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LET THE FLOWERS BLOOM AND PROTECT THE WORKERS TOO

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Let the Flowers Bloom and Protect the Workers Too - A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers

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At the February 2003 UNIVERSITY OF PENNSYLVANIA JOURNAL OF LABOR AND EMPLOYMENT LAW symposium entitled “Workers on the Fringe,” Mr. Read addressed the topic of the relationship between the legal status of the most marginalized workers and the movement to organize the traditionally unorganized.

This article grows out of continuing reflections on the development of effective strategies to confront the legal marginalization of agricultural and undocumented foreign-born workers,¹ who are denied fundamental protections available to other employees.

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1. Although the percentage of agricultural laborers who are undocumented is a constant subject of dispute, it is unquestionable that a large percentage of the agricultural labor force is undocumented. See KALA MEHTA ET. AL., OFFICE OF THE ASSISTANT SEC’Y FOR POLICY, U.S. DEP’T OF LABOR, RESEARCH REP. NO. 8, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 1997-1998: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 22 (2000), available at http://www.dol.gov/asp/programs/agworker/report_8.pdf (estimating that in 1997-98, fifty-two percent of hired farmworkers lacked work authorization).

On September 23, 2003, the Senate and the House of Representatives introduced identical proposed legislation for the earned legalization of most undocumented agricultural laborers. See Agricultural Job Opportunity, Benefits, and Security Act of 2003 (AgJobs), S. 1645, H.R. 3142, 108th Cong. (2003). The legislation developed from years of negotiations between agricultural employers and farm worker advocates. By May 13, 2004, AgJobs had obtained sixty-two co-sponsors in the Senate. <http://thomas.loc.gov/cgi-bin/bdquery/z?d108:SN01645:@@P>. The proposed legislation offers the first hope since September 11, 2001 of changing the legal status of most current agricultural workers in the country. In announcing the proposal on September 23, 2003, supporters of the proposed legislation estimated that the bill would benefit 500,000 agricultural workers. United Farm Workers of America, *UFW Announces Historic Compromise*, at <http://www.ufw.org/H2Analysis.htm> (last visited May 5, 2004).

A principal point of this article is to urge a change in the definition of “agricultural laborer” under the National Labor Relations Act² (NLRA). Such a change can be accomplished most directly by removing the annual federal appropriation rider requiring the usage of the Fair Labor Standards Act³ (FLSA) definition of “agriculture” by the NLRA and *returning* to a much more limited pre-1946 definition of excluded agricultural laborers.

Before undertaking such a change, however, it is important to create procedures that will continue the coverage under state law of agricultural workers who are currently protected under strong state labor legislation, such as the California Agricultural Labor Relations Act.⁴

This article attempts to encourage localized experimentation and alternative approaches to the failure of existing labor law to adequately protect workers’ self-organization rights.⁵

Part I of this article provides background on the NLRA and discusses the exclusion of workers from protections under the Act. Part II identifies barriers to the expansion of labor protections for agricultural workers under the NLRA and proposes actions to be taken under the NLRA to limit federal preemption of effective state laws. Part III explores fundamental labor rights under federal, state and international law that exist independently of the NLRA avenues to protect and expand the rights of agricultural workers. Part IV discusses the treatment of agricultural workers under the NLRA, including the historical basis for the exclusion of agricultural workers from the NLRA. In particular, Part IV argues that the current linkage between the definition of agricultural labor under the NLRA and the FLSA excludes more workers from protection under the NLRA than had the initial treatment of agricultural labor by the NLRB before 1946.

2. 29 U.S.C. § 152(3) (2000).

3. 29 U.S.C. §§ 201-219 (2000). See *id* at §203(f) definition of “agriculture.”

4. CAL. LAB. CODE §§ 1140-1166.3 (West 2004).

5. Many commentators have sought to overcome the destructive effects of current federal labor law preemption over state initiatives to more effectively protect workers’ rights. See, e.g., Henry H. Drummonds, *The Sister Sovereign States: Preemption and the Second Twentieth Century Revolution in the Law of the American Workplace*, 62 *FORDHAM L. REV.* 469, 523-28 (1993) (discussing the division of regulatory authority in the American workplace between the federal government and the states); Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 *YALE J. ON REG.* 355, 356 (1990) (arguing that the NLRA’s preemptive effect should be “rethought and redefined”); David A. Morand, *Questioning the Preemption Doctrine: Opportunities for State-Level Labor Law Initiatives*, 5 *WIDENER J. PUB. L.* 35, 41 (1995) (advocating for the implementation of state-level labor law initiatives).

I. FUNDAMENTAL NLRA PROTECTIONS ARE DENIED TO MARGINALIZED WORKERS

Section 7 of the National Labor Relations Act⁶ sets forth the fundamental rights of workers protected under the Act. Section 7 provides:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection⁷

The categories of workers most consistently marginalized in the law in this country include those persons legally classified as “agricultural” laborers⁸ and “domestic service” workers.⁹ In addition, workers who are classified either as independent contractors or as temporary or contingent workers are regularly denied the same protections as other workers.¹⁰

6. 29 U.S.C. §§ 151-169 (2000).

7. *Id.* § 157 (originally enacted as 49 Stat. 452 (1935)). This section was amended in 1947 as part of the Taft-Hartley amendments to insert a provision that employees have the right to refrain from joining in concerted activities with their fellow employees. 61 Stat. 140 (1947). Section 7 as amended continues:

[Employees] shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157.

8. See Michael H. LeRoy & Wallace Hendricks, *Should “Agricultural Laborers” Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 490-92 (1999) (explaining that agricultural employees are inherently disadvantaged in their employment relationship because of their exclusion from the NLRA).

9. See Peggie R. Smith, *Organizing the Unorganizable: Private Paid Household Workers and Approaches to Employee Representation*, 79 N.C. L. REV. 45, 58-62 (2000-2001) (describing the exclusion of domestic service workers from the NLRA as well as state collective bargaining laws).

10. See CATHERINE RUCKELSHAUS & BRUCE GOLDSTEIN, NAT’L EMP. LAW PROJECT, FARMWORKER JUSTICE FUND, INC., FROM ORCHARDS TO THE INTERNET: CONFRONTING CONTINGENT WORKER ABUSE 5-13 (2002), available at <http://www.nelp.org/docUploads/pub120%2Epdf> (discussing that temporary and contract workers do not get the same protections of law and making suggestions for increasing the protections of these workers); see also BRUCE GOLDSTEIN ET AL., SUBCONTRACTING: THE LEGAL FRAMEWORK 19-24 (n.d.), available at <http://www.nelp.org/document.cfm?documentID=222> (last visited May 5, 2004) (noting the hurdles state labor law places before subcontracted and contingent workers); THE DUNLOP COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: FINAL REPORT 61-62 (1994), available at <http://www.ilr.cornell.edu/library/keyWorkplaceDocuments/government/federal/futuremang.html> (discussing the difficulties that contingent

Section 2 of the NLRA defines employees covered by the Act as follows: “The term “*employee*” . . . shall *not* include any individual employed as an *agricultural laborer*, or in the *domestic service* of any family or person at his home, . . . or any individual having the status of an *independent contractor*”¹¹

Increasingly, undocumented foreign-born workers without lawful employment authorization are similarly denied the fundamental protections of other workers. In *Hoffman Plastic Compounds, Inc. v. NLRB*,¹² the Supreme Court significantly eroded protections for undocumented foreign-born workers without lawful employment authorization by ruling that although such persons were employees protected under the NLRA, they could not recover under the Act’s backpay damage provisions.¹³

workers face because they do not receive the protection of labor and employment laws).

11. 29 U.S.C. § 152(3) (emphasis added).

12. 535 U.S. 137 (2002).

13. *Id.* at 144-45, 151-52. In *Hoffman*, the Supreme Court seriously undercut arguments for legal protections for undocumented alien workers. See REBECCA SMITH ET AL., NAT’L EMP. LAW PROJECT, IMMIGRANT WORKER PROJECT, UNDOCUMENTED WORKERS: PRESERVING RIGHTS AND REMEDIES AFTER HOFFMAN PLASTIC COMPOUNDS V. NLRB 1 (2003), available at <http://nelp.org/iwp/rights/organize/nlghoff040303.cfm> (noting the “devastating effect” the decision has had on immigrant communities); see also U.S. GEN. ACCOUNTING OFFICE, REP. TO CONG. REQUESTERS U.S. SENATE, No. 02-835, COLLECTIVE BARGAINING RIGHTS: INFORMATION ON THE NUMBER OF WORKERS WITH AND WITHOUT BARGAINING RIGHTS 4 (2002), available at <http://www.gao.gov/new.items/d02835.pdf> (estimating that the *Hoffman* decision potentially affected 5.5 million undocumented alien workers).

Had the *Hoffman* decision been rendered at a time other than the post-September 11, 2001 political environment, a simple legislative amendment by Congress with the support of the administration to the Immigration and Nationality Act, 8 U.S.C. §§ 1101-1525 (2000), would likely have been sufficient to undo the negative consequences of that decision. The United States Solicitor General and federal agencies were united in informing the Supreme Court that the administration supported the position of the National Labor Relations Board which the Supreme Court overturned. See Transcript of Oral Argument of Paul R. Q. Wolfson, Assistant to the Solicitor General, On Behalf of the Respondent, at 27-31, *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002) (No. 00-1595), available at http://a257.g.akamaitech.net/7/257/2422/30jan20021630/www.supremecourtus.gov/oral_arguments/argument_transcripts/00-1595.pdf (explaining that the NLRB’s position—the position of the United States—was developed in consultation with the Immigration and Naturalization Service).

II. A STRATEGIC APPROACH TOWARD ADDRESSING THE MARGINALIZATION OF AGRICULTURAL WORKERS

A. *Identifying Barriers to the Expansion of Labor Protections under the NLRA to Agricultural Workers*

It would seem at first blush that advocates for the rights of agricultural workers should focus their energies on simply arguing for removal of the agricultural labor exemption from the NLRA as the approach that would most fully protect the rights of agricultural workers.¹⁴ In fact, however, such a strategy is unlikely to be successful in the foreseeable future given the overwhelming political power of agricultural employers in Congress. Moreover, unless carefully implemented, including agricultural workers as employees under the NLRA would have a strong potential to undercut rights won by the United Farm Workers of America, AFL-CIO for agricultural workers subject to the California Agricultural Labor Relations Act¹⁵ (ALRA).

Virtually every labor practitioner who has represented workers subject to the NLRA is fully aware of the critical failure of the NLRA to adequately protect the rights of workers subject to its provisions.¹⁶

14. See LeRoy & Hendricks, *supra* note 8, at 495 (proposing amending the NLRA to include agricultural workers as a protected class, rather than continuing to rely upon the disparate attempts of individual states to remedy the current exclusion). There have been several congressional efforts to amend the NLRA to revise the definition of "employee" to include certain agricultural workers. See S. 285, H.R. 4179, 4408, 4786, 94th Cong. (1975).

15. CAL. LAB. CODE §§ 1140-1166.3 (West 2004). The rights of California agricultural workers are discussed *infra* note 16 and text accompanying notes 19-20.

16. The delays inherent in NLRB elections are particularly serious in agricultural industries with seasonal elements affecting the labor force needs. The California ALRA has tried to address this problem directly. The California ALRA requires that elections may only be conducted when at least fifty percent of the peak labor force is employed and provides that an election must be conducted within seven days of a timely petition supported by authorization from fifty percent of the workforce at the time of the petition. CAL. LAB. CODE § 1156.3(c) (West 2004). Where a strike has occurred, the California ALRB is expected to exercise due diligence to attempt to conduct an election within forty-eight hours of the petition. See Herman B. Levy, *The Agricultural Labor Relations Act of 1975—La Esperanza De California Para El Futuro*, 15 SANTA CLARA L. REV. 783, 796-98 (1975) (describing these procedures). The Pennsylvania Labor Relations Act (PLRA) has a similar provision requiring the Pennsylvania Labor Relations Board (PLRB) to hold an election within twenty days after a request by either party. 43 PA. CONS. STAT. ANN. § 211.7(c) (West 2004).

The California ALRA further provides a make-whole remedy for employer failure-to-bargain violations that the NLRB has held Congress failed to authorize under the NLRA. See CAL. LAB. CODE § 1160.3 (authorizing the ALRB to order employers engaged in unfair labor practices "to cease and desist from such [practices], to take affirmative action, including reinstatement of employees with or without backpay, and [to] mak[e] employees whole, when the board deems such relief appropriate, for the loss of pay resulting from the

Representation case procedures compelling an employer to recognize and bargain with an exclusive bargaining agent do not exist for farmworkers outside of a limited number of jurisdictions.¹⁷ Therefore, extension of such procedures to agricultural workers (even if wholly inadequate for seasonal workforces)¹⁸ would appear to be a net benefit, if it were not for the negative impact on farmworkers in California and those other jurisdictions where agricultural laborers excluded from the NLRA have utilized state law protections.

Under existing law and procedures, simply removing the exemption of agricultural laborers from protections under the NLRA would preempt the jurisdiction of the California Agricultural Labor Relations Board (ALRB) over such workers.¹⁹ This would risk undercutting hard-won victories of California farm workers under the California ALRA after what will soon be thirty years of ALRA jurisdiction over agricultural workers. Such a huge percentage of agricultural laborers work in California that any such approach would be clearly counterproductive.²⁰

employer's refusal to bargain . . ."); Levy, at 802-03 (discussing the ALRA's make-whole remedy provisions); cf. *Tiidee Products, Inc.*, 194 N.L.R.B. 1234 (1972) (explaining that while the NLRB adhered to the view that Congress did not give it the power to grant make-whole compensation, it was bound by the Court of Appeals for the District of Columbia's ruling in *Int'l Union of Elec., Radio & Mach. Workers v. NLRB*, 426 F.2d 1243, 1248 (D.C. Cir. 1970) that it did have the power to order make-whole relief); *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970) (concluding that the NLRB had no power to grant make-whole compensation), *rev'd sub nom.* *Int'l Union, UAW v. NLRB*, 449 F.2d 1046 (D.C. Cir. 1971).

