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Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal

by

Marc Linder

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Marc Linder*

I. Introduction

Farm workers¹ on large farms constitute the only numerically significant group of adult minimum-wage workers wholly excluded from the maximum hours and overtime provision of the Fair Labor Standards Act (FLSA)² for a reason other than the size of the employing firm.³ The exclusion continues although this class of workers is urgently in need of governmental assistance. Farm workers constitute an extraordinarily low paid stratum of the working class. For example, only forty-four percent of farm workers are legally entitled to the federal minimum wage of \$3.35 per hour.⁴ Even among those covered by FLSA minimum wage legislation,⁵ nineteen percent nationally and thirty-four percent in the South were unlawfully paid less than the minimum wage in 1980.⁶ In addition, almost half of all farm workers entitled to the federal minimum-wage worked overtime hours but did not receive overtime pay.⁷ Overtime pay could increase weekly earnings by 13.7 percent.⁸ In extreme but hardly rare cases, some farm workers have worked in excess of

* Attorney, Farm Worker Division, Texas Rural Legal Aid. B.A., University of Chicago, 1966; M.A. 1971, Ph.D. 1973, Princeton University; J.D. 1983, Harvard University. Robert Glover helped write a draft of Appendix A. Nancy Weiss, Larry Zacharias, Michael Perry, and Edward Still, Jr. read and criticized earlier versions of this Article.

1. Unless otherwise designated, "farm workers" means farm wage workers, "farm laborers" includes both farm wage workers and unpaid family members, and "farmers" includes owners, tenants, sharecroppers, and managers.

2. Fair Labor Standards Act of 1938, ch. 676, § 13, 52 Stat. 1060, 1067-68 (codified as amended at 29 U.S.C. § 213 (1982)).

3. See *infra* Appendix B.

4. See Holt, Elterich & Burton, *Coverage and Exemptions of Agricultural Employment Under the Fair Labor Standards Act*, in 4 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 377, 422 (1981) (table 5.5).

5. See 29 U.S.C. §§ 206, 213(a), (c), (g) (1982).

6. See Holt, Elterich & Burton, *supra* note 4, at 424-31 (presenting statistics from 1980). On tobacco farms the non-compliance rate reached 76.4 percent. See *id.*

7. See *id.* at 459, 461 (tables 8.6 and 8.8).

8. See *id.* at 463 (table 8.10). One of the original purposes of the FLSA, however, was to induce employers to hire more employees, thereby reducing the hours of each employee and the overtime premium payable. See, e.g., *Bay Ridge Operating Co. v. Aaron*, 334 U.S. 446, 460 (1948); *Walling v. Youngerman-Reynolds Hardwood Co.*, 325 U.S. 419, 423-24 (1945).

100 hours weekly at the minimum wage.⁹ Furthermore, government policies have ensured that farm workers remain powerless to improve their condition through the market. For example, the federal government, through its immigration and "guest worker" policies, has inundated the agricultural labor market with thousands of impoverished workers from Mexico and the Caribbean.¹⁰ Moreover, local governments have "manipulate[d] the local labor markets in such a way as to guarantee that agricultural employers will have an oversupply of workers who have little choice but to work on farms. Economic development strategies that will disrupt agricultural labor markets are consistently avoided."¹¹

Direct legislative history explaining the FLSA's exclusion of farm workers is virtually nonexistent. By 1938, when the FLSA became law, the exclusion had become routine in New Deal legislation. An examination of the predecessor legislation to FLSA, however, reveals the reason for the exclusion. To enact the social and economic reforms of the New Deal, President Roosevelt and his allies were forced to compromise with southern congressmen. Those congressmen negotiated with Roosevelt to obtain modifications of New Deal legislation that preserved the social and racial plantation system in the South—a system resting on the subjugation of blacks and other minorities. As a result, New Deal legislation, including the FLSA, became infected with unconstitutional racial motivation.¹²

Gradually, most of the discrimination inherent in New Deal programs has been purged. For example, amendments to the FLSA par-

9. Based on farm workers' wage receipts furnished to the author (1983-1984).

10. R. THOMAS, *CITIZENSHIP, GENDER AND WORK* 209-13 (1985).

11. Briggs, *Comments*, in 4 REPORT OF THE MINIMUM WAGE STUDY COMMISSION, *supra* note 4, at 475, 479; see also B. RUNGELING, L. SMITH, V. BRIGGS & J. ADAMS, *EMPLOYMENT, INCOME AND WELFARE IN THE RURAL SOUTH* 243-44 (1977) (arguing that rural communities rarely seek to attract new industry if the industry would upset existing wage structures or cause labor shortages).

12. The one possible exception to this was the exclusion of agricultural employees from the National Labor Relations Act. National Labor Relations Act, ch. 372, § 2(3), 49 Stat. 449, 450 (1935) (codified as amended at 7 U.S.C. § 152(3) (1982)).

Farmers as a class [we]re opposed to any form of labor organization. Attempts of the I.W.W. [Industrial Workers of the World] . . . to organize the migratory harvest lands . . . helped to give farmers a distaste for unionization of farm labor, a sentiment which deepened into hostility because of the tactics of the I.W.W. group in pulling strikes at critical times during the harvest season.

