is one of the official policies of immigration law.<sup>136</sup> Yet, increased deportation in the past several years demonstrates that the official policy has not been consistent with practice.<sup>137</sup> Indeed, thousands of families have experienced being ripped apart as a result of heightened removal policies and practices in the last several years.<sup>138</sup> Thus, the CNMI guest workers' possible separation from their families is the reality for many immigrant families today under the subordinating implementation of immigration law.

Recognizing the collective subordinated status of the CNMI guest workers and other guest workers and other immigrants in the United States

135. See *id.* 533–35 (discussing different types of temporary worker programs under federal immigration law).

136. Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1637–38 (2007); Monique Lee Hawthorne, *Family Unity in Immigration Law: Broadening the Scope of Family*, 11 LEWIS & CLARK L. REV. 809, 814–15 (2007).

137. Rose Cuison Villazor, *The Undocumented Closet*, 92 N.C. L. REV. 1, 43 (2013) (discussing the impact of deportation on families); Julia Preston, *Deportations from U.S. Hit a Record High*, N.Y. TIMES, Oct. 6, 2010, <http://www.nytimes.com/2010/10/07/us/07immig.html>; *Yearbook of Immigration Statistics: 2013—Table 39: Aliens Removed or Returned: Fiscal Years 1892 to 2013*, U.S. DEP'T OF HOMELAND SEC., <http://www.dhs.gov/yearbook-immigration-statistics-2013-enforcement-actions> (last visited Feb. 19, 2015).

138. Julia Preston, *As Deportation Pace Rises, Illegal Immigrants Dig In*, N.Y. TIMES, May 1, 2007, <http://www.nytimes.com/2007/05/01/us/01deport.html?pagewanted=1>; Julia Preston, *Immigration Quandary: A Mother Torn From her Baby*, N.Y. TIMES, Nov. 17, 2007, <http://www.nytimes.com/2007/11/17/us/17citizen.html?pagewanted=1>; Rebekah Zemansky & Julia Preston, *Immigrants Reach Beyond a Legal Barrier for a Reunion*, N.Y. TIMES, June 11, 2013, [http://www.nytimes.com/2013/06/12/us/divided-immigrant-families-reunite-at-arizona-fence.html?\\_r=0](http://www.nytimes.com/2013/06/12/us/divided-immigrant-families-reunite-at-arizona-fence.html?_r=0).

provides a helpful framework for exploring ways that immigration law should be redesigned to better address their concerns. This includes proposals that would provide a path to citizenship for those immigrants, documented or not, who have been residing in the United States for a specific period of time. Yet, as previously noted, some advocates for the CNMI guest workers have posited that the workers' compliance with immigration law—a position grounded on “legality” —justifies the conferral to them of lawful permanent residency. This contention, however, misses the larger reality that the guest workers share the same subordinated position as those non-citizens who are undocumented and have to live in the shadows of immigration law.<sup>139</sup> Irrespective of whether the non-citizen acquired authority to enter and remain in the United States, both documented and undocumented non-citizens may be subject to removal at any time from a place that does not consider them as members of the polity. A path to citizenship for both groups would correct a serious democratic and moral deficiency in contemporary immigration law.

### *B. Arguments Against Lawful Permanent Status*

In contrast to the foregoing guest workers' claims, some indigenous groups have argued against the granting of lawful permanent residency to these guest workers. The conferral of a path to citizenship to guest workers, these groups contend, will facilitate the subordination of indigenous groups in their own islands. First, many worry about the loss of indigenous peoples' control over the CNMI's internal affairs and their own political power in the commonwealth.<sup>140</sup> A 2011 report issued by the CNMI Senate emphasized this point when it quoted the testimony of a local leader who stated that:

The fear that we will have is that if (guest workers) are granted American citizens and/or granted permanent residency, then we know that in three to five years, once they received permanent residency, they would

139. See generally Kevin R. Johnson, *The Case Against Racial Profiling in Immigration Enforcement*, 78 WASH. U. L. Q. 675 (2000); Leticia M. Saucedo, *Addressing Segregation in the Brown Collar Workplace: Towards a Solution for the Inexorable 100%*, 41 U. MICH. J.L. REFORM 447 (2008); Villazor, *supra* note 137, at 28–49.

140. See Alexie Villegas Zotomayor, *2,500 Sign Petition Against Improved CNMI Nonresident Status*, PAC. ISLANDS REP., Dec. 4, 2013, <http://pidp.eastwestcenter.org/pireport/2013/December/12-05-05.htm> (indicating concerns that locals have about the impact that a path to a permanent status for guest workers would have on the indigenous population); SEVENTEENTH N. MAR. I. LEGISLATURE, SENATE RECOMMENDATION FOR IMPROVED IMMIGRATION STATUS OF GUEST WORKERS IN THE CNMI 7–8 (Mar. 2011), available at [http://www.cnmileg.gov.mp/resources/files/Official\\_Senate\\_Recommendation\\_Appendices\\_A\\_thru\\_F.pdf](http://www.cnmileg.gov.mp/resources/files/Official_Senate_Recommendation_Appendices_A_thru_F.pdf) (discussing statements of some local political leaders who are concerned about the indigenous population becoming politically marginalized in their own territory) [hereinafter N. MAR. I. REPORT].