17. See discussion *infra* Part III B.

18. For a discussion on amending the NLRA to include farm workers, see MARC LINDER, *MIGRANT WORKERS & MINIMUM WAGE: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES* 302 (1992). According to Linder, in order to create support for farm worker unionization, "[t]he NLRA would . . . have to be amended to accommodate the need for quick elections, union access to employers' property, and secondary boycotts as has been done under the California Agricultural Labor Relations Act." *Id.*

19. The extent to which the California ALRB would be preempted if the exemption for agricultural laborers were removed from the NLRA is demonstrated in *Bud Antle, Inc. v. Barbosa*, 45 F.3d 1261, 1268 (9th Cir. 1994):

So-called "Garmon preemption," named for *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed.2d 775 (1959), preserves the primary jurisdiction of the NLRB by prohibiting the states from regulating activities that are at least arguably protected by § 7 of the NLRA or arguably prohibited by § 8 of that statute.

20. Although the methodology of the United States Department of Agricultural National Agricultural Statistics Service (NASS) Census of Agriculture is flawed, it does provide some objective employer-provided data as to the size of the reported employee payroll and the number of positions in agriculture. The last period for which this data is available as of May 2004 is 1997. The 1997 data indicates that nearly twenty-three percent

Moreover, the potential scope of current NLRA preemption could jeopardize other retaliation protections for agricultural workers which have built up under state law unless the scope of NLRA preemption is reconciled with these other protections.²¹

of the reported agricultural payroll was in California and that the top twenty states in terms of agricultural payroll were as follows:

1997 Census of Agriculture, Geographic Area Series, States - Table 5. Hired Farm Labor Workers and Payroll: Top 20 States 1997			
Hired farm labor	farms	workers	\$1,000 payroll
United States	650,623	3,352,028	14,841,036
20 top States	394,488	2,378,126	11,311,183
California	36,450	549,265	3,392,577
Florida	12,199	124,969	925,607
Texas	55,912	193,484	785,447
Washington	13,598	251,395	771,003
North Carolina	18,984	126,934	487,395
Oregon	12,798	124,420	478,595
Wisconsin	25,179	96,482	409,009
Michigan	14,481	95,865	369,145
Pennsylvania	14,055	66,295	362,811
Illinois	23,876	76,607	344,362
New York	11,563	61,589	336,357
Minnesota	27,434	99,439	334,790
Iowa	33,016	94,147	316,779
Ohio	19,017	78,450	314,865
Kansas	20,660	60,431	306,410
Nebraska	21,469	68,312	300,578
Georgia	12,267	66,310	285,883
Idaho	9,410	63,415	270,843
Colorado	9,394	46,072	263,603
Arizona	2,726	34,245	255,124

See NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., 1997 CENSUS OF AGRIC. VOL. 1: PT. 51, CH. 2, U.S. SUMMARY & STATE DATA—STATE LEVEL DATA, TBL. 5, HIRED FARM LABOR—WORKERS AND PAYROLL: 1997, available at http://www.nass.usda.gov/census/census97/volume1/us-51/us2_05.pdf. This data does not include agricultural workers employed through business enterprises that are not classified as primarily agricultural.

21. The NLRA does not provide injunctive remedies for terminated workers. Retaliation protections under state and other federal laws can be far broader. For example, although it would not be preempted, the Migrant and Seasonal Agricultural Worker Protection Act (AWPA), 29 U.S.C. §§ 1801-72 (2000), authorizes equitable relief including injunctions for retaliation in violation of that Act. See *id.* § 1854 (discussing awards of damages and other equitable relief in private rights of action under the Act) and *id.* §1855(a)

B. Expanding Protections for "Agricultural" Laborers While Limiting Federal NLRA Preemption of Effective State Laws

The proposed solution to the dilemma of seeking to expand protections for agricultural laborers while limiting NLRA preemption of state laws protecting these workers is to:

1. Seek to expand and protect the effectiveness of protections for labor organizing under state and territorial laws and other federal laws for persons denied NLRA protection as agricultural laborers.²²
2. Have the NLRB decline to exercise jurisdiction over workplaces employing employees "arguably" subject to the NLRA,²³ where such workers would otherwise be adequately protected under state or territorial laws covering such employees.
3. Remove the NLRA annual appropriation rider requiring the NLRB to utilize the FLSA²⁴ definition of agriculture in defining agricultural laborers for the NLRA.²⁵

(prohibiting retaliation or discrimination).

In a case demonstrating how state law may provide broader retaliation protection than the NLRA, eleven farmworkers in New Jersey were reinstated following a motion for preliminary injunction shortly after being fired for organizing activity based on an argument that the right to organize is protected by the New Jersey Constitution. See GLORIA BONILLA-SANTIAGO, *ORGANIZING PUERTO RICAN MIGRANT FARMWORKERS: THE EXPERIENCE OF PUERTO RICANS IN NEW JERSEY* 104-05 (1988) (discussing the settlement of a New Jersey case, *El Comité de Trabajadores Unidos de Sunny Slope v. Sunny Slope Farms, Inc.*, Nos. C-4631-79E, C-4632-79E, (N.J. Super. Ct. Ch. Div. 1980)); see also Richard A. Goldberg & Robert F. Williams, *Farmworkers' Organizational and Collective Bargaining Rights in New Jersey: Implementing Self-Executing State Constitutional Rights*, 4 RUTGERS L.J. 729, 729 (1987) (discussing the rights of New Jersey farmworkers under the New Jersey Constitution).

22. It is well established that state regulation of agricultural workers excluded from the NLRA is not preempted by the NLRA. See *Giorgi v. Pa. Labor Relations Bd.*, 293 F. Supp. 873, 875 (E.D. Pa. 1968) (noting that the PLRB is asserting jurisdiction in an area apparently beyond the jurisdiction of the NLRB); *Willmar Poultry Co. v. Jones*, 430 F. Supp. 573, 576-78 (D. Minn. 1977) (holding that state regulation of agricultural laborers is not preempted on the ground that it is either protected or prohibited by the NLRA or that the NLRB has jurisdiction, but has declined to exercise it in order to effectuate its policies); see also *NLRB v. Comm. of Interns & Residents*, 566 F.2d 810, 815 n.5 (2nd Cir. 1977) (noting the Congressional decision to exclude agricultural workers from federal regulation, which gives states the right to assert jurisdiction over them); *United Farm Workers Org. Comm. v. Super. Ct. of Monterey County*, 4 Cal. 3d 556, 564-65 (1971) (en banc) (discussing state jurisdictional coverage of agricultural workers in relation to the NLRA).

See discussion *infra* Part III regarding expanding protections under other laws.

23. See *supra* note 19.

24. 29 U.S.C. § 203(f).

25. See discussion *infra* Part IV.C, at 92 (discussing the development of the a definition

4. Narrowly redefine by NLRB regulation “agricultural laborers” excluded as employees from protections under the NLRA, while declining to exercise such expanded NLRB jurisdiction where state and territorial laws adequately protect the rights of such persons. Such a redefinition of “agricultural laborers” should build upon initial NLRB jurisprudence from 1939 to 1946, prior to the imposition of the NLRB appropriation rider requiring the utilization of the FLSA definition of agriculture.²⁶

C. *Limiting the Scope of NLRA Preemption of Effective State Laws*

The proposed process builds on existing statutory authority vested in the NLRB to decline and to cede its jurisdiction over categories of workers and cases.²⁷ Instead of federal labor law wholly preempting state enforcement of laws to protect the labor rights of employees, federal labor policy would set minimum standards of protections that state agencies would be expected to meet in order to operate in this arena.

Such modified preemption would be more similar to federal preemption as applied in other areas of law, such as section 18 of the Occupational Safety and Health Act.²⁸

of agricultural laborers). *See also*, John A. Bourdeau, Annotation, *Who Are “Agricultural Laborers” Exempt from Coverage of National Labor Relations Act § 2(3)* (29 U.S.C.S. § 152(3)), 130 A.L.R. FED. 1, 19-23 (1996) (providing a general overview of the definition of agricultural laborers under the NLRA).

In *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 762-63 (1949), the Supreme Court set forth two distinct branches of the FLSA definition of agriculture:

First, there is the primary meaning. Agriculture includes farming in all its branches. Certain specific practices such as cultivation and tillage of the soil, dairying, etc., are listed as being included in this primary meaning. Second, there is the broader meaning. Agriculture is defined to include things other than farming as so illustrated. It includes any practices, whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidentally to or in conjunction with “such” farming operations.

Id. *See also* 29 C.F.R. 780.105 (2003) (discussing the “primary” and “secondary” definitions of agriculture under section 3(f) of the FLSA).

26. *See* discussion *infra* Part IV.B (providing background on of the rider to the NLRB).

27. *See* 29 U.S.C. § 160(a) (discussing the powers of the Board generally in the prevention of unfair labor practices); *see also* 29 U.S.C. § 164(c) (denoting the powers of the Board to decline jurisdiction of labor disputes and assertion of jurisdiction by State and Territorial courts).

28. Section 18 of the Occupational Safety and Health Act, 29 U.S.C. § 667 (2000), provides:

(a) Assertion of State standards in absence of applicable Federal standards
Nothing in this Chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.

(b) Submission of State plan for development and enforcement of State standards to preempt applicable Federal standards
Any State which, at any time, desires to assume responsibility for development and enforcement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

(c) Conditions for approval of plan

The Secretary shall approve the plan submitted by a State under subsection (b) of this section, or any modification thereof, if such plan in his judgement—

(1) designates a State agency or agencies as the agency or agencies responsible for administering the plan throughout the State,

(2) provides for the development and enforcement of safety and health standards relating to one or more safety or health issues, which standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under section 655 of this title which relate to the same issues, and which standards, when applicable to products which are distributed or used in interstate commerce, are required by compelling local conditions and do not unduly burden interstate commerce,

(3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in section 657 of this title, and includes a prohibition on advance notice of inspections,

(4) contains satisfactory assurances that such agency or agencies have or will have the legal authority and qualified personnel necessary for the enforcement of such standards,

(5) gives satisfactory assurances that such State will devote adequate funds to the administration and enforcement of such standards,

(6) contains satisfactory assurances that such State will, to the extent permitted by its law, establish and maintain an effective and comprehensive occupational safety and health program applicable to all employees of public agencies of the State and its political subdivisions, which program is as effective as the standards contained in an approved plan,

(7) requires employers in the State to make reports to the Secretary in the same manner and to the same extent as if the plan were not in effect, and

(8) provides that the State agency will make such reports to the Secretary in such form and containing such information, as the Secretary shall from time to time require.

D. Proposed Actions to be Taken Under the National Labor Relations Act

1. Promulgation of Regulations Under Section 10(a) of the NLRA

The NLRB should promptly promulgate regulations and procedures²⁹ for exercising its power under section 10(a) of the NLRA³⁰ to enter into

(d) Rejection of plan; notice and opportunity for hearing

If the Secretary rejects a plan submitted under subsection (b) of this section, he shall afford the State submitting the plan due notice and opportunity for a hearing before so doing.

29 U.S.C. § 667(a)-(d) (subsection headings are bold in original).

Other federal statutes have been designed as part of federal and state enforcement schemes which do not preempt further local regulation. *See, e.g.*, Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y (2000) (allowing local regulation of insecticides). The Environmental Protection Agency Administrator may give a state primary enforcement responsibility for pesticide use violations if it has adopted adequate pesticide laws and regulations and meets other requirements set forth in the Act. *Id.* § 136w-1. If a state with primary enforcement responsibility is not adequately enforcing pesticide use regulations, the Administrator may rescind that responsibility, in whole or in part. *Id.* § 136w-2.

29. In *Produce Magic Inc.*, 318 N.L.R.B. 1171 (1995), two dissenting NLRB members, Chairman Gould and Member Browning, argued for a public comment procedure for considering petitions for ceding jurisdiction to a state agency:

Before ruling on the cession petition, we believe that the Board should seek further public comment. Although we recognize that prior Board cases have interpreted the 10(a) proviso narrowly, we are concerned that such decisions have effectively rendered the proviso a nullity, as evidenced by the absence of any cession agreements since the proviso was added by the 1947 amendments.

... Given that a cession agreement with one State might lead to requests for similar agreements from other States, we would publish a Federal Register notice soliciting comments on Local 890's petition from all interested persons. Accordingly, we dissent from our colleagues' denial of Local 890's cession petition.

Id. at 1172-73.

30. 29 U.S.C. § 160(a) provides:

The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of*

agreements with states and territories (including the Commonwealth of Puerto Rico)³¹ to cede NLRB unfair labor practice jurisdiction to such agencies of states or territories over cases in industries other than mining, manufacturing, communications, and transportation.³² These cessation

the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

(emphasis added).

31. Puerto Rico, by Constitution (P.R. CONST. art. II, §§ 17-18) and by statute (Puerto Rico Labor Relations Act, 29 P.R. LAWS ANN. §§ 61-62 (2001)), protects the rights of workers to organize. Puerto Rico does not exempt agricultural workers from the protections of its labor relations statutes.

32. Standard Industrial Classification (SIC) Divisions readily indicate for most industries whether they are subject to section 10(a). See Occupational Safety & Health Administration, U.S. Dep't of Labor, Standard Industrial Classification (SIC) System Search, at <http://www.osha.gov/oshstats/sicser.html> They are:

SIC	Industry	Subject to Sec. 10(a)
01-09	Agriculture, Forestry, & Fishing	TRUE
10-14	Mining	FALSE
15-17	Construction	TRUE
20-39	Manufacturing	FALSE
40-49	Transportation, Communications, Electric, Gas, & Sanitary Services	FALSE
48	Communications	FALSE
50-51	Wholesale Trade	TRUE
52-59	Retail Trade	TRUE
60-67	Finance, Insurance, & Real Estate	TRUE
70-88	Services	TRUE
91-99	Public Administration	TRUE
99	Nonclassifiable Establishments	TRUE

See *id.*

SIC Code 20 is for "Food And Kindred Products." See *id.* at <http://www.osha.gov/cgi-bin/sic/sicser4?20>. Its placement in the SIC Code structure would theoretically make the status of SIC Code 20 "Food And Kindred Products" (Food Processing) questionable, but the history of the NLRA would likely indicate that it was intended to be included in enterprises subject to section 10(a) of the NLRA.