R. WOODBURY, *LIMITS OF COVERAGE OF LABOR IN INDUSTRIES CLOSELY ALLIED TO AGRICULTURE UNDER CODES OF FAIR COMPETITION UNDER NIRA* 4 (Division of Review, Office of Nat'l Recovery Admin., Work Mat'ls No. 45, The Labor Program Under the NIRA, pt. A 1936). I.W.W. organizational efforts, which by the time of the New Deal were more a bad memory than a current threat, were largely directed at white farm workers outside the South. See C. DANIEL, *BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870-1941*, at 81-83 (1981); M. DUBOF-SKY, *WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD* 292-300 (1969); S. JAMIESON, *LABOR UNIONISM IN AMERICAN AGRICULTURE* 59-69, 212-13, 236-37, 398-405 (Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 836, 1945 & photo. reprint 1976).

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tially incorporated farm workers into the minimum wage provision of the Act.¹³ The discrimination survives, however, in the wholesale exclusion of agricultural workers from the maximum hours and overtime provision of the FLSA.

Equal protection attacks against the exclusion have been unsuccessful. Applying the deferential “rational basis” test prescribed by the Supreme Court for economic legislation such as the FLSA, courts have upheld the exclusion.¹⁴ When a claim of racial discrimination forms the basis of the challenge to a statute, however, the courts subject the provisions to much stricter judicial review. Under what has been called “impermissible purpose review,”¹⁵ proof of racially discriminatory motivation or purpose will invalidate a facially neutral statute.

This Article presents proof of the discriminatory purpose behind the exclusion of farm workers from the maximum hours and overtime provisions of the FLSA. Part II of this Article discusses the standards governing impermissible purpose review. Part III presents the evidence of the unconstitutional purpose. Subpart III(A) demonstrates the current disproportionate impact of the exclusion. Subpart III(B) then describes the southern plantation system, which provided the historical and political context for New Deal legislation. A full understanding of the role of discrimination in excluding agricultural labor from the New Deal must begin with a knowledge of the roles played by, and the relationship between, agriculture and racial discrimination. In addition, as Part II demonstrates, the Supreme Court has established history as a fundamental source of evidence for a race-based equal protection claim. Subpart III(C) next analyzes the political realities of the New Deal and the scope of racial discrimination in New Deal programs other than the FLSA, particularly as these programs affected agriculture. The clear discriminatory pattern in all New Deal programs provides important circumstantial evidence that the same pattern existed in the FLSA. Finally, subpart III(D) examines the FLSA itself. Understandably, direct legislative history of a discriminatory purpose in excluding farm workers from the FLSA is sparse. Nevertheless, the primary, if not only, beneficiaries of the exclusion were the large agricultural employers of the South (and of California) who depended upon a cheap supply of minority labor, much

13. Fair Labor Standards Amendments of 1966, Pub. L. 89-601, § 203(a), 80 Stat. 833, 833-34 (1966).

14. See *infra* notes 43-44 and accompanying text.

15. See Note, *Impermissible Purposes and the Equal Protection Clause*, 86 COLUM. L. REV. 1184, 1193-95 (1986) (defining impermissible burden analysis); see also G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, *CONSTITUTIONAL LAW* 518-22 (1986) (reviewing cases in which the Supreme Court applied impermissible purpose review).

as they had depended upon slave labor before 1865. Blacks, Hispanics, and members of other “discrete and insular”¹⁶ racial minorities make up a majority of farm workers affected by the overtime exclusion. Even without direct evidence, this Article presents sufficient circumstantial evidence to prove that this disproportionate impact was no accident, but rather an intended and unconstitutional result.

II. The Legal Context

A. *Constitutional Standards*

Although the equal protection clause of the fourteenth amendment does not directly apply to the federal government, the Supreme Court has long held that general standards of equal protection constitute such a basic part of our traditions that they form an “equal protection component” of the fifth amendment’s due process clause.¹⁷ As a result, the Court’s equal protection doctrine also applies to the federal government’s actions.¹⁸ Under that doctrine, when a statute that is racially neutral on its face is alleged to violate equal protection, the challenger must prove discriminatory *purpose*—that the legislature acted with racial animus in enacting the law.¹⁹

Because a discriminatory purpose is often disguised, courts do not require direct evidence:

Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.

16. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

17. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 93 (1976) (“Equal protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment.”); *Richardson v. Belcher*, 404 U.S. 78, 81 (1971) (holding that a classification contained in social welfare legislation is “perforce consistent with the due process requirements of the Fifth Amendment” if it satisfies fourteenth amendment equal protection analysis); *Bolling v. Sharpe*, 348 U.S. 497, 499 (1954) (holding in a school desegregation case that, although equal protection is a more explicit safeguard, discrimination may be so unjustifiable as to be violative of due process); *see also* L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 16-1, at 992 (1978) (“Moreover, the due process clauses of the fifth and fourteenth amendments have also been held to yield norms of equal treatment indistinguishable from those of the equal protection clause.”).

18. Although the Supreme Court has often applied equal protection standards to cases attacked on fifth amendment due process grounds, the Court has also noted that “the two protections are not always coextensive.” *Hampton v. Mow Sun Wong*, 426 U.S. 88, 100 (1975). In *Mow Sun Wong* the Court recognized that “overriding national interests [may] justify selective federal legislation.” *Id.* *Mow Sun Wong* involved immigration and naturalization issues, an area in which a “paramount federal power” existed that foreclosed a simple extension of fourteenth amendment equal protection analysis to a fifth amendment case. *See also Mathews v. Diaz*, 426 U.S. 67, 84-87 (1976) (noting differences between the constitutional limitations placed on states by the fourteenth amendment and constitutional limitations on federal power under the fifth amendment in imposing restrictions on aliens).