be American citizens, so our fear is that once they become American citizens, we will be a minority in our islands . . . .<sup>141</sup>

Indeed, in November 2013, members of the CNMI House of Representatives passed Resolution 18-34, which expressed opposition to Section 2109 and reflects many of the arguments deployed to oppose permanent immigration status to guest workers.<sup>142</sup> One of these is the view that Section 2109, or any law that would provide a path to a green card to guest workers in the CNMI, would violate the ability of the “indigenous Chamorros and Carolinians of the Northern Mariana Islands their right of local self-government and to govern themselves with respect to internal affairs . . . .”<sup>143</sup> In particular, a law that would confer to guest workers lawful permanent status would infringe upon the CNMI’s right to deal with the local labor workforce.

Second, advocates for indigenous groups contend that the passage of a path to a more permanent status for the CNMI guest workers will “deprive the Chamorro and Carolinian people of Northern Marianas descent and U.S. citizens who are residents of the Commonwealth of employment opportunities, as alien workers and people of other ethnic origin will continue to occupy and fill the positions in the job market . . . .”<sup>144</sup> Currently, guest workers, instead of U.S. citizen workers, fill the majority of jobs in the private sector.<sup>145</sup> In particular, the claim is that once guest workers attain permanent residency status, they will keep these jobs, which advocates for indigenous groups contend should go to residents of the CNMI.

Third, those who disfavor the provision of lawful permanent residency to the CNMI guest workers argue that it would be unfair to accord such status when the status was not an expected privilege *ex ante*. Specifically, they argue that the CNMI government, in its exercise of delegated immigration powers, never promised to give permanent status to the workers. As Resolution 18-34 states, “irrespective of the length of their employment in the Commonwealth,” guest workers “were never promised, bargained, entered and/or agreed upon in their employment contracts” that they would be “entitled to full social, economic, and political rights . . . .”<sup>146</sup> Thus, conferring the guest workers with a path to permanent membership would

141. *Id.* at 10.

142. See Emmanuel T. Erediano, *CNMI House Passes ‘Divisive’ Immigration Resolution*, MARIANAS VARIETY, Nov. 18, 2013, <http://pidp.org/pireport/2013/November/11-18-09.htm>.

143. 113 CONG. REC. S653 (daily ed. Jan. 30, 2014).

144. *Id.*

145. Misulich,, *supra* note 26, at 230 (explaining that guest workers comprise nearly the entire private sector, while Chamorros and Carolinians make up the public sector).

146. 113 CONG. REC. S653.



be seen as overriding a purposeful decision to allow the workers into the CNMI on a temporary basis.

Finally, advocates for indigenous peoples' rights contend that the passage of Section 2109 would lead to a new form of colonization. Specifically, Resolution 18-34 provided:

Whereas, the enactment of Section 2109 . . . of S. 744, and/or any similar Act by Congress, will dramatically change the social, economic, and political landscape in the Commonwealth to the advantage of the thousands of alien workers, their families and people of other ethnic origin or race upon them becoming U.S. Citizens. . . . It will give birth to a new form of foreign domination on the indigenous peoples once again . . .<sup>147</sup>

An anti-subordination analysis of the foregoing arguments against a path to citizenship helps to explain the indigenous peoples' concerns about their own subordinated position. At the outset, the claim that providing the workers with lawful permanent residency could lead to loss of control over internal commonwealth matters is understandable given, as discussed above, the history of colonization that the CNMI people experienced.<sup>148</sup> After all, the CNMI only began exercising their right to govern themselves in the 1970s after centuries of being governed by another country. And, until 2009, the CNMI controlled which non-citizens may enter and remain in the commonwealth. The indigenous peoples' experience in being colonial subjects also provides context to their expressed fear of domination by a foreign country, which they believe would be the effect of a path to citizenship for the guest workers in the CNMI.

Although the fear of a new colonialism is understandable, it is important to note that this claim fails to take into account the role that the CNMI government played in creating the current situation. That is, the guest workers are in the CNMI because they were brought there to help build in the CNMI's economy. Importantly, these guest workers and their families were allowed to remain for many years and have thus been living amongst the indigenous peoples. The conferral of lawful permanent residency would thus go to those who are long-term residents and not to those who are "foreign" to the CNMI. It is difficult to reconcile the fear of a "new" form of foreign domination when the people the indigenous persons fear are already residing there in politically inferior conditions.

Relatedly, advocates for indigenous groups have pointed out that non-citizen workers did not have any expectation of gaining permanent lawful status upon entering the CNMI and thus should not be given such status.

147. *Id.*

148. *See supra* Part I.

This statement also ignores the political system that the CNMI government created as a result of local immigration and labor regulation. That is, the continued renewal of contracts of non-citizen workers facilitated the creation of a class that did not have political, social and economic rights. Focusing only on what guest workers expected *ab initio* and advocating against lawful permanent status is problematic because it fully ignores the ongoing democratic deficit that emerged from the CNMI immigration system.