Those industries which are likely subject to section 10(a) to the extent that they are subject to NLRA jurisdiction are:

agreements should be entered into “unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of the [NLRA] or has received a construction inconsistent therewith.”³³

The NLRB, in the course of this regulatory process, should consider the degree of consistency required between the specific state or territorial unfair labor practice provision and the NLRA in order to meet this standard. The language of section 10(a) of the NLRA appears to permit the NLRB to retain jurisdiction over specific unfair labor practice sections that it did not believe the state or territorial law reflected with sufficient fidelity while permitting the NLRB to defer its jurisdiction to the state or territorial agency where the matter did not involve such unfair labor practice provisions.

In a significant number of workplaces, it is common for some workers to be covered as employees under the NLRA, while others are excluded as agricultural laborers.³⁴ Cessation agreements under section 10(a) of the

87	Engineering And Management Services
88	Private Households
89	Services, Nec
91	Executive, Legislative, And General
92	Justice, Public Order, And Safety
93	Finance, Taxation, And Monetary Policy
94	Administration Of Human Resources
95	Environmental Quality And Housing
96	Administration Of Economic Programs
97	National Security And Intl. Affairs

33. 29 U.S.C. § 160(a).

34. As will be discussed more fully *infra* at text accompanying note 74, since 1956, the Pennsylvania Labor Relations Board (PLRB) has asserted jurisdiction under the Pennsylvania Labor Relations Act (PLRA), 43 PA. CONS. STAT. ANN. § 211.1 (West 2004) over the mushroom industry and greenhouse horticultural specialty workers, despite the exclusion of such workers as “agricultural laborers” under the NLRA and a parallel provision of the PLRA excluding agricultural workers. *Id.* § 211.3(d).

After a PLRA election was held among employees of a mushroom industry employer, the employer attempted to overcome the overwhelming vote in favor of the labor organization by asserting that a significant percentage of its workers were not agricultural laborers and were subject to the exclusive jurisdiction of the NLRB under the NLRA. In *re* the Employees of Blue Mt. Mushroom Co., PLRA-R-97-6-E (PLRB, Dec. 15, 1998), *aff’d sub nom.*, Blue Mt. Mushroom Co. v. Pa. Labor Relations Bd., 735 A.2d 742, 744 (Pa. Commw. 1999). The resulting certified bargaining unit excluded workers who regularly interacted with bargaining unit members who were agricultural workers, because such workers regularly handled some outside product of other mushroom producers. *Id.* at 745.

The same issue arises regularly in other workplaces where employers have packinghouses that pack products produced by other employers. The resulting exclusion of

NLRA should be promptly entered into with states and territories with appropriate procedures for protecting rights of classes of workers (specifically including agricultural workers) who are currently excluded from protections under the NLRA to the extent that the same employers may have other employees in covered workplaces subject to the NLRA.³⁵

Such cessation agreements should include an arrangement between the NLRB and the California ALRB providing for the NLRB to cede jurisdiction over employees “arguably” subject to the NLRA who are employed by California employers subject to the California ALRA.³⁶ A

packinghouse workers from a PLRA certified bargaining unit undermines the ability of a labor organization to effectively represent the rights of all employees of an employer. *See* *Kaolin Mushroom Farms v. Pa. Labor Relations Bd.*, 702 A.2d 1110, 1114-15, 1115 n.9, 1126 (Pa. Commw. Ct. 1997) (affirming an order of the PLRB, which certified a bargaining unit consisting of “[a]ll full-time and regular part-time mushroom production laborers, including but not limited to pickers, casers, spawners and watermen; and excluding . . . packers, shippers, [and] maintenance shop personnel”). Although the Kaolin Workers Union now has a collective bargaining agreement, there is no existing mechanism to force the employer to include within the bargaining unit such workers who are subject to NLRB jurisdiction.

35. It would be theoretically possible for the NLRB to cede unfair labor practice jurisdiction while retaining authority to determine certain unfair labor practice issues if the state tribunal’s law was deemed not sufficiently consistent with the NLRA as to that specific provision. Alternatively, the state tribunal could agree to apply NLRA law to employees covered by the NLRA, and the NLRB could establish procedures to retain jurisdiction to review such claims. (This could operate in much the same manner as would a deferral to arbitration).

The PLRA offers an interesting example of a statute that is substantively very similar to the NLRA, except for the significant difference that unfair labor practice charges must be filed within six weeks rather than six months under the NLRA. *See* 43 PA. CONS. STAT. ANN. § 211.8(c) (West 2004) (“No order shall award backpay from a period more than six weeks prior to the time of the filing of the complaint.”). An agreement ceding jurisdiction could retain sufficient residual NLRB jurisdiction to consider unfair labor practice claims otherwise untimely under Pennsylvania law. Alternatively, the PLRB could agree by regulation to utilize the NLRA’s time limits for workers subject to NLRA jurisdiction.

36. The California ALRA attempted to avoid any conflict with the NLRA by adopting a definition of covered agricultural employees mirroring the NLRB FLSA derived definition excluding agricultural laborers. *See* CAL. LAB. CODE § 1140.4(b) (West 2004) (“The term ‘agricultural employee’ or ‘employee’ shall mean one engaged in agriculture, as such term is defined in subdivision (a). However, nothing in this subdivision shall be construed to include any person other than those employees excluded from the coverage of the [NLRA] as agricultural employees . . .”). Nonetheless, the potential for differing interpretations of the FLSA standard has resulted in conflict between the California ALRB and the NLRB. *See* *Bud Antle v. Barbosa*, 45 F.3d 1261, 1278 (9th Cir. 1994) (holding that the NLRA preempted the California ALRB over charges of unfair labor practices); *Produce Magic Inc.*, 311 N.L.R.B. 1277, 1280 (1993) (*Produce Magic I*) (finding that the “harvesting” employees were not considered agricultural laborers, and therefore fell under the protection of the NLRA); *Produce Magic Inc.*, 318 N.L.R.B. 1171, 1171 (1995) (*Produce Magic II*) (denying a request that the NLRB cede to the California ALRB jurisdiction “with respect to all agricultural employees over whom the ALRB asserts jurisdiction under the [ALRA] but with respect to whom the NLRB would assert jurisdiction” under the NLRA).

ceding of jurisdiction under section 10(a) of the NLRA to the California ALRB will likely require the NLRB to rethink the degree to which the provisions of the California ALRA as applied by the California ALRB need to be *identical* to the NLRA as applied by the NLRB.³⁷ This issue may not be easily resolved since the only recent consideration by the NLRB of section 10(a) of the NLRA involved a rejection of a request by the California ALRB for the NLRB to cede jurisdiction to it.³⁸ Nonetheless, it might be possible to resolve such differences by reconsidering the degree to which state law must conform to federal law and the degree to which the states could agree to apply federal law to NLRA covered employees.³⁹

Virtually all commentators have recognized that the absence of coordinated administration of the NLRA and the California ALRA has created significant problems for workers, unions, and employers in California agricultural and related food processing industries. See generally articles from the University of California at Davis Conference, *The ALRA at 25* (Oct. 4, 2000), available at <http://migration.ucdavis.edu/cf/archives1.php?id=A2000102>. The purpose of the conference was to review the economic and legal trends in farm labor relations since the ALRA was signed into law in 1975. See also Ronald H. Barsamian & E. Mark Hanna, *ALRB or NLRB: Where Do We Draw the Line?*, 11 SAN JOAQUIN AGRIC. L. REV. 1, 1 (2001) (discussing the difficulty in drawing the jurisdictional line between the California ALRA and the NLRA).

37. As to the California ALRA as initially enacted, see Levy, *supra* note 16, at 785–88, discussing the structure of the California ALRB, and speculating on the extent to which the ALRB will follow precedents set by the NLRB. The California ALRA has been amended several times. It is beyond the scope of this article to review the full current status of the ALRA. Fundamentally, however, it is critical to note that the Act has been uniquely crafted to respond to the specific administrative problems of effective protections for agricultural laborers excluded from the NLRA.

As Professor David Morand has pointed out:

State laws are not required to be “consistent” with federal laws; section 10(a) allows the NLRB to cede jurisdiction “unless” the law of the state in question is “inconsistent” with federal law. The consistent or inconsistent distinction is an important one that could substantially affect future rulings, yet it is often treated as if it were a distinction without a difference. The phrase “unless inconsistent with” is by definition significantly broader than “consistent with.” For example, *Black’s Law Dictionary* defines “inconsistent” as follows: “mutually repugnant or contradictory. Contrary, the one to the other, so that both cannot stand, but the acceptance or establishment of the one implies the abrogation or abandonment of the other; as, in speaking of ‘inconsistent defenses,’ or the repeal by a statute of ‘all laws inconsistent herewith.’” The definition of “consistent” in *Black’s* is not antonymous with “inconsistent.” “Consistent” is defined as “having agreement with itself or something else; accordant; harmonious; congruous; compatible; compilable; not contradictory.” Thus “inconsistent” denotes a more restricted class of situations than does “not consistent.”

Morand, *supra* note 5, at 67.

38. *Produce Magic II*, 318 N.L.R.B. at 1172.

39. A formalized process could identify specific concerns with the state law, which would allow the state to determine if it was prepared to address such concerns legislatively.

The NLRB should also consider entering into agreements under section 10(a) with state and territorial agencies that have the capacity to provide protections to workers subject to the NLRA. Agreements for federal funding to such state and territorial agencies as part of these agreements could be further explored.

2. Promulgation of Regulations Under Section 14(c) of the NLRA

Section 14(c)(1) of the NLRA allows the Board to decline to assert jurisdiction over a labor dispute “where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.”⁴⁰

The Board’s discretionary authority to decline jurisdiction has been exercised in a wide variety of contexts.⁴¹ The principal advantage of declining jurisdiction under section 14(c) is that section 14(c)(2) explicitly preserves the right of a state or territorial authority to exercise jurisdiction over such employers.⁴² Moreover, although on its face section 10(a) only

Alternatively, the NLRB could retain jurisdiction to hear specific categories of unfair labor practices for workers subject to the NLRA.

40. Section 14(c)(1) of the NLRA states:

The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to subchapter II of chapter 5 of title 5, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction: *Provided*, That the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

29 U.S.C. § 164(c)(1).

41. For current jurisdictional standards, see OFFICE OF THE GEN. COUNSEL, NAT’L LABOR RELATIONS BD., AN OUTLINE OF LAW AND PROCEDURE IN REPRESENTATION CASES, Ch. 1: Jurisdiction (2002), available at http://www.nlr.gov/nlr/legal/manuals/outline_chap1.pdf. See also *id.* § 1-500 at 18 (“[T]he Board . . . is empowered to decline to assert jurisdiction where the impact on commerce of a labor dispute would not be sufficiently substantial to warrant the exercise of its jurisdiction.”).

An example of the specificity of the Board’s discretionary authority is the Board’s exercise of rulemaking authority to decline to exercise its jurisdiction over the horseracing and dogracing industries. 29 C.F.R. § 103.3 (2003).

42. Section 14(c)(2) provides:

Nothing in this subchapter shall be deemed to prevent or bar any agency or the courts of any State or Territory (including the Commonwealth of Puerto Rico, Guam, and the Virgin Islands), from assuming and asserting jurisdiction over labor disputes over which the Board declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction.

relates to a declination by the NLRB of the exercise of unfair labor practice jurisdiction, section 14(c) authorizes a state agency to determine representational issues as well.⁴³

The most effective course for the NLRB when considering jurisdiction over employers with both employees arguably subject to the NLRA and employees excluded from the NLRA as agricultural workers, would be to develop regulations and procedures jointly under *both* sections 10(a) and 14(c) of the NLRA. This process would allow the NLRB to make a state-by-state determination as to whether the state law sufficiently protects the *fundamental* rights under section 7 of the NLRA of workers “arguably” subject to the NLRA to justify deferral of jurisdiction over such workers to the state agency, where such workers are employed by employers of agricultural laborers exempted from coverage under the NLRA.⁴⁴

Where a bargaining unit has been established under a state’s labor relations act or where a “question concerning representation” has arisen in a workplace with a potential bargaining unit including persons excluded from the NLRA as agricultural workers, the NLRB could utilize its section 14(c)(1) power to decline jurisdiction over the workers subject to the NLRA in order to permit the state or territorial agency to assert jurisdiction over all workers in that workplace, including those who might arguably be subject to NLRB jurisdiction.⁴⁵ This should include workplaces with employees subject to the California ALRB.⁴⁶

29 U.S.C. § 164(c)(2).

43. See 29 U.S.C. §§ 160(a), 164(c) (explaining the powers of the Board generally, including the right to decline jurisdiction of labor disputes).

44. As discussed further below, at least some states have developed agricultural worker labor laws that would deprive workers who should be subject to the NLRA of fundamental protections under the NLRA. See *infra* notes 99-104 and accompanying text.

The intention of this proposal is that such a state’s labor relations act would not have to meet the degree of fidelity to the NLRA previously required by the NLRB in relationship to section 10(a) of the NLRA in order for the NLRB to agree to defer jurisdiction over workers arguably subject to the NLRB to the state’s labor relations agency.

Specifically, as discussed further below, the California ALRA should be deemed to sufficiently protect workers’ fundamental rights under section 7 of the NLRA to permit the NLRB to cede jurisdiction over workers “arguably subject” to the NLRA where they are employed in workplaces together with employees exempt from the NLRA as agricultural workers. See discussion *supra* Part II.B.