19. *See Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

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It is also not infrequently true that the discriminatory impact . . . may for all practical purposes demonstrate unconstitutionality because in various circumstances the discrimination is very difficult to explain on nonracial grounds.²⁰

Ultimately, the complaining party must prove that racial discrimination, whether or not the sole purpose, was at least a “motivating factor in the decision.”²¹ Although an unconstitutional purpose may be “inferred from the totality of the relevant facts” including disproportionate impact, impact and purpose cannot be neatly separated. Even though the Court subsequently has stated that “impact alone is not determinative,”²² proof of impact remains persuasive, if not always conclusive, proof of purpose. As Justice Stevens noted in a concurrence in *Washington v. Davis*, “the line between discriminatory purpose and discriminatory impact is not nearly as bright, and perhaps not quite as critical, as the reader of the Court’s opinion might assume.”²³

In *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,²⁴ the Court issued what remains its most detailed outline of the kind of evidence available to plaintiffs who bear the burden of proving a racially discriminatory purpose behind official action. The Court identified, “without purporting to be exhaustive,”²⁵ several subjects properly belonging to a “sensitive inquiry into such circumstantial and direct evidence of intent as may be available.”²⁶ This evidence can include “[t]he historical background of the decision . . . particularly if it reveals a series of official actions taken for invidious purposes.”²⁷ General historical facts also would include “the specific sequence of events leading up to the challenged decision.”²⁸ Also, “[t]he legislative or administrative history may be highly relevant, especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.”²⁹ Finally, the Supreme Court has evinced a willingness to accept “the opinions of historians” in a case of racial discrimination

20. *Washington v. Davis*, 426 U.S. 229, 242 (1976).

21. *Id.*; see also *Village of Arlington Heights*, 429 U.S. at 265-66 (stating that racial discrimination is not just another competing consideration; when race was a motivating factor in a governmental decision, judicial intervention is warranted).

22. 429 U.S. at 266.

23. 426 U.S. 229, 254 (Stevens, J., concurring)

24. 429 U.S. 252.

25. *Id.* at 268.

26. *Id.* at 266.

27. *Id.* at 267; see also *Rogers v. Lodge*, 458 U.S. 613, 625 (1982) (“Evidence of historical discrimination is relevant to drawing an inference of purposeful discrimination”); *Keyes v. School Dist. No. 1*, 413 U.S. 189, 207 (1973) (“[P]rior doing of other similar acts . . . is useful as reducing the possibility that the act in question was done with innocent intent.”).

28. 429 U.S. at 267.

29. *Id.* at 268

when the legislation “was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.”³⁰ Post-Reconstruction racial discrimination, however, was not limited to disenfranchisement; nor had it ended by the 1930s. This Article presents evidence that, like the effort to disenfranchise blacks, the exclusion of farm workers from the FLSA was “part of a movement” that swept the New Deal.

B. *The Exclusion in the Courts*

*Doe v. Hodgson*³¹ considered a racial discrimination challenge to the exclusion of farm workers from maximum hours and overtime legislation. For several reasons, however, *Doe* is a flawed decision that should not influence the resolution of the issue.

First, the plaintiffs in *Doe* based their claim of unconstitutional racial discrimination on an argument substantially different from those presented in this Article. They attempted “to establish a ‘pattern or practice’ of systematic exclusion of migrants”³² by attacking not only the exclusion of farm workers from the maximum hours and overtime provision of the FLSA, but from an array of other statutes.³³ The plaintiffs argued that the agricultural labor force *had become* “overwhelmingly black and chicano.”³⁴ The *Doe* plaintiffs, as a result, attacked only the current disproportionate impact of the exclusion. The trial court explicitly stated that it was *not* deciding a case involving charges that the legislation was racially motivated.³⁵ This Article presents precisely the argument the court in *Doe* expressly did not decide: that the exclusion of farm workers was racially motivated.

Second, both the trial and appellate courts in *Doe* considered the summary affirmance by the Supreme Court of *Romero v. Hodgson*³⁶ to be controlling precedent.³⁷ Apart from the dubious precedential value of such summary affirmances,³⁸ the courts’ reading of *Romero* is erroneous. The trial court’s short opinion in *Romero* made no mention of racial discrimination,³⁹ and the Supreme Court never considered or decided the

30. *Hunter v. Underwood*, 471 U.S. 222, 228-29 (1985).

31. 344 F. Supp. 964 (S.D.N.Y. 1972), *aff’d*, 478 F.2d 537 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973).

32. 478 F.2d at 539-40.

33. 344 F. Supp. at 966.

34. *Id.*

35. *See id.* at 968.

36. 403 U.S. 901 (1971), *aff’g* 319 F. Supp. 1201 (N.D. Cal. 1970).

37. *See* 344 F. Supp. at 968; 478 F.2d at 539-40.

38. 478 F.2d at 539 (noting that the Ninth Circuit and various scholars have stated that a summary affirmance by the Supreme Court has little precedential significance).

39. *See* *Romero v. Hodgson*, 319 F. Supp. 1201 (N.D. Cal. 1970), *aff’d*, 403 U.S. 901 (1971).

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issue of direct racial discrimination.⁴⁰ Although the plaintiffs in *Doe* argued this distinction, the trial court dismissed the point by stating: “Actually, the plaintiffs in *Romero* argued repeatedly to the Supreme Court that the exclusion ‘discriminates, albeit inadvertently, against Mexican-Americans.’”⁴¹ Although inadvertent racial discrimination was mentioned in the briefs in *Romero*,⁴² neither inadvertent nor direct racial discrimination was presented to or decided by either the trial court or the Supreme Court.