To be sure, the revocation of local control over immigration does impact the CNMI's power over what should be considered core internal matters, including the regulation of its own labor force. Yet, as the case of *Northern Mariana Islands v. United States* pointed out, the political agreement that the CNMI signed with the United States expressly gave Congress authority to regulate immigration law.<sup>149</sup> Indeed, the court noted that even if Congress's power did affect local internal affairs, federal interests in immigration law overrides local interests.<sup>150</sup> Thus, any passage of legislation that would confer a path to citizenship for these workers would fall within the plenary power of Congress to control immigration law, regardless of whether it would affect the local government's ability to regulate the labor force. Such clash between federal and local interests evidences the practical consequences of the current federal immigration model, which accords limited powers to state and local governments.

Finally, some advocates for indigenous peoples expressed concerns about the guest workers' continuing to keep jobs that should go to U.S. citizen workers once the guest workers acquire lawful permanent status. From a broader perspective, this fear about loss of jobs highlights the historical dependency of the CNMI on non-citizen guest workers and the lack of skills and training among the U.S. citizen population to fill the jobs currently held by the guest workers. Understandably, it is important for indigenous individuals, all of whom are U.S. citizens, to obtain employment, including positions that are held by guest workers. Indeed, the CNRA's purpose of reducing the reliance on guest workers to zero by the end of 2014 (and now until the end of 2019 as a result of the extension) presumes that there are jobs that would be available for U.S. citizens.<sup>151</sup> It also presumes that there will be available U.S. citizen workers, including those

149. *Northern Mariana Islands v. United States*, 670 F. Supp. 2d 65, 82 (D.D.C. 2009) (noting that the Covenant expressly states that Congress has the power to impose federal immigration law in the CNMI).

150. *See id.* at 88–90.

151. *See* Secretary of Labor Extends the Transition Period of the Commonwealth of the Northern Mariana Islands—Only Transitional Worker Program, 79 Fed. Reg. 31,988 (June 3, 2014).

who are indigenous, who could fill those jobs once the guest workers depart the commonwealth.<sup>152</sup> As discussed below, there are insufficient U.S. citizen local workers in the CNMI to meet the employment demands currently filled by guest workers. Despite this, advocates for indigenous groups maintain that Congress should not confer a path to citizenship to the guest workers at the end of the extension period in order to ensure that jobs would be preserved for local U.S. citizen workers.<sup>153</sup>

In sum, each group presented compelling arguments to support their opposite position regarding whether guest workers should be given a path to lawful permanent residency. The guest workers claim that the denial of a path to citizenship would keep them at their currently politically subordinated status, and indigenous groups counter that providing the guest workers with lawful permanent resident status and citizenship would lead to their own political subordination. In analyzing this interracial, “color-on-color” conflict, this section demonstrated the need to examine the historical, political and social context of each argument in order to more deeply understand both sides. Ultimately, both groups have identified their desire to achieve and protect the ability to have meaningful participation in the political process in the CNMI. Notably, it is unclear whether the conferral of a path to citizenship would necessarily lead to the political result that each group desires. What is clear, however, as the ensuing section explains, is that both groups would do well to find common ground and work towards interracial collaboration because doing so would be in the best interest of the CNMI.

### *C. Toward Interracial Collaboration and Healing*

At the outset, the CNMI guest workers’ and indigenous groups’ opposite views regarding a path to citizenship for the guest workers need to understand a critical point: when placed within the larger context of immigration law, neither group has any control over the outcome. When it comes to immigration law, the Supreme Court has long noted that Congress

152. *See id.*

153. To be sure, some local advocates have recommended that the workers be given a different type of permanent status—one that has been held by citizens of freely associated states (FAS). *See* N. MAR. I. REPORT, *supra* note 140, at 5. In 1985, Congress gave FAS citizens, who are people from Micronesia, the right to enter and work in the United States and its territories as non-citizens regardless of the type of job. *See* Act of Jan. 14, 1986, Pub. L. 99-239, 99 Stat. 1770 (codified as amended at 48 U.S.C. §§ 1901–1912 (West 2014)) (establishing the Compact of Freely Associated States). If Congress confers this status to the guest workers, it would presumably allow them to remain in the CNMI. However, as non-citizens, they would continue without the ability to participate in the political process and would thus remain politically powerless.

has plenary power<sup>154</sup> and thus, resolution of the status of guest workers rests ultimately upon Congress. Encouraging the two groups to recognize their related inferior status and to understand their respective concerns may lead to a productive collaboration towards a mutually beneficial resolution.<sup>155</sup>

Indeed, recent findings by the DOL suggest that the failure to provide the guest workers with a path to lawful permanent residency would be economically detrimental to the CNMI. In particular, in determining that the CNMI needed another five years of transition before the INA would fully apply, the Secretary of Labor found that foreign workers were essential to ensure that adequate workers will be available for legitimate businesses in the CNMI.<sup>156</sup> One of the factors that the Secretary of Labor examined in reaching his decision to extend the transition period for another five years is the finding that “the majority of the CNMI’s current labor supply is provided by foreign workers.”<sup>157</sup> In so determining, the Secretary of Labor concluded that “restrictions on the foreign labor supply will exacerbate the CNMI’s current economic problems and restrain economic growth.”<sup>158</sup>

Additionally, the agency determined that there were not enough U.S. citizen or lawful permanent resident workers in the CNMI “to fill all of the jobs held by foreign workers.”<sup>159</sup> Crucially, it found that “even if all the U.S. workers in the labor force were employed, more than 11,000 jobs would still need to be filled by foreign workers.”<sup>160</sup> U.S. workers in this context include, of course, indigenous workers. Without doubt, guest workers in the CNMI continue to play a necessary role in the CNMI’s workforce and economy.