45. Such an approach applied to the PLRA would permit the PLRB to determine the appropriate scope of bargaining units at such workplaces without having to artificially exclude workers otherwise appropriately included simply because such workers are subject to the NLRA. See *supra* note 34 and accompanying text.

46. NLRA § 14(c), 29 U.S.C. § 164(c) would allow the NLRB to defer to the California ALRB in workplaces with employees clearly excluded from the NLRA without having to resolve all issues as to the degree of similarity and differences between the California ALRA and the NLRA.

The practical necessity for such a resolution in the conflict between the jurisdiction of the California ALRB and the NLRB is clearly recognized by practitioners familiar with

3. Removal of the Federal Appropriation Rider Requiring Usage of the FLSA Definition of Agriculture.

As suggested above, after the NLRB has established procedures for declining expanded jurisdiction over agricultural laborers where there are adequate state or territorial laws covering workers who might be arguably subject to the NLRA, Congress should remove the annual appropriation rider tying the definition of employees excluded from the NLRA as agricultural laborers to the FLSA definition of agriculture. The NLRB should then exercise its authority to promulgate regulations narrowly defining agricultural laborers excluded from protections under the NLRA.⁴⁷ The agricultural laborer exemption should be consistent with the early standards developed by the NLRB prior to the initial adoption of the current appropriation rider requiring the usage of the FLSA definition of agriculture.⁴⁸

In particular, workers in indoor “horticultural specialty” operations such as greenhouses and mushroom operations should not be treated as agricultural laborers.⁴⁹ Only outdoor hand harvest agricultural laborers

California agricultural and food processing industries. *See supra* note 36; *see also* Mike Johnston, Mixed Bargaining Unit Work (unpublished transcript of address at the University of California at Davis conference, *The ALRA at 25* (Oct. 4, 2000), available at http://migration.ucdavis.edu/cf/comments.php?id=48_0_2_0) (describing the practical impact of the current state of the law regarding mixed units on workers, unions, and employers in the California fresh vegetable industry).

47. It is important to understand that the sequence of steps suggested here is critical to not upset the balance of state labor regulation which has already occurred. A change in the federal NLRA definition of agricultural workers without a companion ceding jurisdiction to state agencies which have regulated employees previously treated as agricultural workers under federal law could be disruptive of existing collective bargaining arrangements particularly in California, but potentially in other jurisdictions as well.

48. This issue is discussed extensively below. *See infra* Part IV.B.

49. The importance of agricultural workers employed in horticultural specialty operations is that many more of these positions offer year-round employment opportunities in which labor organizing is more likely to occur.

The United States Department of Agricultural National Agricultural Statistics Service (NASS) *1997 Census of Agriculture* included a special *1998 Census of Horticultural Specialties* (which includes products in addition to those produced in indoor greenhouse or mushroom operations). Data on the top twenty states therein (by payroll) is as follows:

		Hired Labor		
	Area	Operations	Payroll (\$1,000)	Employees
Rank		Total	Total	Total
	United States	19,876	3,603,812	376,194

employed directly by employers engaged only in farming the land and performing no secondary food processing activities should be excluded from protections as agricultural laborers.⁵⁰

1	California	1,827	738,560	62,276
2	Florida	2,042	482,738	40,923
3	Michigan	1,048	232,807	25,979
4	Oregon	1,061	211,111	25,853
5	Pennsylvania	1,092	197,006	18,873
6	Texas	687	160,674	15,753
7	Ohio	880	146,800	14,928
8	Illinois	562	103,639	9,742
9	North Carolina	853	93,542	11,658
10	New York	805	87,885	8,818
11	Washington	555	83,488	14,203
12	Connecticut	295	82,723	7,279
13	New Jersey	606	80,949	6,767
14	Tennessee	500	61,357	6,210
15	Georgia	398	58,798	5,952
16	Colorado	277	55,496	6,423
17	Wisconsin	570	55,459	7,867
18	Minnesota	385	55,008	7,352
19	Alabama	270	53,303	5,939
20	Virginia	387	50,795	5,808

See NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., 1997 CENSUS OF AGRIC. VOL. 3, 1998 CENSUS OF HORTICULTURAL SPECIALTIES, TBL. 49, SELECTED PRODUCTION EXPENSES FOR HORTICULTURAL OPERATIONS BY STATE: 1998, available at <http://www.nass.usda.gov/census/census97/horticulture/table45-47.pdf>.

50. See *supra* note 25 and accompanying text. The NLRB has narrowly interpreted primary agriculture to exclude many operations that might generally be assumed to be agricultural in nature. See *Produce Magic I*, 311 N.L.R.B. at 1279, where the NLRB affirmed findings of its Regional Director regarding the status of "cutter-packers:"

The act of severing the lettuce from the ground plainly is "harvesting" and, therefore, those who perform this work are agricultural laborers while they are doing so. The videotape introduced into evidence reveals that the cutter both severs the lettuce and trims off any excess from the bottom. This work accounts for 50% of each cutter-packer's workday. The remainder of each cutter-packer's day is spent in the packing function. Approximately 25% of packing is comprised of "sleeving," wherein the packer wraps the lettuce head before inserting the head into a carton. Such work, I find, is analogous to traditional packing operations which, as in *Mario Saikhon, supra*, [278 N.L.R.B. 1289, 1291 (1986)], and [*Employer Members of] Grower-Shippers [Vegetable Ass'n.]*, *supra*, [230 NLRB 1011 (1977)], is performed in the field but, nevertheless, does not constitute primary agriculture.

The record establishes that approximately 75% of the Employer's packing

III. EXPANDING PROTECTIONS FOR THE RIGHT OF AGRICULTURAL LABORERS CURRENTLY EXCLUDED FROM THE NLRA TO ORGANIZE

It is critical to note as a threshold matter that the right of all workers, including agricultural and domestic workers excluded from NLRA protection, to collectively withhold their services or otherwise engage in collective activity exists independently of whether or not that right is specifically protected under the NLRA. This right has foundations under the Thirteenth Amendment to the United States Constitution.⁵¹ The right to

operation is comprised of “naked pack” operations, wherein the packer may have occasion to “trim” by hand excess or dead leaves before inserting the lettuce heads directly into the carton. This trimming and packing function is precisely the kind of activity which the Board found did not constitute primary agriculture in *Mario Saikhon, supra*, and *Grower-Shipper, supra*, and I so find herein.

51. U.S. CONST. amend. XIII. Under sufficiently aggravated conditions, attempted employer interference with employees’ rights to withhold services would raise issues of slavery in violation of the Thirteenth Amendment. See Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 *FORDHAM L. REV.* 981, 1044 & n.354 (2002). Azmy states: “In the 1920s and 1930s, labor activists had developed a full theory of Thirteenth Amendment protections of labor rights, which included the right to organize, strike and bargain collectively. n.354.” *Id.* at 1044. Footnote 354 provides examples from the case law:

The labor movement had, over previous years, modest success in courts advancing these theories. See, e.g., *Bedford Cut Stone Co. v. Journeymen Stone Cutters’ Ass’n*, 274 U.S. 37, 65 (1927) (Brandeis, J., dissenting) (stating that an injunction against a sympathy strike “reminds [one] of involuntary servitude”); *Hopkins v. Oxley Slave Co.*, 83 F. 912, 937 (8th Cir. 1897) (declaring that denial of right to strike amounted to unconstitutional wage slavery); *Arthur v. Oakes*, 63 F. 310, 319-20 (7th Cir. 1894) (Harlan, Circuit Justice) (overturning part of anti-strike injunction in part because workers enjoyed Thirteenth Amendment right to “confer with each other upon the subject of the proposed reduction in wages”); *Kemp v. Div. No. 241 Amalgamated Ass’n of St. & Elec. Ry. Employees of Am.*, 99 N.E. 389, 392 (Ill. 1912) (overturning, partly on Thirteenth Amendment basis, an injunction prohibiting union from calling a strike); see also *Local 232, U.A.W.A. v. Wisconsin Employment Relations Bd.*, 336 U.S. 245, 251 (1949); *U.S. v. Petrillo*, 68 F. Supp. 845, 849 (N.D. Ill. 1946) (“Under the Thirteenth Amendment the right of any worker to leave his employment at will or for no reason at all is protected and that right is inviolate.”), *rev’d* on other grounds, 332 U.S. 1, 13 (1947) (“The Union contends that the statute . . . violates the Thirteenth Amendment in that it imposes a form of compulsory service or involuntary servitude.”).

Id. at 1044 n.354.

Attempted employer interference with employees’ rights to withhold services may also raise issues of peonage under 42 U.S.C. § 1994, which provides:

engage in collective activity also has foundations under the First Amendment.⁵²

A. *Recognition of Fundamental Labor Rights in the Norris-LaGuardia Act of 1932*

In 1932, Congress adopted the Norris-LaGuardia Act⁵³ (NLA). Unlike the subsequent NLRA, the NLA had *no exemption* for agricultural laborers in its provisions. The NLA not only included provisions intended to prevent federal courts from issuing injunctions to enjoin labor disputes, but also included a declaration of public policy in labor matters.⁵⁴ Section 2, the declaration of public policy in the NLA states:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that *he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives*

The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.

42 U.S.C. § 1994 (2000).

52. U.S. CONST. amend. I. There is a potential First Amendment constitutional argument where there is state involvement in preventing workers from collectively expressing their grievances. See *Babbitt v. United Farm Workers*, 442 U.S. 289, 313 (1979), where the Court noted that “[t]he Constitution guarantees workers the right individually or collectively to voice their views to their employers.”

53. Norris-LaGuardia Act (NLA) of 1932, ch. 90, § 1, 47 Stat. 70, codified as amended at 29 U.S.C. §§ 101-115 (2000). See also Azmy, *supra* note 51, at 1044 n.358 (noting that early versions of the NLA were explicitly based on the Thirteenth Amendment to the United States Constitution).

54. 29 U.S.C. §§ 101-102.

or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.⁵⁵

These policy considerations are also apparent in section 3 of the NLA which provides:

Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this title, is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization.⁵⁶

Largely as a result of the passage of subsequent labor legislation, the content of the substantive protections of labor rights under the NLA have not been tested. Nonetheless, there is a significant argument that the NLA confers substantive protections on all workers, including agricultural and domestic workers excluded from the NLRA.⁵⁷

55. *Id.* § 102 (emphasis added).

56. *Id.* § 103(a)–(b).

57. See Kayce R. Compton, *Defeating the Agricultural Exemption: The Norris LaGuardia Act as a Means for Collective Action for Agricultural Labor*, 74 N.D. L. REV. 509, 510, 527-530 (1998) (arguing that the NLA provides substantive protections for all workers).

It is beyond the scope of this article to answer the question of whether under *Cort v. Ash*, 422 U.S. 66 (1975) and subsequent decisions regarding implied causes of action, a direct federal cause of action to enforce the substantive provisions of the NLA can be maintained for agricultural workers excluded from the NLRA. However, a preliminary

B. Recognition of Fundamental Labor Rights of Federally Excluded Workers in State Law

Because the Norris-LaGuardia Act only restrained federal courts in the issuance of injunctions, parallel state Norris-LaGuardia Acts were adopted in numerous states and territories.⁵⁸ Courts in three states—Wisconsin,⁵⁹ Washington,⁶⁰ and Oregon⁶¹ have held that the language of state statutes modeled after the federal NLA was sufficient to confer substantive protective rights on workers, including agricultural workers excluded from the NLRA.

Potentially, a similar argument could be made under the federal NLA or under the public policy provisions of other state anti-injunction

examination of this issue would strongly suggest that the correct answer is that such an action should be able to be maintained.

58. Numerous states have adopted state laws limiting injunctions in labor disputes. See W. J. Dunn, Annotation, *Applicability of Norris-La Guardia Act and Similar State Statutes to Injunction Action by Private Complainant*, 29 A.L.R. 2d 323, 330-335 (1953) (examining applicability of anti-injunction acts against unions); see also Compton, *supra* note 57, at 511 n.16 (identifying the following states with versions of the NLA incorporated within their state code: Arizona, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Utah, Washington, Wisconsin, and Wyoming). A few of these statutes incorporated public policy provisions similar to those in the federal NLA. See *infra* text accompanying notes 62-65.

59. Wisconsin was the first state to address this issue prior to the enactment of the NLRA in 1935. WIS. STAT. ANN. §§ 103.51-.62 (1931). See *Trustees of Wis. State Fed'n of Labor v. Simplex Shoe Mfg. Company*, 256 N.W. 56, 60-61 (Wis. 1934) (applying Wisconsin labor laws).

60. The next state to address this issue was Washington State. WASH. REV. CODE ANN. §§ 49.32.011-.020 (West 1933). See *Culinary Workers & Bartenders Union, Local No. 596 v. Gateway Cafe, Inc.*, 588 P.2d 1334, 1345 (Wash. 1979) (applying Washington's NLA in favor of employees); see also *Bravo v. Dolsen Cos.*, 888 P.2d 147, 155 (Wash. 1995) (holding that the Washington NLA and the public policy of the state gives farm workers the right to strike and engage in other concerted activity to improve their working conditions without employer retaliation); *Krystad v. Lau*, 400 P.2d 72, 83 (Wash. 1965) (construing Washington state's Norris LaGuardia Act); *Garza v. Patnode*, 65 Lab. Cas. (CCH) ¶ 52,570 (1971) (holding that in Washington, state protections extend to farm workers); cf. Peter B. Gonick, Note & Comment, *Bravo v. Dolsen Cos.: Shoring Up Employer Bargaining Power by Sandbagging Nonunion Workers*, 70 WASH. L. REV. 203, 210 (1995) (critiquing the Washington Court of Appeals decision denying rights to agricultural workers). But see *Int'l Union of Operating Eng'rs v. San Point Country Club*, 519 P.2d 985, 988 (Wash. 1974) (imposing no employer duty to bargain).