Finally, both *Romero* and *Doe* applied only the minimum scrutiny rational basis test for equal protection.⁴³ Subsequent Supreme Court decisions make clear, however, that a stricter standard is mandatory when racial discrimination is alleged to have motivated legislation.⁴⁴

For the arguments presented by this Article, neither *Doe* nor *Romero* is controlling or even persuasive precedent. The evidence establishes a fundamentally distinguishing fact: the exclusion of farm workers from the FLSA not only has a current disproportionate impact, but more importantly, it was motivated from the very beginning by racial discrimination. This claim must be evaluated not according to the loose rational basis test, but according to the stricter limits of impermissible purpose as delineated by *Washington v. Davis*⁴⁵ and *Arlington Heights*.⁴⁶

III. Proof of Racial Discrimination

A. *The Current Disparate Racial Impact of the Exclusion of Farm Workers from the Overtime Provision of the FLSA*

The disproportionate impact of the exclusion of farm workers from the FLSA continues in the 1980s just as it existed fifty years ago. In the interim, some farm workers have become entitled to the protection of the minimum wage provision. Agricultural labor, however, remains excluded from the overtime provision. This exclusion perpetuates the New Deal’s unconstitutional discrimination against minorities.

At a minimum, fifty-three percent of all agricultural labor performed by employees that are currently excluded from the maximum hours provision of the FLSA but subject to the minimum wage provision

40. 403 U.S. at 901.

41. *Doe*, 344 F. Supp. at 968.

42. *Id.*

43. See 319 F. Supp. at 1207; 344 F. Supp. at 968.

44. See *Washington v. Davis*, 426 U.S. 229, 241 (1976). Even the Second Circuit in *Doe* expressed reservations about applying such a deferential standard. *Doe*, 478 F.2d at 540.

45. 426 U.S. 229 (1976).

46. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977).

is done by nonwhites—almost exclusively Hispanics and blacks.⁴⁷ In comparison, Hispanics and blacks accounted for only 18.1 percent of the United States population in 1980, and only 14.3 percent of all employed persons sixteen years and older in 1981.⁴⁸

B. *The Southern Plantation System*

To understand the motivations of southern congressmen, it is necessary to understand the southern plantation as a social system—a system

47. See *infra* appendix A. Perfectly accurate and complete data on the disproportionate impact of the agricultural exclusion does not exist because no comprehensive or even representative surveys of agricultural employing units inquiring into the racial characteristics of employees has been made. Only household surveys, two of which are pertinent here, provide data on such personal characteristics.

The Bureau of the Census administers and conducts a monthly survey of labor-force activity and economic status. See S. POLLOCK & W. JACKSON, *THE HIRED FARM WORKING FORCE OF 1981*, at 4 (Economic Research Serv., U.S. Dep't of Agric., Agricultural Economic Report No. 507 (1983)) [hereinafter *HIRED FARM WORKING FORCE*]; BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, TECHNICAL PAPER NO. 40, *THE CURRENT POPULATION SURVEY: DESIGN AND METHODOLOGY* (1978). Among the approximately 58,000 households surveyed in December 1981, the survey identified 1,555 with farm workers. *HIRED FARM WORKING FORCE*, *supra*, at 4. The Department of Agriculture relied on this sample in generating a report. *Id.* at 4, 50. Sample households are interviewed for four consecutive months, skipped for eight months, and finally, included in the sample for the corresponding four months one year after the first set of interviews. Although this sampling frame may be satisfactory for the nation as a whole, it cannot be used to generate accurate information about the farm worker population in individual states or in substate areas.

The decennial Population Census is “[t]he only complete enumeration of the national labor force.” Whitener, *A Statistical Portrait of Hired Farmworkers*, MONTHLY LAB. REV., June 1984, at 49, 52. Unfortunately, the occupational data collected for the census are, as applied to farm workers, subject to significant limitations. For example, because the census questionnaire asks about employment during only one week, it can report inaccurate figures about seasonal employment such as farm labor. *Id.* at 49. Data from the *Hired Farm Working Force* survey reveal that three times as many people worked as hired farm workers at some point in 1981 as in the month of March. Because the data for 1981 presumptively approximate those for 1980, the 1980 Census of Population may have missed “as many as two-thirds of the Nation’s hired farm workers.” *Id.* In particular, the census omitted spring, summer, and fall seasonal workers. Moreover, the general undercount of minorities and aliens, both documented and undocumented, has been repeatedly acknowledged by the Bureau of the Census, see, e.g., *Big-City Mayors Ask Census Change*, N.Y. Times, July 24, 1987, at 15, col. 2 (nat’l ed.), distorts the real racial composition of the farm work force.

Although neither of these surveys provides complete, accurate, and up-to-date data on the racial and ethnic composition of the farm work force, educated estimates can be developed by combining information from establishment surveys and household surveys and by making reasonable adjustments to correct for the deficiencies and limitations of the data collection methods. Estimates derived in part from *Hired Farm Working Force* are augmented by the July 1980 *Farm Labor* survey conducted by the United States Department of Agriculture. Crop Reporting Board, Statistical Reporting Service, U.S. Dep’t of Agric., *FARM LABOR*, May 1985, at 22-23 (tables reporting results of July 1980 survey along with other similar studies from 1980-1985). The Minimum Wage Study Commission was in the midst of an in-depth study of the Fair Labor Standards Act, including the agricultural exemption. The Commission employed the *Farm Labor* survey to help them with their own study and inserted several additional items in the survey for July 1980. See Holt, Elterich & Burton, *supra* note 4, at 377. Consequently, the July 1980 survey is without question the statistically most reliable survey in the *Farm Labor* series in several years.