Further, the Secretary of Labor found that some U.S. citizens and lawful permanent residents are unwilling to accept jobs that are typically held by the non-citizen workers.<sup>161</sup> These jobs are typically “low-wage jobs or

154. *E.g.*, *Chae Chan Ping v. United States (The Chinese Exclusion Case)*, 130 U.S. 581, 603 (1889) (“That the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy.”); see Kevin R. Johnson, *Immigration and Civil Rights: State and Local Efforts to Regulate Immigration*, 46 GA. L. REV. 609, 613 (2012).

155. See Yamamoto, *Conflict and Complicity*, *supra* note 24, at 495 (“[S]ensitive handling of intergroup justice grievances” may facilitate the formation of “intergroup alliances and . . . coalitions”).

156. See *id.*

157. See Secretary of Labor Extends the Transition Period of the Commonwealth of the Northern Mariana Islands—Only Transitional Worker Program, 79 Fed. Reg. 31,988, 31989 (June 3, 2014).

158. See *id.* The Department of Labor relied on other factors to reach its decision to extend the CW-1 program. See *id.*

159. *Id.*

160. *Id.*

161. See *id.*

jobs with few or no benefits.”<sup>162</sup> Indeed, the CNMI government reported that legitimate businesses in the CNMI have had difficulty finding U.S. citizens and lawful permanent residents who are qualified for available skilled jobs.<sup>163</sup> These findings demonstrate the importance of increasing wages to attract U.S. citizen workers to apply for these jobs. Importantly, it highlights the need to provide training for low-skilled and low-wage jobs that are currently filled by the guest workers.

In brief, both groups would do well to examine how they might be able to collaborate and lobby Congress for a mutually beneficial economic solution. Recognizing the fact that their economic interests are tied to each other might help them move towards interracial healing and collaboration, and find resolution to their seemingly conflicting views on the question about lawful permanent membership for guest workers. Assuming that both groups entertain such an approach, the next Part offers two potential approaches that may be explored.

#### IV. RECOMMENDATION

Overall, the foregoing discussion of the plight of CNMI guest workers strongly suggests the need for Congress to pass legislation that would eventually confer a path to lawful and permanent U.S. residency for guest workers. This remedy may be supported by two arguments. Using Professor Ayelet Shachar’s normative argument of “earned citizenship,”<sup>164</sup> Part A contends that the guest workers should be given the opportunity to become members of the American polity based on their contributions to the CNMI. Part B argues that there is support for such a remedy. In particular, Congress similarly addressed democratic inequities that resulted from a guest worker program in the U.S. Virgin Islands.

##### *A. Jus Nexi*

Professor Shachar has argued for the acquisition of citizenship based on the view that one works towards it.<sup>165</sup> In “Earned Citizenship,” Professor Shachar offers the concept of *jus nexi*, “an auxiliary path for inclusion in the polity that could operate alongside the established principles of citizenship acquisition . . . .”<sup>166</sup> This conception of citizenship could provide

162. *See id.*

163. *See id.*

164. *See* Shachar, *supra* note 27, at 113–14 (explaining the importance of a path to citizenship that is earned).

165. *See id.*

166. *Id.* at 115.

an alternative to the traditional paths to citizenship, *jus soli* (birth on the territory) and *jus sanguinis* (birth to a citizen parent).<sup>167</sup> *Jus nexi* would grant an equitable path to citizenship for those who are deeply rooted and connected to the territory in which they live, but who were not born there and do not have a family lineage in that place.<sup>168</sup>

This concept satisfies the competing interests of the “nation-of-immigrants” supporters and the “nation-of-laws” proponents by offering a new opportunity for immigrants while respecting the need for a rational legal system that defines the conditions of citizenship.<sup>169</sup> Professor Shachar proposes that the *jus nexi* principle offers an improvement to the current immigration process because “it accounts for the significance of an immigrant’s actual community membership and the social fact of her attachment to the nation, rather than simply relying on the initial moment of entry that fails to account for subsequent immersion and changed expectations over time.”<sup>170</sup> Rather than looking to formal titles, it is a more pragmatic consideration of the immigrant’s relationship with and ties to her adopted country.<sup>171</sup>

Professor Shachar’s *jus nexi* borrows ideas from property law, arguing that “citizenship itself has become a special kind of ‘new property’ that guarantees security and opportunity to those fortunate enough to hold it.”<sup>172</sup> Immigration laws, like property laws, govern access to a scarce resource, namely citizenship rights.<sup>173</sup> *Jus nexi* creates a path to citizenship through an equitable process of evaluating rootedness, analogous to adverse possession in the property context.<sup>174</sup> The “property-like entitlement” of *jus nexi* is both communally and individually held.<sup>175</sup> Ultimately, the “broad conception that informs the rootedness framework emphasizes the underlying human values that property and citizenship serve and the social relations that they shape and reflect.”<sup>176</sup>

Applied in the CNMI context, *jus nexi* could mean recognizing the contributions of the guest workers to the CNMI. That is, their long-term presence in the CNMI, coupled with their efforts to promote the economic

167. *Id.*

168. *Id.* at 116.