61. The third state to address this issue was Oregon. OR. REV. STAT. §§ 662.010-.130 (1997). The Oregon courts similarly held that farm workers are protected by the Oregon state Norris-LaGuardia Act. See *Rauda v. Or. Roses, Inc.*, 935 P.2d 469, 473 (Or. Ct. App. 1997) (determining that an exemption of agricultural workers from the state's equivalent of the NLRA did not deprive agricultural workers of protections under the state Norris-LaGuardia Act), *vacated* by 986 P.2d 1157 (Or. 1999).

statutes.⁶² Among others, states with public policy provisions in anti-injunction statutes modeled on the federal NLA include Idaho,⁶³ Indiana,⁶⁴ and Minnesota.⁶⁵ Other state statutes might contain policy declarations as to labor rights which do not exclude agricultural workers.⁶⁶

As in Oregon, the Pennsylvania Labor Anti-Injunction Act⁶⁷ public policy declarations⁶⁸ do not exclude agricultural laborers,⁶⁹ although the

62. See Compton, *supra* note 57, at 510, 527-30 (arguing that the Norris-LaGuardia Act confers substantive protections on all workers, including agricultural and domestic workers excluded from the NLRA).

63. IDAHO CODE § 44-701 (Michie 2003).

64. IND. CODE ANN. § 22-6-1-2 (Michie 1976).

65. MINN. STAT. § 185.08 (1993).

66. This article does not purport to comprehensively review all state laws which could be the basis for arguing for a state public policy protecting rights of workers excluded from protections under the NLRA.

The judicial development of tortious wrongful discharge claims in violation of public policy may also provide alternative sources of protection for agricultural workers. This would be particularly true if the state wrongful discharge law was prepared to recognize a right grounded in the federal Norris-LaGuardia Act, since that public policy is national.

It is also significant to note that seasonal agricultural workers (including H-2A temporary nonimmigrant workers) terminated from employment might be able to argue that at common law, employment for a period of time was not like the common law employment-at-will standard. See, e.g., *Greene v. Oliver Realty, Inc.*, 526 A.2d 1192, 1196 (Pa. Super. Ct. 1987) (“When it is proven that the [employment] contract specified a definite period, the employee may not be terminated during that period unless the employer has ‘just cause.’”).

67. PA. STAT. ANN. tit. 43, § 206a-r (West 2004).

68. Section 206b(a) provides:

Under prevailing economic conditions developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor or their agents in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

Id. § 206b(a). The author is unaware of any attempt to date to argue that the Pennsylvania equivalent of the Norris-LaGuardia Act provides substantive protections for agricultural laborers exempt from protections under the Pennsylvania Labor Relations Act. However, *Rauda v. Oregon Roses, Inc.*, 935 P.2d 469, 473-74 (Or. Ct. App. 1997), *vacated by* 986 P.2d 1157 (Or. 1999), would support an argument that it does.

69. Employees are defined under the Pennsylvania Labor Anti-Injunction Act as follows:

Pennsylvania Labor Relations Act (PLRA), which was modeled on the federal Wagner Act,⁷⁰ does exempt agricultural laborers.⁷¹ Similarly, most of the other states that adopted state labor relations acts modeled after the Wagner Act include exclusions in the acts for agricultural workers.⁷² Exemptions for agricultural workers in state acts are not necessarily the same as the exemption in the NLRA.⁷³ Significantly, the Pennsylvania Supreme Court has upheld the Pennsylvania Labor Relations Board's (PLRB) treatment of mushroom and greenhouse workers as non-agricultural workers protected under the PLRA.⁷⁴

Several state constitutions confer substantive protections on workers generally, without an exclusion of agricultural workers.⁷⁵ In New Jersey, for example, a state constitutional provision providing that "[p]ersons in private employment shall have the right to organize and bargain collectively"⁷⁶ was held to be a sufficient basis for an equity court to

The term "employee" is declared to include all natural persons who perform services for other persons, and shall not be limited to the employees of a particular employer, and shall include any individual who has ceased work as a consequence of, or in connection with, any matter involved in a labor dispute.

Id. § 206c(h).

70. Pub. L. No. 198, 49 Stat. 449 (1935), codified as amended at 29 U.S.C. §§ 151-169 (2000).

71. Pennsylvania Labor Relations Act, PA. STAT. ANN. tit. 43, § 211.3(d) (West 2004) (defining employee such that it does "not include any individual employed as an agricultural laborer").

72. COLO. REV. STAT. ANN. § 8-1-101(7)(b) (West 2004); CONN. GEN. STAT. ANN. § 31-101(6) (West 2003); MICH. COMP. LAWS ANN. § 423.2(e) (West 2004); MINN. STAT. ANN. § 179.01, subd. 4 (West 2003); N.D. CENT. CODE § 34-12-01(2) (2003); R.I. GEN. LAWS § 28-7-3(3)(ii) (2003); UTAH CODE ANN. § 34-20-2(4)(b) (2003); VT. STAT. ANN. tit. 21, § 1502(6)(A) (2003); W. VA. CODE § 21-1A-2 (2004).

73. *See, e.g.,* Willmar Poultry Co. v. Jones, 430 F. Supp 573, 577-78 (D. Minn. 1977) (holding that the NLRA did not preclude state law from excluding workers at a turkey hatchery from the definition of "agricultural laborer" under the Minnesota Labor Relations Act).

74. *Vlasic Farms Inc. v. Pa. Labor Relations Bd.*, 777 A.2d 80, 83 (Pa. 2001). *See also* *Blue Mt. Mushroom Co. v. Pa. Labor Relations Bd.*, 735 A.2d 742, 750 (Pa. Commw. Ct. 1999) (holding that mushroom production workers are not agricultural laborers under the PLRA).

Pennsylvania produces nearly half the mushrooms in the country and employs thousands of workers in its mushroom industry in Southeastern Pennsylvania. In *In re Grocery Store Products. Co.*, (PLRB Case No. 22 (1956)), the PLRB first held that mushroom workers were not agricultural laborers within the meaning of the PLRA. The PLRB has consistently asserted jurisdiction over mushroom workers since 1956. *See* *Vlasic Farms Inc. v. Pa. Labor Relations Bd.*, 734 A.2d 487 (Pa. Commw. Ct. 1999).

75. *See* Goldberg & Williams, *supra* note 21, at 730-32 (listing five states which guarantee the right to organize in their constitutions); *see also* LeRoy & Hendricks, *supra* note 8, at 517-536 (providing an overview of state laws that regulate collective bargaining rights for agricultural employees).

76. N.J. CONST. art. 1, para. 19.

fashion remedies, including procedures for the determination of collective bargaining representatives.⁷⁷ Missouri, like New Jersey, also has a state constitutional provision without any subsequent enacting legislation.⁷⁸ Hawaii⁷⁹ and Puerto Rico⁸⁰-by state constitution and by statute-are among jurisdictions that recognize agricultural workers' organizing rights together with the rights of other workers without distinction.

Some "right-to-work" states have constitutional or statutory provisions, or both, which could provide a basis for the protection of agricultural workers' organizing rights.⁸¹ Florida's Constitution, for example, states that: "The right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization. The right of employees, by and through a labor organization, to bargain collectively shall not be denied or abridged."⁸² A Florida statute reinforces this constitutional right by providing that:

77. See *Comite Organizador de Trabajadores Agricolas (COTA) v. Molinelli*, 552 A.2d 1003, 1007-08 (N.J. 1989) (discussing the court's ability to fashion remedies under article 1, paragraph 19, by using NLRA adjudications as guidelines).

78. See MO. CONST. art. I, § 29 ("[E]mployees shall have the right to organize and to bargain collectively through representatives of their own choosing.").

79. See HAW. CONST. art. XIII, § 1 ("Persons in private employment shall have the right to organize for the purpose of collective bargaining."); HAW. REV. STAT. § 377-1(3) (2003) ("'Employee' includes any person. . . working for another for hire in the State. . .").

80. See P.R. CONST. art. II, §§ 17-18 (drawing no distinction between the types of employees granted the right to organize); 29 P.R. LAWS ANN. § 62 (2001) (declaring that collective bargaining rights for all employees is an important public policy goal).

81. "Right-to-work" laws prohibit union-security arrangements that would otherwise be valid under the NLRA. II *THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 2008-09* (Patrick Hardin et al. eds., 4d ed. 2001). Under these laws, employees are given "the option of employment without having to join or contribute financial support to any union, including a union that has been selected as the employees' lawful collective bargaining representative." *Id.* at 2008. As of 1998, a total of twenty-one states had statutes or constitutional provisions which, in varying degrees, prohibited right-to-work laws. *Id.* at 2008-09. States with "right-to-work" laws include Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. See *id.* at 2008 n.249 (listing states and their provisions).

See also Okl. Const. Art. XXIII, § 1A (providing that no employer shall make it a condition of employment to join or refrain from joining a union). Oklahoma, however, now only has power to enforce limited provisions of this article. See *Local 514 Transport Workers Union of America v. Keating*, 358 F.3d 743, 745 (10th Cir. 2004) (holding that sections 1A(b)(5) and 1A(c) of Okl. Const. Art. XXIII, which are preempted by federal law, are severable from the remaining portions of the article).

The language of each individual state's statute or constitutional provision is critical to its interpretation. For example, Nevada's right-to-work law provides no protection for workers discriminated against because they joined a union. NEV. REV. STAT. § 613.230-613.300 (2004).

82. FLA. CONST. art. I, § 6.

Employees shall have the right to self-organization, to form, join, or assist labor unions or labor organizations or to refrain from such activity, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.⁸³

Similarly, Arkansas, in its constitution⁸⁴ and by statute,⁸⁵ protects the right to work in terms which may be utilized to protect agricultural workers. Wyoming has provisions under its constitution⁸⁶ and its statutes⁸⁷ which protect workers' rights, and do not distinguish between agricultural and non-agricultural workers. Although its language is far more limited, the Oklahoma Constitution provides at least some constitutional protection for union membership.⁸⁸

Other states with statutory "right-to-work" provisions include

83. FLA. STAT. ANN. § 447.03 (West 2004).

84. ARK. CONST. amend. 34, § 1 provides that:

No person shall be denied employment because of membership in or affiliation with or resignation from a labor union, or because of refusal to join or affiliate with a labor union; nor shall any corporation or individual or association of any kind enter into any contract, written or oral, to exclude from employment members of a labor union or persons who refuse to join a labor union, or because of resignation from a labor union; nor shall any person against his will be compelled to pay dues to any labor organization as a prerequisite to or condition of employment.

85. ARK. CODE. ANN. § 11-3-301-11-3-304 (Michie 2003).

86. *See* WYO. CONST. art. 1, § 22 ("The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service and to promote the industrial welfare of the state.")

87. WYO. STAT. ANN. § 27-7-101 (Michie 1977) provides that:

It is hereby declared to be the policy of the state of Wyoming that workers have the right to organize for the purpose of protecting the freedom of labor, and of bargaining collectively with employers of labor for acceptable terms and conditions of employment, and that in the exercise of the aforesaid rights, workers should be free from the interference, restraint or coercion of employers of labor, or their agents in any concerted activities for their mutual aid or protection.

88. *See* OKLA. CONST. art. XXIII, § 1A(B)(1) ("No person shall be required, as a condition of employment or continuation of employment, to . . . [r]esign or refrain from voluntary membership in, voluntary affiliation with, or voluntary financial support of a labor organization."). In *Local 514 Transport Workers Union of America v. Keating*, 2003 OK 110, 83 P.3d 835, 839 (2003) the Oklahoma Supreme Court noted: ". . . the Oklahoma right to work law applies to . . . agricultural workers, regardless of its preemption by federal law with respect to certain classes of employees in certain situations."

language in their laws which may protect agricultural workers from discrimination for union activities. These states include Georgia,⁸⁹ North Carolina,⁹⁰ South Carolina,⁹¹ Texas,⁹² and Virginia.⁹³ Some other jurisdictions, including New York, do not exclude agricultural workers from state constitutional protections,⁹⁴ but have excluded them from implementing legislation.⁹⁵

A few states, most notably California,⁹⁶ have adopted laws to regulate the labor rights of agricultural workers.⁹⁷ One of the most recent states to

89. See GA. CODE ANN. § 34-6-21 (1998) (“No individual shall be required as a condition of employment or continuance of employment to be or remain a member or an affiliate of a labor organization or to resign from or to refrain from membership in or affiliation with a labor organization.”). See also GA. CODE ANN. § 34-6-6 (1998) providing:

It shall be unlawful for any person, acting alone or in concert with one or more other persons, to compel or attempt to compel any person to join or refrain from joining any labor organization or to strike or refrain from striking against his will by any threatened or actual interference with his person, immediate family, or physical property or by any threatened or actual interference with the pursuit of lawful employment by such person or by his immediate family.

90. N.C. GEN. STAT. § 95-78 (2003) provides:

The right to live includes the right to work. The exercise of the right to work must be protected and maintained free from undue restraints and coercion. It is hereby declared to be the public policy of North Carolina that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization or association.

See also N.C. GEN. STAT. § 95-83 (2003) (outlining recovery of damages by persons denied employment).

91. See S.C. CODE ANN. § 41-7-10 (1962) (“It is hereby declared to be the public policy of this State that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.”).

92. See TEX. LAB. CODE § 101.052 (1993) (“A person may not be denied employment based on membership or nonmembership in a labor union”).

93. See VA. CODE ANN. § 40.1-58 (1950) (“It is hereby declared to be the public policy of Virginia that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization.”).

94. See N.Y. CONST. art. I, § 17 (“Employees shall have the right to organize and to bargain collectively through representatives of their own choosing.”). This provision could arguably protect agricultural workers despite the lack of implementing legislation.

95. See New York State Labor Relations Act, N.Y. LAB. LAW § 701(3)(a) (McKinney 2002) (excluding individuals employed as farm laborers from the definition of “employees” covered by the state Labor Relations Act).