48. See BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, at 32, 381 (103d ed. 1982) [hereinafter *STATISTICAL ABSTRACT*] (tables 36 & 634).

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threatened by many New Deal reforms. Indeed, it is crucial to view the threats to the system in just those terms: as threats to a *system*. Southern agricultural employers, therefore, were not merely the economic beneficiaries of the exclusion of farm workers from New Deal legislation. Instead, they—and, consequently, their representatives in Congress—could either win the exclusions or suffer the collapse of an entire way of life based on the subjugation of blacks.

1. *The farm worker population.*—Agriculture was largely a southern industry and the South was the only region of the country with a predominantly agricultural economy. In 1930, for example, 53 percent of all persons engaged in agriculture, but only 19 percent of all persons engaged in manufacturing, worked in the South.⁴⁹ Throughout the 1930s, half or more of the nation's farms and farm population were in the South.⁵⁰ And, although agriculture in 1930 accounted for 21.5 percent of the labor force in the United States as a whole, it accounted for a much higher share in the southern states, ranging from 66 percent in Mississippi to 42.8 percent in Georgia.⁵¹ In addition, within the South blacks were much more dependent on agricultural employment than were whites. In the South in 1940, about one-third of all white males, but more than one-half of all black males, were listed by the census as farmers or farm laborers.⁵² Blacks, however, were “almost wholly confined to the Cotton Belt.”⁵³

The unique and defining characteristic of southern agriculture was the dominance of cotton. Cotton farms constituted from two-thirds to five-sixths of all farms in the Cotton Belt states,⁵⁴ and those states grew fifty-five to sixty percent of the world's annual supply of cotton.⁵⁵ Southern farmers depended on cotton and tobacco for two-thirds of their cash income, thus relying as “[n]o other similar area of the world” on the

49. J. FOLSOM & O. BAKER, *A GRAPHIC SUMMARY OF FARM LABOR AND POPULATION* 3 (United States Dep't of Agric., Misc. Pub. No. 265, 1937).

50. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970*, at 458-59 (1975) (defining the South to include the border states of Delaware, Kentucky, Maryland, Oklahoma, and West Virginia).

51. J. FOLSOM & O. BAKER, *supra* note 49, at 4 (table 2). In the North, only the Dakotas exhibited a similar dependence on agriculture. *Id.*

52. *See* [Population: Comparative Occupation Statistics for the United States, 1870 to 1940] BUREAU OF THE CENSUS, U.S. DEP'T. OF COMMERCE, *SIXTEENTH CENSUS OF THE UNITED STATES: 1940*, at 196, 200 (1943) [hereinafter *CENSUS 1940*].

53. J. FOLSOM & O. BAKER, *supra* note 49, at 25.

54. O. BAKER & A. GENUNG, *A GRAPHIC SUMMARY OF FARM CROPS* 5 (United States Dep't of Agric., Misc. Pub. No. 267, 1938) (figs. 4 & 5). The Cotton Belt states are Alabama, Arkansas, Georgia, Louisiana, Mississippi, South Carolina, and Texas.

55. Vance, *Human Factors in the South's Agricultural Readjustment*, 1 *LAW & CONTEMP. PROBS.* 257, 262 (1934).

annual success of a single crop.⁵⁶

Cotton, like the region's other major crops—tobacco, rice, and sugar—was large scale and labor intensive.⁵⁷ In the mid-1930s, for example, the production of one acre of cotton required an average of 88 worker hours compared to 6.1 hours for wheat and 22.5 hours for corn.⁵⁸ Because of the large labor requirements, much of southern agriculture took place on large plantations.⁵⁹ The extraordinary size of the plantation as an institution was captured by a special census study in 1939 that enumerated 12,160 plantations employing 169,208 *families*.⁶⁰ The average plantation employed fourteen “wage hand” and cropper families; fifty-one plantations (fifty of which were located in Mississippi and Arkansas) employed one hundred or more families.⁶¹

Not only was a larger proportion of the population in the South composed of agricultural laborers, compared with other regions, but a much larger portion of that population was black. In 1930, 26.5 percent of all farm workers ten years and older were reported by the census to be Negro or “other races” than white.⁶² In the eleven states of the former Confederacy,⁶³ however, 54.9 percent of this group of workers were non-white.⁶⁴ The black farm workers in these states accounted for 87.4 percent of all black farm workers.⁶⁵

56. U.S. NAT'L EMERGENCY COUNCIL, REPORT ON ECONOMIC CONDITIONS OF THE SOUTH 45 (1938). See generally [Agriculture: Special Cotton Report] CENSUS 1940, *supra* note 52, at XI-XV (statistics indicating the extent of cotton production in the South from 1879 to 1939).

57. See J. FOLSOM & O. BAKER, *supra* note 49, at 4; R. VANCE, HUMAN GEOGRAPHY OF THE SOUTH 197-99, 208-09, 217-19, 221-23 (1932).