169. *Id.*

170. *Id.*

171. *See id.* at 131.

172. *Id.* at 117.

173. *Id.* at 125.

174. *Id.* at 149–50.

175. *See id.* at 126.

176. *Id.* at 137.

development of the CNMI, should be viewed as an important factor towards their claims. Yet, policy makers must be mindful of the colonial history of the CNMI and the indigenous peoples' concerns about loss of land, culture and political rights. What needs to be addressed is a change in immigration and citizenship law that would meaningfully take into account the on-the-ground concerns of people whose lives are affected by current immigration laws and policies. As applied to the CNMI context, this "thicker" version of citizenship would recognize both the contributions of non-citizens to the CNMI and also the need to protect indigenous groups from being marginalized in their own islands.

### *B. Virgin Islands' Guest Worker Program*

From 1975 to 1982, Congress examined the ongoing propriety of the guest worker program in the U.S. Virgin Islands. Similar to the CNMI today, guest workers and policy officials in the Virgin Islands requested permanent immigration status from Congress. Congress granted the Virgin Islands' guest workers with a path to citizenship.<sup>177</sup> Congressional response to the Virgin Islands' guest worker program and attendant issues provide a precedent for granting CNMI guest workers permanent residency. This Congressional action also serves as a reminder that "temporary" guest worker programs yield a class of "de facto" permanent workers without political representation, which is contrary to the democratic and equality norms that are embedded in the U.S. Constitution.

#### 1. Historical Context

The U.S. Virgin Islands have been an unincorporated U.S. territory since their purchase from Denmark in 1917.<sup>178</sup> It was not until 1927, however, that the people of the Virgin Islands acquired U.S. citizenship.<sup>179</sup> At that time, the United States extended federal naturalization laws to the Virgin Islands.<sup>180</sup>

Yet, the INA itself did not apply to the Virgin Islands until 1938 when the Immigration and Naturalization Service (INS) began implementing

177. See *infra* Section IV(A) citations.

178. See LEIBOWITZ, *supra* note 19, at 233.

179. See *id.* at 254.

180. SUBCOMM. ON IMMIGRATION, CITIZENSHIP, & INT'L LAW, COMM. ON THE JUDICIARY HOUSE OF REPRESENTATIVES, 94TH CONG., NONIMMIGRANT ALIEN LABOR PROGRAM OF THE VIRGIN ISLANDS OF THE UNITED STATES (Comm. Print 1975) [hereinafter 1975 REPORT].

federal immigration law on the islands.<sup>181</sup> Still, it was not until 1941 that the INA began to systematically enforce U.S. immigration law.<sup>182</sup> In 1952, Congress enacted and applied the current INA to the Virgin Islands.<sup>183</sup> In particular, the INA included a provision allowing the nonimmigrant admission of foreign workers who enter the United States to perform temporary work under Section 1101(a)(15)(H).<sup>184</sup>

Implementing the INA created a host of problems in the Virgin Islands, particularly with respect to the employment of workers in hotel and agriculture industries.<sup>185</sup> The INS rejected many employer petitions on the islands under subsection (ii) of 101(a)(15)(H) of the INA (H2 visa program) because it did not deem jobs in the hotel<sup>186</sup> and agriculture industries to be seasonal or temporary in nature.<sup>187</sup> Many workers who held these jobs were from the British, Dutch, and French islands, and were previously able to travel between the islands but have since been barred from entering the Virgin Islands because of the INA.<sup>188</sup> Consequently, a labor shortage emerged on the islands and employers pointed to the need to relax the H2 visa program.<sup>189</sup>

The employers were largely successful in gaining congressional assistance. The need to support the growing economy of the Virgin Islands further fueled a more flexible temporary worker program. In a 1954 report, a subcommittee of the Committee on Judiciary recommended that, “the economic development of the Virgin Islands of the United States could be further enhanced by a more realistic and expeditious application of [the H2 program].”<sup>190</sup> The Subcommittee explained that such an approach “would permit the temporary employment of natives of the British island of Tortola at jobs which become available at specified seasons, either in agriculture or in the tourist (hotel) industry.”<sup>191</sup>

Eventually, the INS adopted the subcommittee’s recommendation and promulgated special procedures that established the Virgin Islands’ guest

181. *See id.* at 3–4. It was not until 1941, however, that the Immigration and Nationality Services (INS) began systematically enforcing the Immigration and Nationality Act (INA). *Id.* at 7.