96. See discussion relating to the California Agricultural Labor Relations Act, *supra* note 16 and text accompanying notes 19-20.

97. See LeRoy & Hendricks, *supra* note 8, at 518-29. (discussing state law protections for collective bargaining rights of agricultural workers); see also discussion *supra* notes 59-61 of provisions of the laws of Oregon, Wisconsin, and Washington.

adopt an agricultural worker specific law is Maine.⁹⁸ Unfortunately, at least some of the states outside of California with agricultural worker specific labor laws designed their laws to restrict the rights of agricultural workers.⁹⁹ States with restrictive agricultural specific provisions include Arizona,¹⁰⁰ Kansas,¹⁰¹ Idaho,¹⁰² South Dakota,¹⁰³ and Louisiana.¹⁰⁴

Finally, specific retaliation protections in a number of federal or state statutes may be triggered by retaliation against workers engaged in concerted activity where the issues raised include issues for which there are

98. ME. REV. STAT. ANN. tit. 26, § 1321 (West 1997) provides:

It is declared to be the public policy of this State and it is the purpose of this chapter to promote the improvement of the relationship between agricultural employers and their employees by providing a uniform basis for recognizing the right of agricultural employees to join labor organizations of their own choosing and to be represented by those organizations in collective bargaining for terms and conditions of employment. It is also the public policy of this State and the purpose of this chapter, by encouraging voluntary agreements between agricultural employers, employees and their organizations, to limit industrial strife, promote stability in the farm labor force and improve the economic status of workers and businesses.

See also *id.* § 1323, which provides:

Agricultural employees have the right to self-organize; to form, join or assist labor organizations; to bargain collectively through representatives of their own choosing; and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. Agricultural employees also have the right to refrain from such activities except to the extent that this right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 1324, subsection 1, paragraph B.

ME. REV. STAT. ANN. tit. 26, § 1325 has detailed additional agricultural specific provisions.

99. See LeRoy & Hendricks, *supra* note 8, at 517-37 (discussing instances where the rights of agricultural laborers were restricted by labor laws); see also discussions *supra* notes 59-61 of provisions of the laws of Oregon, Wisconsin, and Washington.

100. ARIZ. REV. STAT. ANN. §§ 23-1381-23-1395 (West 1993). See LeRoy & Hendricks, *supra* note 8, at 524-29 (discussing the policy of Arizona toward agricultural laborers).

101. KAN. STAT. ANN. §44-818 (1993). See LeRoy & Hendricks, *supra* note 8, at 521-24 (discussing how Kansas labor law affects agricultural laborers).

102. Idaho Agricultural Labor Act, IDAHO CODE §§ 22-4101-4103 (Michie 1972).

103. South Dakota has enacted statutes that are specific to agricultural workers and are intended to restrict agricultural organizing activity. S.D. CODIFIED LAWS §§ 60-10-4 to 60-10-7 (Michie 1993).

The South Dakota Constitution, however, provides as to all persons that "[t]he right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization." S.D. CONST. art. VI, § 2.

104. LA. REV. STAT. ANN. § 23:881 (West 2001).

statutory retaliation protections.¹⁰⁵

C. Recognition of Fundamental Labor Rights in International Law

The right of workers to organize collectively is a fundamental human right recognized by the United States as a principle of international law.¹⁰⁶

105. Amongst statutes with retaliation protections for agricultural workers are the Fair Labor Standards Act, 29 U.S.C. §§ 215(a)(3), 216(b) (2000), and the Migrant and Seasonal Agricultural Worker Protection Act, 29 U.S.C. § 1855(a) (2000). General civil rights statutes may also provide retaliation protections.

106. See Brief of Amicus Curiae Labor, Civil Rights and Immigrants' Rights Organizations in the United States at app. C, tbl. 1, In re Request for Advisory Opinion Submitted by the Government of the United Mexican States, Inter-Am. C.H.R. OC-18/03 (Sept. 17, 2003) available at <http://www.nelp.org/docUploads/Brief%20to%20interameric%20court%20.pdf> (listing binding treaty provisions protecting the right to freedom of association to protect labor union interests).

On September 17, 2003 the Interamerican Court of Human Rights issued its Advisory Opinion in OC-18/03, holding:

1. That States have the general obligation to respect and ensure the fundamental rights. To this end, they must take affirmative action, avoid taking measures that limit or infringe a fundamental right, and eliminate measures and practices that restrict or violate a fundamental right.
2. That non-compliance by the State with the general obligation to respect and ensure human rights, owing to any discriminatory treatment, gives rise to international responsibility.
3. That the principle of equality and non-discrimination is fundamental for the safeguard of human rights in both international law and domestic law.
4. That the fundamental principle of equality and non-discrimination forms part of general international law, because it is applicable to all States, regardless of whether or not they are a party to a specific international treaty. At the current stage of the development of international law, the fundamental principle of equality and non-discrimination has entered the domain of *jus cogens*.
5. That the fundamental principle of equality and non-discrimination, which is of a peremptory nature, entails obligations *erga omnes* of protection that bind all States and generate effects with regard to third parties, including individuals.
6. That the general obligation to respect and guarantee human rights binds States, regardless of any circumstance or consideration, including the migratory status of a person.
7. That the right to due process of law must be recognized as one of the minimum guarantees that should be offered to any migrant, irrespective of his migratory status. The broad scope of the preservation of due process encompasses all matters and all persons, without any discrimination.
8. That the migratory status of a person cannot constitute a justification to

Among the treaties protecting collective organization rights are:

- American Declaration of the Rights and Duties of Man, Article XXII;¹⁰⁷
- American Convention on Human Rights, Article 16.1-16.2;¹⁰⁸ Protocol of Amendment to the Charter of the Organization of American States (OAS), Article 43(c), (g);¹⁰⁹

deprive him of the enjoyment and exercise of human rights, including those of a labor-related nature. When assuming an employment relationship, the migrant acquires rights that must be recognized and ensured because he is an employee, irrespective of his regular or irregular status in the State where he is employed[.] These rights are a result of the employment relationship.

9. That the State has the obligation to respect and guarantee the labor human rights of all workers, irrespective of their status as nationals or aliens, and not to tolerate situations of discrimination that are harmful to the latter in the employment relationships established between private individuals (employer-worker). The State must not allow private employers to violate the rights of workers, or the contractual relationship to violate minimum international standards.

10. That workers, being possessors of labor rights, must have all the appropriate means to exercise them. Undocumented migrant workers possess the same labor rights as other workers in the State where they are employed, and the latter must take the necessary measures to ensure that this is recognized and complied with in practice.

11. That States may not subordinate or condition observance of the principle of equality before the law and non-discrimination to achieving their public policy goals, whatever these may be, including those of a migratory character.

Inter-Am. C.H.R. Advisory Opinion OC-18/03 (Sept. 17, 2003), *available at* http://www.corteidh.or.cr/serie_a_ing/index.html.

107. American Declaration of the Rights and Duties of Man, May 2, 1948, art. 22, OAS Doc. OEA/Ser. L/V/II Doc. 6, available in 9 I.L.M. 673.

108. American Convention on Human Rights, Nov. 22, 1969, art. 16.1-16.2, 1144 U.N.T.S. 123 (entered into force July 18, 1978).

109. *Charter of the Organization of American States*. Apr. 30, 1948, arts. 45(c) and 45(g), 2 U.S.T 2394, 2422, 119 U.N.T.S. 3. Article 45(c) provides that:

Employers and workers, *both rural and urban*, have the right to associate themselves freely for the defense and promotion of their interests, including the right to collective bargaining and the workers' right to strike, and recognition of the juridical personality of associations and the protection of their freedom and independence, all in accordance with applicable laws. . . .

Id.

- International Covenant on Civil and Political Rights, Article 22;¹¹⁰
- International Covenant on Economic, Social and Cultural Rights, Article 8;¹¹¹
- International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, Article 2,¹¹²

110. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 22, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

111. International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, art. 8, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976). Article 8 provides that:

(a) The right of everyone to form trade unions and join the trade union of his choice, subject only to the rules of the organization concerned, for the promotion and protection of his economic and social interests. No restrictions may be placed on the exercise of this right other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(b) The right of trade unions to establish national federations or confederations and the right of the latter to form or join international trade-union organizations;

(c) The right of trade unions to function freely subject to no limitations other than those prescribed by law and which are necessary in a democratic society in the interests of national security or public order or for the protection of the rights and freedoms of others;

(d) The right to strike, provided that it is exercised in conformity with the laws of the particular country.

Id., available at http://www.unhchr.ch/html/menu3/b/a_ceschr.htm.

112. ILO Declaration on Fundamental Principles and Rights at Work, June 18, 1998, art. 2, 37 I.L.M. 1233.

The ILO has identified four “core” worker rights that are internationally recognized as fundamental human rights. These four fundamental rights are: “(a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; and (d) the elimination of discrimination in respect of employment and occupation.” *Id.* at 1238. The four fundamental worker rights are supported by eight ILO conventions. These conventions include, for example, ILO Convention Concerning Discrimination in Respect of Employment and Occupation (No. 111), June 25, 1958, 362 U.N.T.S. 31 (entered into force June 15, 1960); ILO Convention Concerning Freedom of Association and Protection of the Right to Organize (No. 87), July 9, 1948, 68 U.N.T.S. 16 (entered into force July 4, 1950); and ILO Convention Concerning the Application of the Principles of the Right to Organize and to Bargain Collectively (No. 98), July 1, 1949, 96 U.N.T.S. 257 (entered into force July 18, 1951).

See ILO C87, Freedom of Association and Protection of the Right to Organise Convention, art. 2, (1948), available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their

- North American Agreement on Labor Cooperation, Articles 2 and 4;¹¹³ and
- Universal Declaration of Human Rights, Article 23.4;¹¹⁴

While the enforceability of these international law provisions is beyond the scope of this article, it is important to recognize that the rights of agricultural workers are protected under international law.¹¹⁵

IV. TREATMENT OF AGRICULTURAL WORKERS UNDER THE NLRA

The National Labor Relations Act, since its inception as the Wagner Act, has excluded from protection persons employed in “agricultural labor.”¹¹⁶ Although this definition has been a consistent element of the NLRA since its inception, it has been construed to exclude more persons as agricultural laborers since 1946 than had been initially treated as agricultural laborers by the NLRB.¹¹⁷

own choosing without previous authorisation.”); ILO C98, Right to Organize and Collective Bargaining Convention, art. 1.1, (1949), available at <http://www.ilo.org/ilolex/english/convdisp1.htm> (“Workers shall enjoy adequate protection against acts of anti-union discrimination in respect of their employment.”).

Without addressing the binding force of the Declaration of Fundamental Principles and Rights at Work, the ILO, Committee On Freedom Of Association, in Case No. 2227, on November 20, 2003 found the U.S. Supreme Court decision in *Hoffman Plastic Compounds v. NLRB*, 535 U.S. 137 (2002), to be inconsistent with international law. See copy of decision at http://friendsfw.org/international/ILO_COFA_Hoffman.pdf.

113. North American Agreement on Labor Cooperation, Sept. 13, 1993, U.S.-Can.-Mex., arts. 2, 4, 32 I.L.M. 1499.

114. North American Agreement on Labor Cooperation, G.A. Res. 217(111)(A), U.N. GAOR, U.N. Doc. A/810 (1948).

115. For an excellent summary of international law protections for agricultural workers, see the introductory summary and section III of HUMAN RIGHTS WATCH, UNFAIR ADVANTAGE: WORKERS’ FREEDOM OF ASSOCIATION IN THE UNITED STATES UNDER INTERNATIONAL HUMAN RIGHTS STANDARDS (2000), available at <http://www.hrw.org/report/s/2000/uslabor/>.

An interesting issue to explore in a state with a broad public policy approach toward tortious wrongful discharge claims would be whether any international law agreements could provide a public policy basis for challenging a discharge.

116. See NLRA, 29 U.S.C. § 152(2) (excluding “agricultural laborer” from the NLRA’s definition of “employee”); Wagner Act, ch. 372, § 2(3), 49 Stat. 450 (1935) (current version at 29 U.S.C. § 152) (excluding “agricultural laborer” from the Wagner Act’s definition of “employee”).

117. This earlier, more limited view by the NLRB of what constituted an agricultural laborer is relevant both to alternative interpretations of similar language in state laws and to the possibility that Congress may free the NLRB of the annual appropriation rider requiring it to use the FLSA definition of agriculture. See discussion *supra* Part II. *z*

A. *Historical Basis for Exclusion of Agricultural Workers from the NLRA and other New Deal Legislation*

Considerable legal scholarship has been devoted to the efforts to plumb the legislative history of the 1935 Wagner Act and other contemporaneous New Deal legislation, which included exemptions for “agricultural” workers.¹¹⁸

The first New Deal legislation to include protections for the right to organize was contained in the 1933 National Industrial Recovery Act¹¹⁹ (NIRA). The NIRA was subsequently declared unconstitutional in 1935 by the United States Supreme Court in *Schechter Poultry Corp. v. United States*.¹²⁰ Notably, the NIRA had no statutory exclusion of agricultural laborers.¹²¹

Senator Wagner’s original bill for a National Labor Relations Act was introduced in 1934¹²² and included no exclusion of agricultural labor.¹²³ In the legislative hearings on this proposed bill in the Senate and House committees, agricultural labor was hardly discussed.¹²⁴ Despite the absence

118. See, e.g., LINDER, *supra* note 18, at 126-75 (discussing how the exemptions of agricultural workers from New Deal legislation continues to negatively impact these workers); Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 CAL. L. REV. 1939, 1951-56 (1966) (discussing the history of the agricultural worker exclusion); Maurice Jourdan, Note, *The Constitutionality of the NLRA Farm Labor Exemption*, 19 HASTINGS L.J. 384, 384-86 (1968) (examining the exemptions for “agricultural workers”).