58. J. HOPKINS, CHANGING TECHNOLOGY AND EMPLOYMENT IN AGRICULTURE 118, 123, 131 (1973) (tables 40, 41 & 43). The differential between the Mississippi Delta cotton region and the prime northern corn and small grain areas is even greater. See *id.* See generally E. SHAW & J. HOPKINS, TRENDS IN EMPLOYMENT IN AGRICULTURE, 1909-36, at 130-39 (1938).

59. G. MYRDAL, AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY 233-34 (1962).

60. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SPECIAL STUDY, PLANTATIONS: BASED UPON TABULATIONS FROM THE SIXTEENTH CENSUS OF THE UNITED STATES, 1940, at 86 (n.d. [circa 1943]) (table 16). The study defined a plantation as a “continuous tract or closely adjacent tracts of land in which five or more families (including one cropper or tenant family) are regularly employed, and which tracts are operated as a single working unit in respect to central farm headquarters and to the control of labor, cropping systems, and farming operations.” *Id.* at v.

61. *Id.* at 88-90 (table 17).

62. See [4 Population] BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES, at 25 (1933) [hereinafter CENSUS 1930] (table 13).

63. Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia.

64. Of a total of 970,978 workers, 471,408 were black and 61,811 were of “other races,” almost all of whom lived in Texas and thus probably were “Mexicans.” See [4 Population] CENSUS 1930, *supra* note 62, table 11 (totals and percentages computed by author from relevant states' table 11 figures).

65. Of the black farm workers outside the states of the Confederacy, more than three-fifths lived in the border states of Kentucky, Maryland, Missouri, and Oklahoma. *Id.*

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Outside of the Confederacy, Arizona, California, and New Mexico had the highest proportion of nonwhite farm workers.⁶⁶ It is likely that these workers were largely Hispanic, with some ethnic Japanese and Chinese.⁶⁷ In these three states, "other races" accounted for 41.1 percent of all farm workers.⁶⁸ Only a small number of nonwhite farm workers lived in the remaining states. The eighteen states composing the Small Grain Area,⁶⁹ the Western Dairy Area,⁷⁰ the Corn Area,⁷¹ and the Eastern Dairy Area⁷² accounted for 37.8 percent of all farm laborers and the vast majority of nonsouthern farms in the United States. Yet, only 2.2 percent of all farm workers in these areas were reported as nonwhite.⁷³

The proportion of nonwhite farm workers grew markedly between the 1930 and the 1940 censuses. By 1940, 26.7 percent of all farm workers were nonwhite.⁷⁴ This modest rise significantly understated the true figure because the 1940 census, unlike the 1930 census, classified Mexican-Americans as white.⁷⁵ The true figure exceeded one-third.⁷⁶

66. See [4 Population] CENSUS 1930, *supra* note 62, table 11 (all states).

67. *Mutatis mutandis*, they occupied the same socioeconomic and political positions in those states as blacks did in the South and thus were subject to the same history of institutionalized discrimination. See generally *Violations of Free Speech and Rights of Labor: Hearings Pursuant to S. Res. 266 Before a Subcomm. of the Senate Comm. on Education and Labor*, 76th Cong., 3d Sess., pt. 53, app. at 19677, 19691, 19696 (1940) [hereinafter *Free Speech and Labor Hearings*] (exhibits 8744, 8750 & 8752) (discussing ethnic and social characteristics of California agricultural labor); C. MCWILLIAMS, *Factories in the Fields: The Story of Migratory Farm Labor in California* 134-51 (1939) (discussing the social discrimination against the races that made up California's farm labor force).

68. [4 Population] CENSUS 1930, *supra* note 62, at table 11 (totals and percentages computed by author from relevant states' table 11 figures).

69. Kansas, Montana, Nebraska, North Dakota, and South Dakota.

70. Michigan, Minnesota, and Wisconsin.

71. Illinois, Indiana, Iowa, and Ohio.

72. Connecticut, Massachusetts, New Hampshire, New York, Pennsylvania, and Vermont. These classifications are taken from Bowden, *Farm Employment, 1909 to 1938*, 48 MONTHLY LAB. REV. 1241, 1244 (1939) (chart 2).

73. See [4 Population] CENSUS 1930, *supra* note 62, table 11 (totals and percentages computed by author from relevant states' table 11 figures).

74. See [3 Population] CENSUS 1940, *supra* note 52, pt. 1, at 89-90 (table 62).

75. *Id.*, at 2. This classification particularly distorted the composition of the work force in Texas and California, where many Mexican-Americans lived. Other changes between the censuses may have produced a further understatement of the number of nonwhites. In 1930, data were collected on "gainful" workers (*i.e.*, workers proclaiming to be part of a paying occupation, regardless of whether individuals were currently employed at the time of the census), and on workers above the age of ten. In 1940, data were collected only on "employed" workers (*i.e.*, workers who were working or seeking work during the week of March 24th), and on workers above the age of fourteen. *Id.* at 5-6. If, as seems plausible, a disproportionately large share of minority farm workers were unemployed or between the ages of eleven and fourteen at the time of the 1940 census, their numbers would have been artificially depressed. In addition, the 1940 numbers, unlike the 1930 numbers, include farm foreman with farm workers. Assuming that more whites were foreman than nonwhite, this would further understate the true percentage of nonwhite farm workers in 1940.