182. *Id.*

183. Immigration and Nationality Act, 8 U.S.C. § 1406 (West 2014).

184. *See id.* § 1101(a)(15)(H).

185. *See* 1975 REPORT, *supra* note 180, at 7.

186. *Id.*

187. *Id.* at 7–8.

188. *See id.* at 8.

189. *See id.*

190. *Id.* at 5.

191. *Id.*



worker program under the H2 visa provisions of the INA.<sup>192</sup> Originally restricted to subjects of the British Islands, the program the INS created was extended to include workers from the French and Dutch Islands.<sup>193</sup> Moreover, the program expanded to facilitate the entry of hotel and agricultural workers as well as domestic workers, unskilled labor workers, and other special project workers.<sup>194</sup> Workers were allowed to enter for a period of one year and eligible to extend employment for another year.<sup>195</sup> They were required to leave the Virgin Islands for a period of at least one day at the end of each employment year.

Unsurprisingly, the Virgin Islands guest worker program had a tremendous impact on the economic, social and political systems of the islands. By the 1960s, the Virgin Islands' guest worker program "expanded to the point where, by the end of the decade, alien laborers constituted roughly half of the Virgin Islands labor force."<sup>196</sup> Indeed, the Virgin Islands experienced an unprecedented increase in its population over the course of a short period.<sup>197</sup> The growth of the tourist industry and low wages offered to those jobs typically held by guest workers led to the Virgin Islanders' dependence on guest workers. In 1968, for instance, guest workers were estimated to hold 90 percent of construction jobs and 60 percent of service jobs.<sup>198</sup> Most Virgin Islanders by contrast were employed in the public sector, with either the local or federal government.<sup>199</sup> As discussed next, these factors, among other things, led federal and local officials and other individuals to criticize the program and advocate for its termination.

## 2. Criticisms

Critics of the Virgin Islands' guest worker program focused largely on two interrelated issues. First, the program facilitated the establishment of a class of people who were intended to work in the Virgin Islands temporarily but were in fact permanent workers. Second, although they were "de facto" permanent workers, the guest workers did not have political and civil rights considered essential in a U.S. democratic society. Although the federal government sought to amend the guest workers program to address

192. *See id.* at 12 (explaining that the procedures were adopted on March 19, 1956).

193. *See id.* at 14.

194. *See id.* at 12.

195. *Id.* at 13.

196. *Id.* at 15.

197. *See id.* at 15 (explaining that in 1960, twelve percent of the Virgin Islands' population were noncitizens, but by 1970, about thirty percent noncitizens resided on the islands).

198. *Id.*

199. *See id.* at 16.

what it saw as the troubling consequences of the program, it failed to fully rectify its attendant political and civil rights problems.

Critics' chief concern of the Virgin Islands' guest worker program was the creation of a permanent category of workers who were intended to work in the islands on a temporary basis. As previously noted, the H2 visa program was, as it is today, intended to allow the entry of workers who are coming to the United States to perform work that is seasonal in nature.<sup>200</sup> Yet, the Virgin Islands' guest workers worked and lived on the islands for many years. Many of them had resided there for at least five years and many had lived there for twenty years or more. Thus, despite their nonimmigrant status of "temporary" workers, the guest workers were "de facto" permanent workers, in direct violation of the underlying principle and goals of the H2 visa program under the INA. Congressman Ron de Lugo, former delegate of the Virgin Islands to Congress, eloquently noted that the guest worker program increased "the influx of foreign temporary workers and somewhat paradoxically, at the same time prevent[ed] most of the workers from attaining permanent resident status, even 20 or more years later."<sup>201</sup>

Part of the discomfort with having such a paradoxical "de facto" class of permanent yet temporary workers was that many of them faced exploitation in the workplace and experienced poor living conditions. At least one policy official criticized the islands' "increasing dependence [of its] economy on underpaid alien labor" and what appeared to be the "modern version of slave labor . . ."<sup>202</sup> In addition to comments about the guest workers' low wages, officials highlighted the guest workers' substandard daily-living conditions.<sup>203</sup> Studies were conducted in the late 1960s, which reported the lack of available educational, housing and social services to guest workers.<sup>204</sup>

The second principal contention with the Virgin Islands' guest worker program is that the population of guest workers did not have adequate representation in the political process. The United States promotes democratic principles and grants individuals within the country opportunities to effectively voice their opinions. The guest worker program in the Virgin Islands,

200. See generally *H-2B Certification for Temporary Non-Agricultural Work*, U.S. DEP'T OF LABOR, <http://www.foreignlaborcert.doleta.gov/h-2b.cfm> (last updated Oct. 7, 2014) (describing the purpose and requirements of H-2B visas).

201. *Virgin Islands Nonimmigrant Alien Adjustment Act of 1981: Hearing on H.R. 3517 Before the Subcomm. on Immigration, Refugees, & Int'l Law of the H. Comm. on the Judiciary*, 97th Cong. 11 (1981) [hereinafter *1981 Hearing Report*] (statement of Hon. Ron De Lugo, Delegate, Virgin Islands).

202. 1975 REPORT, *supra* note 180, at 26–27.