119. National Industrial Recovery Act of 1933, ch. 90, 48 Stat. 195 (1933) (repealed 1966).

120. 295 U.S. 495, 541-42 (1935).

121. See Morris, *supra* note 118, at 1945-48 (describing the NIRA).

122. S. 2926, 73d Cong. (1934); H.R. 8423, 73d Cong. (2d Sess. 1934).

123. See Morris, *supra* note 118, at 1951-52 (explaining that Senator Wagner’s original bill would have applied to farm workers).

124. In hearings before the Committee on Education and Labor in the Senate on March 29, 1934, the only discussion of employers of agricultural laborers focused entirely on the context of small farm employers’ ability to function under the Act. For example, Arthur F. Thompson, secretary and manager of the Manufacturers Association of Racine, Wisconsin, testified that:

[T]he measure is extended to every farmer in the State of Wisconsin who has a hired man or any domestic help, and he is subject to all the drastic provisions and penalties of the act. I can well sense the difficulty which farmers will have in understanding the purpose of this act. I appreciate, of course, that the act ostensibly is based upon principles of interstate commerce but, if constitutional at all, it may well be extended to a farmer growing crops with the ultimate view of disposing of the same in an interstate transaction.

Hearings on S.2926 Before the Committee on Education and Labor, 73d Cong. 967 (1934) (statement of A. F. Thompson).

Similarly, Fred Brenckman, *The National Grange*, wrote a letter brief addressing his concerns about inclusion of farm labor. He asserted that farmers only grossed \$827 per

of any explanation, two months later the Senate Committee on Education and Labor reported out the bill with an exclusion from the definition of employee of "any individual employed as an agricultural laborer."¹²⁵ No definition of "agricultural laborer" was contained within that bill. The seventy-third Congress did not act further on Senator Wagner's bill.

In 1935, Senator Wagner reintroduced his bill.¹²⁶ The Senate Report mentioned that agricultural laborers, domestic servants, and persons employed by a parent or a spouse had been excluded for "administrative reasons."¹²⁷

The minority report of the House Committee on Labor included an impassioned plea for the inclusion of farm labor.¹²⁸ The author of the minority report, Representative Vito Marcantonio introduced an amendment to the Wagner Act on the floor of the House of Representatives to strike the exemption for agricultural workers.¹²⁹ The articulated opposition to this proposed amendment focused on the small family farmer.¹³⁰

farm. He added:

In light of these facts, it would manifestly be absurd to place hired farm labor in the same category with the industrial labor, and to give the proposed national labor board jurisdiction over the farmer's hired help.

If farm labor is poorly paid in the United States today, then it can be said with emphasis that the farmer and his family are still more poorly paid. After we have restored the purchasing power of the farmer and converted agriculture from a losing to a gainful venture, it will be in plenty of time for the Government to talk about regulating the conditions of farm labor.

Hearings on S.2926 Before the Committee on Education and Labor, 73d Cong. 1000 (1934) (brief of Fred Brenckman, The National Grange).

But cf. Morris, supra note 118, at 1953 n.66 (discussing how some testimony focused on the urgent need for farm worker protections under the Wagner Act).

125. *See S. REP. NO. 1184, at 1 (1934) (reporting that as drafted "the bill does not relate to employment . . . as an agricultural laborer); see also, Morris, supra note 118, at 1952-53 (explaining the lack of much discussion on the farm worker exclusion just prior to when the bill was reported out).*

126. *S. 1958, 74th Cong. (1935). See also H.R. 6288, 74th Cong. (1935).*

127. *Morris, supra note 118, at 1953.*

128. *Id. at 1953-54. See, e.g., S. REP. NO. 969, at 27-28 to accompany H.R. 7978; S. REP. NO. 972 to accompany S.1958; S. REP. NO. 1147 to accompany S.1958.*

129. *See 79 CONG. REC. H9720 (1935) (statement of Rep. Marcantonio) (presenting his arguments supporting the adoption of his proposed amendment).*

130. In voicing his opposition to the proposed amendment, Representative Boileau stated:

I oppose this amendment most emphatically . . . I grant there may be some sections of the country where it would be desirable to permit the organization of share-croppers or tenant farmers or other types of agricultural labor, but in the vast sections of the Middle West, especially in those States where the farms are

The Wagner Act as finally enacted contained no definition of an “agricultural laborer.”¹³¹ The Social Security Act as originally enacted in the seventy-fourth Congress similarly excluded “agricultural labor” without defining the term.¹³² Likewise, as originally introduced on May 24, 1937, the Fair Labor Standards Act contained no definition of the agricultural laborers excluded from the Act’s protections. The FLSA merely provided for the term “agricultural laborer” to be defined by the Fair Labor Standards Board, which was proposed to administer the FLSA.¹³³

B. Initial NLRB Interpretation of the Wagner Act Agricultural Exemption

It is important to review the NLRB’s early interpretation and application of legislative intent concerning the scope of the 1935 Wagner Act exclusion of “agricultural laborers.” The Wagner Act’s exclusion of agricultural laborers was not otherwise explicitly defined either in the Act or in its legislative history. The NLRB, which did not provide statutory guidance as to the meaning of the term “agricultural laborer” under the NLRA until 1946,¹³⁴ was required to interpret and apply the legislative

smaller and more or less of a family affair, where only the family is employed on the farm except with occasional employment of others, it would be very unfortunate to permit the organization of casual farm employees. In some States of the Union, especially in the Middle West, the farmers seldom employ more than one or two employees, and then for only seasonal employment. I do not believe that it is advisable to bring them within the scope of the bill.

79 CONG. REC. H9721 (1935) (statement of Rep. Boileau).

131. Wagner Act, ch. 372, § 2(3), 49 Stat. 450 (1935) (current version at 29 U.S.C. § 152).

132. Social Security Act of 1935, 49 Stat. 625 (1935); Morris, *supra* note 118, at 1956 n.76. Identical regulations promulgated at the time by the United States Treasury Department, the Bureau of Internal Revenue, and the Social Security Board included no reference to labor in “horticultural” specialties as agricultural labor. “The term . . . includes all services performed—(a) By an employee on a farm, in connection with the cultivation of the soil, the raising and harvesting of crops, or the raising, feeding or management of livestock, bees, and poultry . . .” 1 Fed. Reg. 4-5 (1936) (Treasury Department); 1 Fed. Reg. 1767 (1936) (Internal Revenue Service); 2 Fed. Reg. 1278 (1937) (Social Security Board). *See also* Morris, *supra* note 118, at 1958 n.84.

133. S. 2475, 75th Cong. (1937). H.R. 2700, 75th Cong. (1937). *See* John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROB. 464, 474, 483-87 (1939) (explaining the classes of exemptions in the original bill); Morris, *supra* note 118, at 1959 n.86 (providing the language of the original bill).

The current definition of agriculture in the FLSA at § 3(f), 29 U.S.C. § 213(f), which includes the harvesting of “horticultural commodities,” was not enacted until June 25, 1938. *See* 52 Stat. 1060, 1067 (1938); Forsythe, *supra* at 474, 483-87.

134. As will be discussed more fully below, beginning on July 26, 1946, with the passage of the National Labor Relations Board Appropriation Act of 1947, 60 Stat. 698, Congress included in the Board’s annual appropriation act a proviso directing the Board to apply the definition of “agriculture” found in section 3(f) of the Fair Labor Standards Act,

intent of the 1935 United States Congress, even though it had exempted “agricultural laborers” from the protections of the NLRA.¹³⁵ Federal courts routinely defer to the interpretations of administrative agencies, especially in the initial implementation of the statutory language.¹³⁶

In 1937, the United States Supreme Court upheld the constitutionality of the National Labor Relations Act of 1935.¹³⁷ It was not until after this

29 U.S.C. §203(f), in construing the term “agricultural laborer.” See *Bayside Enters. v. NLRB*, 429 U.S. 298, 300 & n.6 (1977) (“Annually since 1946, Congress, in riders to the Appropriations Acts for the Board, has tied the definition of ‘agricultural laborer’ in § 2(3) of the NLRA to § 3(f) of the FLSA.”).

135. As early as 1939, the food processing industry in particular sought to introduce amendments to the NLRA to define agricultural labor “broadly enough to cover practically every industry allied to agriculture.” Morris, *supra* note 118, at 1964. Hearings conducted on legislative proposals during 1939 allowed such interests an opportunity to articulate rationales for broadened exemptions from the NLRA. See Morris, *supra* note 118, at 1964-74 (providing a discussion on the hearings).

Agricultural industry spokespersons attempted to articulate an idyllic view of small farm agricultural life in which harmony between the small farmer and his employees made labor organizing protections unnecessary. For example, Ivan McDaniel stated:

These employees live in small communities, most of them are housewives, *they work portions of the year* The workers and the farmers are thrown into daily close contact with one another, in many cases they eat at a common table, their children attend the same schools, they bow down together in religious worship; in other words, there is that unity of contact between the farm labor even in these packing houses, and the farmers, that you do not find in industrial centers. . . .

The mechanized theories of industry do not fit in . . . agriculture, the rigidity of operations does not fit. Agricultural labor is seasonal and widely scattered and closely connected with the family of the farmers. Most of them are daughters or sons or cousins or relatives of the farmers.

. . . The need for collective bargaining does not exist where 1 employer has to deal with only 1 or 2 employees. . . . Where a few persons are employed on a farm or in a packing shed . . . there is very little likelihood of any labor dispute arising which needs collective bargaining as means of settlement.

Hearings on S. 1550 Before the Committee on Education and Labor, 76th Cong. 3638-39 (1st Sess. 1939) (statement of Ivan McDaniel) (emphasis added).

Agricultural industry spokespersons at the 1939 hearings heavily emphasized that coverage under the NLRA would impose unbearable hardships on farmers because of the perishable nature of agricultural commodities, the consequent need for uninterrupted harvesting and preparation for market, and the lack of control over weather, production, prices, and markets. Morris, *supra* note 118, at 1970-72.

136. See *Udall v. Tallman*, 380 U.S. 1, 16 (1965) (holding that deference to the interpretation of an administrative agency is important). Specifically, the *Udall* Court held: “Particularly . . . when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.” *Id.* (internal quotes omitted).

137. *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 49 (1937).

decision that the NLRB confronted its first cases about the definition of an “agricultural laborer” under the NLRA.¹³⁸

In 1939, the NLRB rejected an attempt to apply exemptions under the FLSA,¹³⁹ which apply to individuals “employed within the area of production” in the packing of agricultural commodities, to exempt packinghouse operations laborers from the NLRA as agricultural laborers.¹⁴⁰

The first NLRB decision to address the application of the Wagner Act exclusion of “agricultural laborers” to laborers working in cultivation in greenhouses was *Park Floral Co.*¹⁴¹ The NLRB, in applying the term “agricultural laborer” as used in the Act, held:

We have had occasion in several cases to interpret the term “agricultural laborer” as used in the Act. What we have said may be epitomized, as follows: An agricultural laborer, within the meaning of Section 2(3), is a person employed by the owner or a tenant of a farm on which products in their raw or natural state are produced (1) to perform services on such farm in connection with the cultivation of the soil, the harvesting of crops, the nursing, feeding, or management of livestock, bees, and poultry, or other ordinary farming operations; or (2) to perform services in connection with the processing of the products produced, or the packing, packaging, transportation or marketing of such product in their raw or natural, or processed state, as an incident to ordinary farming operations, as distinguished from manufacturing or commercial operations.

Under this construction of the statute, *persons employed to*

138. Morris, *supra* note 118, at 1957. An overwhelming percentage of the early NLRB cases defining agriculture arose in the context of arguments by packing and processing operations that their employees were exempt from the NLRA as agricultural laborers. *Id.* at 1957-63.

139. See 29 U.S.C. § 213 (stating exemptions under the FLSA).

140. N. Whittier Heights Citrus Ass'n, 10 N.L.R.B. 1269, 1284 (1939), *enforced*, 109 F.2d 76, 83 (9th Cir. 1940).

In enforcing the *North Whittier* decision, the Ninth Circuit attempted to harmonize the exclusion of agricultural laborers with the exclusion of persons employed by a parent or spouse. *North Whittier*, 109 F. 2d at 80. The court noted that parents and spouses were excluded “because in this classification there never would be a great number suffering under the difficulty of negotiating with the actual employer and there would be no need for collective bargaining and conditions leading to strikes would not obtain.” *Id.* The court found the common denominator between this exclusion and the exclusion of agricultural and domestic workers applied only if the exclusion were “not enlarged beyond the usual idea the term suggests.” *Id.* The court noted: “When every detail of farming from plowing to delivering the produce to the consumer was done by the farmer and his ‘hired man,’ this common denominator was present.” *Id.*

141. 19 N.L.R.B. 403, 413-14 (1940).

*cultivate plants and flowers in commercial greenhouses, to perform other services in connection with the operation of these greenhouses, such as tending to the heating and watering facilities, or to pack, package, transport, or market the floral products grown, are not agricultural laborers. The cultivation in which they engage is not done on a farm, nor are the services which they perform incident to ordinary farming operations. Planting, care, and growing of the plants and flowers have been removed from the farm and from the natural conditions which there obtain, and are carried on under artificial conditions and as a specialized process. Growing is done in soil-filled containers kept in glass-covered, heat-regulated houses. Production is continuous throughout the year and not affected by the change of the seasons. The work in the greenhouses is industrial in nature rather than agricultural in the common understanding of that term. With respect to the services performed in operating the heating and watering facilities, in packing, packaging, transporting, and marketing the products, and in other similar activities, such work is not agricultural in nature, nor is it, in view of what has been stated above, incident to ordinary farming operations.*¹⁴²

In 1940, the NLRB applied its principles concerning greenhouse workers to hold for the first time that mushroom harvesting workers were not considered agricultural laborers under the NLRA.¹⁴³ In *Great Western Mushroom Co.*, the NLRB held:

[T]he growing of mushrooms by the respondent is carried on under artificial conditions more like cultivation in green houses than on a farm. The mushrooms are grown in enclosed houses under controlled conditions of heat and moisture. The crop is not seasonal, but is so regulated by the respondent as to maintain a constant output of mushrooms throughout the year. For these reasons, the growing of mushrooms and the work incidental thereto is not agricultural in nature in the common understanding of the term.¹⁴⁴

142. *Id.* (emphasis added).