76. This figure rests on the assumption that the number of Mexican-American workers declined at the same slower-than-average rate as that of black workers. Between 1930 and 1940, the total number of farm workers declined by 29.6%, while the number of black farm workers declined

The regional distribution of farm workers by race was even more skewed by 1940. In the eleven southern states, blacks accounted for 53.5 percent of all farm workers, compared with 48.5 percent in 1930.⁷⁷ Black farm workers in the South accounted for 92.3 percent of all black farm workers.⁷⁸ Although the black element of the farm work force grew in the South during this period, it decreased to a negligible 0.9 percent in the eighteen states containing the bulk of American farms outside the South.⁷⁹

On the large southern cotton plantations, much of the work was performed not by farm workers but by sharecroppers and tenant farmers.⁸⁰ The sharecropper and tenant farmer population, like the farm worker population, was disproportionately and increasingly nonwhite. Although the number of sharecroppers of all races in the eleven states of the former Confederacy decreased dramatically between 1930 and 1940, the percentage of black sharecroppers rose from 53.1 percent to 58.1 percent.⁸¹ Adding the sharecropper and tenant population, as well as unpaid family members, to the number of farm workers counted by the census further increases the share of nonwhites in the national and southern farm worker force.⁸²

Although blacks represented a disproportionately large share of the South's agricultural work force, their labor was considerably more restricted than that of white farm workers. This disparity is attributable to the discriminatory regime conducted by white planters, most of whom

by only 10.3%. *See id.* at 89-90 (table 62); [4 Population] CENSUS 1930, *supra* note 62, at 25 (table 13).

77. [3 Population] CENSUS 1940, *supra* note 52, pts. 2-5, table 13 (totals and percentages computed by author from relevant states' table 13 figures); [4 Population] CENSUS 1930, *supra* note 62, table 11 (totals and percentages computed by author from relevant states' table 11 figures). Had the 1940 census classified Mexican-Americans as "other," and had the "other" group decreased in number at the same rate (5.3 %) as that of black farm workers in the South between 1930 and 1940, then nonwhites in the South would have accounted for more than three-fifths of all farm workers there.

78. *See* [3 Population] CENSUS 1940, *supra* note 52, pts. 2-5, table 13 (totals and percentages computed by author from relevant states' table 13 figures).

79. *See id.* The eighteen states are listed *supra* notes 69-72.

80. D. ALEXANDER, *THE ARKANSAS PLANTATION, 1920-1942*, at 55-58 (1943); A. RAPER & I. REID, *SHARECROPPERS ALL!* 36 (1941).

81. *See* [3 Agriculture] CENSUS 1940, *supra* note 52, at 392, 406-416 (table 14). Only one-tenth of all black tenant farmers (including sharecroppers) in the South were cash tenants—the highest tenure rank and the only rank that plausibly contained independent entrepreneurs. G. MYRDAL, *supra* note 59, at 245.

82. To place the data on nonwhite farm workers in their demographic context, it is useful to note that in 1930 blacks represented only 9.7% of the total population and other races accounted for only .5% of the total population. *See* STATISTICAL ABSTRACT, *supra* note 48, at 26 (table 28). In 1940, the corresponding figures were 9.8% and .4%. The decrease in the percentage of other races is due to the reclassification of Mexican-Americans as white in the 1940 Census. *See supra* text accompanying note 75.

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felt that blacks had to be carefully controlled and supervised.⁸³ As a result, blacks generally worked on the plantation proper but white tenants worked more independently in outlying areas.⁸⁴ Most black sharecroppers had “practically no voice in deciding what crops to grow, or what methods to follow in cultivation.”⁸⁵ In other words, “[t]he plantation community was essentially feudalistic.”⁸⁶ An especially prominent aspect of this racial dichotomy was the different career patterns experienced by black and white farm workers. Typically, white laborers eventually achieved ownership of their own farms; black laborers rarely achieved such status.⁸⁷ Not surprisingly, the dichotomy extended to wage rates as well. Blacks uniformly received less,⁸⁸ and plantation pay was especially low. Thus, one author concluded, “the Negro . . . has remained in the position of a tenant peasantry with semi-feudal attachment to the land.”⁸⁹ Other contemporary observers also noted the nature of the plantation system:

Plantation workers belong to an economically and socially submerged racial group. Thus, agricultural labor has not been thought of as an occupation which should give adequate support to its members. . . . The modern variant of the plantation may well employ white Americans of pioneer ancestry. But the agricultural industry has been organized, and the mentality of the agricultural employers has congealed, on the basis of apprentice “hired men” and colored wage hands.⁹⁰

This Article’s discussion of farm labor in the South has focused on the conditions immediately before and during the New Deal era. The concentration of black farm workers and the disparity in treatment of black and white labor in the South, however, certainly predated this period. As a result, an attack on the exclusion of farm workers from New Deal economic legislation because of racial discrimination is neither un-

83. C. BRANNEN, RELATION OF LAND TENURE TO PLANTATION ORGANIZATION 23 (United States Dep’t of Agric., Dep’t Bull. No. 1269, 1924).

84. G. MYRDAL, *supra* note 59, at 243-44.

85. D. ALEXANDER, *supra* note 80, at 66.

86. A. RAPER & I. REID, *supra* note 80, at 5.

87. H. TURNER, A GRAPHIC SUMMARY OF FARM TENURE 31 (United States Dep’t of Agric., Misc. Pub. No. 261, 1936) (fig. 48).

88. G. MYRDAL, *supra* note 59, at 240. In 1934, for example, the cash income of black wage laborers amounted to 58.8% of the white rate in one Georgia county, and 25.9% in another. See A. RAPER, PREFACE TO PEASANTRY 55 (1936) (table X).