203. See *id.* at 27.

204. See *id.* at 28–30.

however, failed to meet this norm by denying the workers with stable permanent residence and the ability to participate in the government that has authority over them.<sup>205</sup> As one of the reports concluded, “The most basic problem . . . is that [the guest worker program] is completely inimical to the democratic process to cut off so completely from participation in society a group such as the aliens.”<sup>206</sup>

These particular issues, and others (including a two-track or public/private employment system, poor conditions for the workers, and presence of unauthorized immigrants in the Virgin Islands)<sup>207</sup> led the federal government to adopt measures designed to alleviate the democratic deficits implicated by the guest worker program. In particular, in May 1970, the U.S. Department of Labor (DOL) issued a directive that changed the policies and procedures of the temporary workers program.<sup>208</sup> The directive allowed those workers who had been employed in the Virgin Islands as of December 31, 1969, to obtain indefinite certifications of employment.<sup>209</sup> This enabled the employees to change their employers “almost as freely as a citizen worker . . . .”<sup>210</sup> The overall goal of the directive was to “establish a free labor market in the Virgin Islands” by “integrating the nonimmigrant workers then present on the Islands into the permanent labor force” and to curtail “the entry of new workers.”<sup>211</sup> INS subsequently implemented the directive.<sup>212</sup>

The DOL directive, however, unsuccessfully integrated the guest workers into permanent employment. Indeed, the 1975 Committee Report noted that “[i]t does not seem probable that the indefinitely certified workers will be gradually absorbed into the population as permanent residents.”<sup>213</sup> This was in large part because of the limited number of immigrant visa quotas that would allow the guest workers to adjust their status to that of permanent residents.<sup>214</sup> It became evident that Congress would need to undertake the question of whether to continue the guest worker program in the Virgin Islands and the workers’ collective immigration status on the islands.

205. *See id.* at 30.

206. *Id.*

207. *See id.* at 36.

208. *Id.*

209. *See id.* at 36.

210. *Id.* at 37 (quoting the DOL’s May 1970 directive).

211. *See id.* at 36.

212. *Id.* at 38.

213. *Id.* at 39.

214. *See id.*

### 3. Conferral of lawful permanent residency

Ultimately, in 1982, Congress enacted the Virgin Islands Nonimmigrant Alien Adjustment Act (VI Act).<sup>215</sup> The law expressly “authorize[d] the granting of lawful permanent residence status to certain nonimmigrant aliens” (H-2) and stated that those who have adjusted their status under the VI Act would be provided the legal and social services that they needed.<sup>216</sup> In passing the VI Act, Congress achieved three particular goals that are relevant to the question of whether to grant permanent immigration status to guest workers in the CNMI. The first is that, similar to the CNRA, the VI Act terminated the islands’ guest worker program.<sup>217</sup> The second is that, unlike Public Law 110-229, the VI Act conferred long-term immigrant workers in the Virgin Islands with a path to permanent residency.<sup>218</sup> Finally, the VI Act recognized that the enactment of the law had to take into account Congress’s responsibility and authority over the Virgin Islands.<sup>219</sup> Overall, the VI Act reflects the ways in which Congress tailors legislation in the territories to meet particular needs and circumstances.

Foremost in the VI Act was the elimination of “the uncertainty and insecurity of aliens”<sup>220</sup> who legally entered the Virgin Islands under the temporary guest worker program and have continuously resided in the Virgin Islands for long periods of time.<sup>221</sup> Specifically, the VI Act allowed guest workers and their noncitizen family members to apply for permanent residency.<sup>222</sup> In so doing, Congress sought to overturn the undemocratic consequence of creating a class of “permanent” yet “temporary” workers who did not have political representation in the society in which they resided. Critics of the program were particularly concerned about the mistreatment of people who, but for their continued nonimmigrant status, were permanent residents of the islands.<sup>223</sup> As long-term residents of the islands, these guest workers and their families “ha[d] contributed to the economic, social, and cultural development of the Virgin Islands and ha[d] become an inte-

215. See Act of Sept. 30, 1982, Pub. L. No. 97-271, 96 Stat. 1157 (1982).

216. See 1981 Hearing Report, *supra* note 201, at 3.

217. See *id.*

218. See *id.*

219. See *id.*

220. See Act of Sept. 30, 1982, Pub. L. No. 97-271, 96 Stat. 1157.

221. See Misulich, *supra* note 26, at 233–34 (explaining that Congress sought to resolve the “uncertain status” of guest workers).

222. See *id.* at 234.

223. *Id.*

gral part of the [islands'] society."<sup>224</sup> In passing the VI Act, Congress aimed to reverse the undemocratic effects of the guest worker program.