143. *Great W. Mushroom Co.*, 27 N.L.R.B. 352, 359 (1940).

144. *Id.* In *Great Western Mushroom Co.*, the NLRB made detailed findings of fact about the nature of the controlled cultivation conditions in the mushroom operation. *Id.* at 358. Among the findings of the NLRB were:

The mushroom houses are artificially heated in the winter and artificially cooled and moistened in the summer, and the air within the houses is kept in constant

Following the *Great Western Mushroom Co.* decision, the NLRB twice affirmed its position that mushroom harvesting and growing laborers were not agricultural workers. In *Knaust Brothers, Inc.*,¹⁴⁵ the NLRB reaffirmed its definition of agricultural laborers from the earlier *Park Floral Co.* decision, holding that mushrooms harvesting workers are industrial rather than agricultural laborers. The NLRB held:

[T]he growing of mushrooms under such conditions is not agricultural in nature as that term is commonly understood. *Mushroom growing, as practiced by the Company, does not depend upon climate, temperature, rainfall, or other conditions which affect the growing of crops under ordinary circumstances. It is, in fact, very similar to the production which goes on in industrial plants under controlled and artificial conditions at the will of the producer.* The Company has cited provisions of the Federal Social Security Act and of the Internal Revenue Code¹⁴⁶ in support of its contention that its employees are agricultural laborers. We cannot consider the definitions contained therein as controlling in this case.¹⁴⁷

In its final decision on mushroom growing before passage of the July 18, 1946 Congressional appropriations rider mandating usage of the FLSA definition of agriculture, the NLRB reaffirmed that “the term ‘agricultural laborer’ as commonly understood refers to a person employed on a farm in the cultivation of the soil, including the harvest of crops.”¹⁴⁸ In *Indiana Mushroom Corp.*, the NLRB again held mushroom growing workers to be industrial workers subject to the NLRA.¹⁴⁹

circulation by the use of electric fans in order to maintain a uniform temperature above all the shelf-beds. Also the beds themselves are watered whenever they become dry. In addition to controlling the conditions under which mushrooms are grown, the respondent so arranges the output of the mushroom houses that mushrooms are picked daily, and the respondent thus obtains a steady and constant supply of mushrooms throughout the entire year.

Id.

145. 36 N.L.R.B. 915, 917-18 (1941).

146. “Section 209(1)(3) of the Federal Social Security Act and Section 1426(h)(3) of the Internal Revenue Code define agricultural labor to include all services ‘performed . . . in connection with the raising or harvesting of mushrooms . . .’” *Id.* at 918 n.3.

147. *Id.* at 917-18 (emphasis added). The NLRB in this case relied upon its prior decisions in *Park Floral Co.*, 19 N.L.R.B. at 403, and *Great Western Mushroom Co.*, 27 N.L.R.B. at 352.

148. *Indiana Mushroom Corp.*, 60 N.L.R.B. 1065, 1068.

149. The factual findings of the NLRB about the growing of mushrooms in *Indiana*

The NLRB decisions viewed greenhouse and mushroom worker operations as markedly distinguishable from the traditional seasonal agricultural operations, involving the outdoor cultivation of the soil. The traditional seasonal agricultural operations were dependent upon uncontrollable weather and production conditions, which the NLRB perceived had been the basis for the exclusion of agricultural workers from the Wagner Act as enacted in 1935.¹⁵⁰

C. NLRB Appropriations Rider of 1946

Since the July 26, 1946 passage of the National Labor Relations Board Appropriation Act for 1947,¹⁵¹ Congress has included in the NLRB's annual appropriation act a proviso directing it to apply the definition of "agriculture" found in section 3(f) of the FLSA¹⁵² in construing the term "agricultural laborer."

In the 1950 *Michigan Mushroom Co.*¹⁵³ decision, the NLRB

Mushroom were:

The growing of mushrooms is a highly specialized and scientific business. The entire process is conducted in sheds and buildings by employees, each of whom is trained to perform a particular operation. The first step is the preparation of a compost from horse manure, straw, and chemicals. This compost is then placed in growing boxes and put in a dark room which is called a growing room. The room is then closed tightly and live steam is turned on in order to sterilize the air and soil and to kill all rodents and bugs. Thereafter, spawn is planted in the growing boxes and from 12 to 21 days after the planting, casing soil is placed in the growing boxes. Approximately 57 days after the growing boxes are filled, the first mushrooms are ready for picking. After these are harvested the holes left by the stems of the extracted mushrooms are filled and more mushrooms continue to grow in the same mushroom beds. Several crops or flushes of mushrooms are thus obtained from one filling, the cycle lasting approximately 90 days from the time the first growing boxes are filled until they are ready for a new filling. The filling of the growing boxes in the various growing rooms is staggered at such intervals that the Company obtains a constant supply of mushrooms throughout the entire year. In order for mushrooms to grow, the temperature in the growing room must be controlled and the growing boxes watered daily. Growing rooms are kept at temperatures between 55 and 65 degrees Fahrenheit. This is done by heating the rooms in the winter and artificially cooling them in the summer.

Id. at 1067.

150. See Morris, *supra* note 118, at 1964-74 (discussing congressional hearings regarding agriculture-related amendments to the NLRA); *North Whittier*, 109 F.2d 76, 81 (holding that while fruit pickers were engaged in agricultural labor, fruit packers were engaged in industry and so were not "agricultural laborers").

151. National Labor Relations Board Appropriation Act for 1947, 60 Stat. 698.

152. 29 U.S.C. § 203(f).

153. 90 N.L.R.B. 774 (1950).

abandoned its coverage of mushroom workers as employees protected by the NLRA because of the Congressional mandate for the NLRB to employ the FLSA definition of agriculture.¹⁵⁴ The FLSA definition provided that “agriculture” includes “the production, cultivation, growing and harvesting of any agricultural or horticultural commodities.”¹⁵⁵ The NLRB concluded that it was thereafter required to respect the United States Department of Labor’s treatment of mushroom harvesting workers under the FLSA as agricultural workers.¹⁵⁶

The Congressional Record of the 1946 floor debates does not reflect any consciousness of the impact on “horticultural” workers in greenhouses and mushroom operations of the adoption of the FLSA definition of agriculture.¹⁵⁷

154. Michigan Mushroom Co., 90 N.L.R.B. at 777.

155. 29 U.S.C. § 203(f).

156. Michigan Mushroom Co., 90 N.L.R.B. at 777.

157. 92 CONG. REC. H6689-94, H8656-62, H8733-47, H9144-51, H9292, H9494, H9514-15 (1946) (debates on H.R. 6739).

California food packing operations sought to reverse the NLRB’s assertion of jurisdiction over food processing operations. *See* N. Whittier Heights Citrus Ass’n, 10 N.L.R.B. 1269, 1284 (holding that fruit packers fell under the NLRB’s jurisdiction), *enforced*, 109 F.2d 76 (9th Cir. 1940).

Representative Elliott of California introduced what became amendment thirty-nine (the Elliott Amendment) to the labor appropriation providing, “no funds shall be used . . . in connection with bargaining units composed in whole or in part of agricultural laborers as defined in the Social Security Act.” 92 CONG. REC. H6689 (1946) (statement of Rep. Elliot). Debate over the next month in the House and Senate over this proposal focused exclusively on its impact on removing coverage from an estimated one million food processing workers who had been covered under the NLRA, but who would not be covered under the Social Security Act definition.

The Senate, with its members arguing passionately in favor of protection of such workers, repeatedly refused to agree to the provision. Finally, on July 19, 1946, (after the annual appropriation for the year ending June 30, 1947 was already overdue) the conference committee agreed to an appropriations rider which referred to the FLSA definition of agriculture instead of the Social Security Act definition. 92 CONG. REC. S9494 (1946).

The Senate agreed after being assured by their representatives on the Conference Committee that, unlike the Elliott Amendment, this definition was a “much narrower definition” and that “one of the members and the counsel of the National Labor Relations Board . . . said that it might require a few minor changes in their present procedure and definition, but that they would be very minor.” 92 CONG. REC. S9514-9515 (1946) (statement of Sen. Ball).

Other floor statements in the Senate indicated an understanding that the proposed language was not intended to adversely effect the rights of covered food processing workers. Renewed attempts in the 80th Congress during consideration of Taft-Hartley amendments to redefine agricultural laborers in order to restrict coverage of food processing workers were unsuccessful. *See* Morris, *supra* note 118, at 1974-76 n.138.

V. CONCLUSION: BOTH STATE AND FEDERAL GOVERNMENTS COULD BETTER PROTECT THE ORGANIZING RIGHTS OF MARGINALIZED "AGRICULTURAL" LABORERS

As agricultural production becomes increasingly similar to industrial production in terms of the demand for labor, the likelihood of spontaneous concerted activities by workers to improve the terms and conditions of their employment is also increasingly likely.

Mushroom and greenhouse industries, which often operate on a year-round basis have more in common with industrial operations than they do with the kinds of idealized small family farm employers who argued for exclusion from NLRA coverage at the time of the passage of the Wagner Act in 1935.¹⁵⁸

158. The record before the Pennsylvania PLRB and the Pennsylvania Supreme Court in *Vlasic Farms Inc. v. Pennsylvania Labor Relations Board*, which held mushroom workers to be protected under the Pennsylvania PLRA, included testimony from Dr. Thomas Juravich who was qualified as "an expert in the field of sociology of work and the labor process." See Supplemental Record for Intervenor at 1157, *Vlasic Farms, Inc. v. Pennsylvania Labor Relations Board*, (Pa. Sup. Ct. 1999)(No. 3252 C.D. 1998).

Dr. Juravich testified that from the sociological perspective, a significant indicator of an industrial rather than an agricultural form of production is the centralized nature of production rather than the decentralized nature of production common to agriculture. *Id.* at 1166. The mushroom production facilities of the employer were referred to as plants and each "double" was assigned a number much like a factory. *Id.* at 1169. Production space was measured in square footage rather than in acres and materials for production are brought to the worker more than the worker to the materials. *Id.* at 1169-70. Each worker is given an assigned work space of limited dimensions in which he may work for a period of hours. *Id.* Each picking worker is expected to perform a limited number of motions in the harvesting of mushrooms and is able to move his tools and picking baskets so as to perform all motions at any point in time on a single horizontal plane. *Id.* at 1170-71. There are many similarities in terms of the centralization of work area between the work of a construction worker such as a brick layer and a mushroom picker.

A further significant indicator of an industrial rather than an agricultural form of production was the development of artificial mushroom varieties which can only be grown indoors in a carefully regulated artificial environment on a very regular production cycle. Agricultural producers may frequently perform research in order to develop specialized agricultural products for greater productivity. The focus in development for commercial mushroom production, however, has not only been on the development of mushroom cultivars and strains which are highly productive, but also on the development of a product which can be produced in a relatively rapid period of time indoors on a year round basis despite adjustments which must be made in the internal environment because of outside environmental conditions. The naturally occurring wild genetic ancestor of this mushroom cannot be grown under the artificial conditions permitting indoor commercial mushroom production. A similar process of development of specialized products suitable for a high division of labor occurred in the shift from craft production to industrial manufacturing where such things as garments or furniture were changed in order to be adaptable to factory type production. The transformation from the harvesting of wild mushrooms to the development of a mushroom for commercial production has followed a similar process.

The jobs involved in mushroom production by the employer appeared to require very

It is the responsibility of the national and state governments to design mechanisms to protect the basic rights of marginalized workers and to act collectively to deal with employers about their terms and conditions of employment.

Encouraging local state experimentation to design mechanisms responsive to the particular needs of workers and employers would more effectively serve the protective rights of such workers. The probable success of local state experimentation would be enhanced if it was accomplished within a national framework that set minimum standards expected to be met in protecting labor rights.

specific skills. This was demonstrated by formal on the job training programs by the employer for job positions, including those of harvesters, and by detailed job descriptions for at least 12 different kinds of jobs. *Id.* at 1174. The existence of jobs requiring specific skills rather than generalized skills is more indicative of an industrial than an agricultural production process. *Id.*

A further indicator of the industrial rather than agricultural nature of the process involved in commercial production of mushrooms is the extent to which the mushroom picker is expected to perform duties which would more typically be those of a food processing employee. *Id.* at 1177-78. The mushroom harvester is not only expected to distinguish between mature and not mature mushrooms as would many agricultural hand harvesters, but he is also expected to sort mushrooms of fresh market quality from those of lower quality. Even more importantly, the mushroom harvester does not use his knife to harvest the mushroom, but instead to cut or process the mushroom to a marketable size product. *Id.* at 1177. Mushroom harvesters for the employer harvested mushrooms which required no further food processing other than weighing and "overwrapping" with plastic. *Id.* at 1231. This food processing similarity includes a concern for cleanliness and sterility in the environment that has more in common with food processing than typical agricultural harvesting. *Id.* at 1176.

The non-seasonal nature of mushroom production and, in particular, both the attempt to stagger production so as to maintain nearly constant production levels and the constant year round work force levels of major mushroom producers such as the employer were significant indicators of an industrial type production rather than an agricultural type production. *Id.* at 1181.

The predictable work expectations of a mushroom worker from day to day and week to week show a greater similarity to an industrial or manufacturing work process than they do to an agricultural work process. *Id.* at 1178. This includes the predictability of such things as permanent employment, assigned daily work schedules, assigned work locations, unimportance of outside weather especially rain, uniform work temperatures, predictable minimum work or picking quotas, predictable work tasks and limited work movements. *Id.*