The legislative history of the VI Act demonstrates that fairness principles dictated the grant of permanent immigration status. It is evident that supporters of the law believed that the termination of the program was intricately tied to granting permanent status to those individuals who suffered under the program. Statements included in the congressional reports reflected the equitable goal of the VI Act. Assistant U.S. Secretary of the State, Diego Asencio, for example, noted that the "off-island workers have lived and worked . . . [and] developed enduring economic, social and family ties [on the islands], yet under existing immigration law [had] no real chance of obtaining legal resident status."<sup>225</sup> Moreover, Mr. David Williams of the DOL expressed that the grant of permanent status to guest workers was a "fair and equitable solution to [the] problem of aliens whose status . . . has been in limbo for many years . . . ."<sup>226</sup>

Additionally, supporters of the VI Act considered the grant of permanent status a humanitarian approach to the problems that beset the islands. Representative de Lugo explained that the VI Act was "humane[] and honorable."<sup>227</sup> Governor Juan Luis, then governor of the Virgin Islands, explained that the VI Act was "an acceptable and humane solution of the limbo status of . . . nonimmigrants . . ."<sup>228</sup> Among the concerns that emerged as a result of the termination of the guest worker program was the effect it would have on families in the islands who were of mixed-status, or families comprised of both citizen and noncitizen members. Governor Luis noted that most of the workers who had children resided with them on the island.<sup>229</sup> Then Senate Vice-President, Gilbert Sprauve, of the Virgin Islands Legislature, noted that, "intermarriages and intermingling [of immigrants and local people] have recharged and fortified [the islands]."<sup>230</sup> In allowing long-term guest workers to adjust their status, the VI Act enabled them to remain in the Virgin Islands with their U.S. citizen children. As Associate Commissioner Andrew Carmichael noted in his statement, many

224. See Act of Sept. 30, 1982, Pub. L. No. 97-271, 96 Stat. 1157.

225. See *id.* at 46 (statement of Ambassador Diego C. Asencio, Assistant Secretary for Consular Affairs, Department of State).

226. *Id.* at 47 (statement of David O. Williams, Administrator, U.S. Employment Service, Department of Labor).

227. See *id.* at 21 (statement of Hon. Ron de Lugo, Delegate, Virgin Islands).

228. See *id.* at 23 (statement of Hon. Juan Luis, Governor, Virgin Islands).

229. See *id.* at 24.

230. See *id.* at 30 (statement of Sen. Gilbert Sprauve, Vice President, Virgin Islands Legislature).

guest workers “have raised their families there, and many have had United States citizen children.”<sup>231</sup>

While recognizing the need to grant guest workers with permanent status, the VI Act recognized that Congress had a special responsibility to the territories. In administering such authority over the islands, Congress ensured that the VI Act would not have the effect of overwhelming the small and insular islands, which already had very limited resources.<sup>232</sup> It was thus necessary to prevent a “second migration” of relatives from those guest workers who originated from those islands.<sup>233</sup> Although Congress sought to keep intact the families that were already present on the islands, it elected to place restrictions on the ability of those who were able to adjust their status under the law to petition some family members.<sup>234</sup> The VI Act determined that most non-immigrants who were eligible to adjust their status were natives of the Caribbean Islands and that, if given the opportunity, they would most likely seek to reside in the Virgin Islands.<sup>235</sup> However, the Virgin Islands were not in the position to support a surge in immigration from the other islands. Thus, the VI Act limited the migration of these relatives by placing restrictions on the preference category system under the family-based immigration law program.<sup>236</sup>

In sum, the VI Act terminated a guest worker program that Congress viewed to be a mistake and ultimately corrected the anomalous undemocratic consequence of such a program on guest workers and their families. Applying this precedent to the CNMI should similarly result in the guest workers acquiring a path to citizenship and thus allow them to continue living and residing in the commonwealth. Importantly, this could lead to the workers obtaining U.S. citizenship providing them the opportunity to engage in the political process. Accordingly, the political concerns of indigenous groups would still need to be addressed. Thus, as stated previously, Congress must take into account the indigenous peoples’ concerns about becoming marginalized when issuing a remedy that would eventually politically integrate the guest workers to the American polity.

231. *Id.* at 52 (statement of Andrew Carmichael, Associate Commissioner, Examinations, Immigration, and Naturalization Service).

232. *See id.* at 1.

233. *See id.* at 2.

234. *See* S. REP. NO. 97-529, at 2 (1982), *reprinted in* 1982 U.S.C.C.A.N. 2408.

235. *Id.*

236. *See id.*

## CONCLUSION

The debate about a path to lawful permanent residency for the CNMI guest workers is a compelling overlooked issue in which questions about membership entitlement, anti-subordination principles, and post-colonial approaches overlap. Clearly, the opposition to the conferral of citizenship to the CNMI guest workers reveals a post-colonial dimension to comprehensive immigration reform. Given the history of colonization in the CNMI, many indigenous persons are rightly concerned about the impact that the conferral of citizenship would have on their political power. As this Essay hoped to make clear, this history should play an important role in finding resolution to the immigration issue in the CNMI. At the same time, the fear of a new form of colonialism should not deflect the need to establish policies that would meaningfully address the democratic deficit concerns of guest workers. The workers have lived and worked in the CNMI under a system in which they have been unable to participate in the democratic process by virtue of their non-citizenship status. The CNMI guest workers' experience should inform the debate on whether a path to citizenship should be accorded to them. Being mindful of the experiences of both groups may yield a resolution that could be mutually beneficial for both groups and ultimately facilitate interracial collaboration and justice.