89. See R. VANCE, THE NEGRO AGRICULTURAL WORKER UNDER THE FEDERAL REHABILITATION ACT 126 (1934); see also E. CALDWELL, TENANT FARMER 21 (1935) (“The Negro is a slave of the large landowner”); D. GRUBBS, CRY FROM THE COTTON: THE SOUTHERN TENANT FARMERS’ UNION AND THE NEW DEAL 15 (1971) (describing the dominant position of landlords over sharecroppers).

90. A. Ross, Agricultural Labor and Social Legislation 57 (1941) (unpublished dissertation, University of California at Berkeley).

sual nor surprising. Discrimination against agricultural labor and discrimination by race have been part of the same problem ever since white landowners in the New World began importing slave labor. Slavery in America was motivated by the economic need for cheap farm labor. For southern planters, consequently, issues of farm labor became issues of economics and race.⁹¹

The North's victory in the Civil War formally ended the institution of slavery. It did not end the southern plantation owners' need for a cheap supply of labor or the regime of white supremacy in the South. Despite the Civil War and a formal national policy, expressed in the Civil War amendments, of fair treatment for blacks, the expectation in the South was that the newly freed blacks would continue to supply the needed cheap labor.⁹² In fact, most of the southern black population remained as farm laborers, either wage laborers, sharecroppers, or tenant farmers.⁹³ Blacks were slaves no longer, but neither were they the equals of whites.

2. *Subjugation by law.*—The racial status quo, and thus the plantation social system, was maintained in part through the influence of plantation owners in southern state legislatures. For example, Alabama,⁹⁴ Florida,⁹⁵ Georgia,⁹⁶ North Carolina,⁹⁷ and South Carolina⁹⁸ made it a criminal offense to obtain advances from an employer with an intent to defraud. Under these statutes, the refusal to begin or complete the work was prima facie evidence of the intent to defraud.⁹⁹ These regulations forced “plantation croppers, tenants and workers to carry out their contracts faithfully and completely under threat of criminal punishment.”¹⁰⁰

91. R. SCOTT & J. SHOALMIRE, *THE PUBLIC CAREER OF CULLY A. COBB: A STUDY IN AGRICULTURAL LEADERSHIP* 206 (1973).

92. See 9 C. WOODWARD, *ORIGINS OF THE NEW SOUTH, 1877-1913* 208-09 (1951); G. WRIGHT, *OLD SOUTH, NEW SOUTH* 84-85 (1986).

93. 9 C. WOODWARD, *supra* note 92, at 205-07; see also J. MANDLE, *THE ROOTS OF BLACK POVERTY: THE SOUTHERN PLANTATION ECONOMY AFTER THE CIVIL WAR* 44-46 (1978) (describing the use of wage laborers, tenant farmers, and sharecroppers as a means of supplying a labor force for plantations); G. WRIGHT, *THE POLITICAL ECONOMY OF THE COTTON SOUTH* 160-64 (1978) (describing the decline in the use of wage laborers and the rise in the use of tenant farmers on plantations).

94. Act of Mar. 9, 1911, No. 98, 1911 Ala. Acts 93-94 (repealed 1977).

95. Act of June 7, 1919, ch. 7917, 1919 Fla. Laws 286 (repealed 1951).

96. Act of Aug. 15, 1903, No. 345, §§ 1-2, 1903 Ga. Laws 90-91 (repealed 1968).

97. Act of Mar. 11, 1889, ch. 444, 1889 N.C. Pub. Laws 423 (codified as amended at N.C. GEN. STAT. § 14-104 (1986)).

98. Act of Feb. 20, 1907, No. 252, 1907 S.C. Acts 536 (codified as amended at S.C. CODE ANN. §§ 41-23-30, 41-23-40 (Law. Co-op. 1976)).

99. See Zeichner, *The Legal Status of the Agricultural Laborer in the South*, 55 POL. SCI. Q. 412, 424-25 & n.41 (1940).

100. *Id.* at 424-25.

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As early as 1911, the United States Supreme Court recognized that these statutes violated the thirteenth amendment.¹⁰¹ Nevertheless, these statutes continued to be enforced until the early 1940s in an effort to force blacks to remain on the farm, ensuring a cheap supply of labor.¹⁰² The laws persisted even though they were “known to be unconstitutional and of no use in a contested case.”¹⁰³ The only rationale that the Supreme Court could find for the persistence of the laws was their “extra-legal coercive effect.”¹⁰⁴

Competition from out-of-state enterprises also threatened planters’ labor supply and prompted a legislative response. Many states greatly restricted the activities of agents sent to solicit labor for out-of-state work.¹⁰⁵ In addition, other criminal provisions prohibited the enticement of agricultural laborers already under contract to farm employers.¹⁰⁶

Perhaps the most important weapons in the planters’ legal arsenal, however, were debt laws. Sharecroppers and tenant farmers depended on loans of seed, tools, food, and even money from the white landowners. These loans had to be repaid from a portion of the debtor’s crop. High-priced necessities and low returns for crops then created a system of “perpetual indebtedness [that kept] the tenant farmer nearly . . . as securely tied to the land and to his landlord as he was under slavery.”¹⁰⁷

101. See *Bailey v. Alabama*, 219 U.S. 219, 227-28, 245 (1911) (striking down an earlier version of the Alabama law).

102. For cases invalidating later versions of these statutes, see *Pollock v. Williams*, 322 U.S. 4 (1944) (Florida statute); *Taylor v. Georgia*, 315 U.S. 25 (1942) (Georgia statute).

103. *Pollock*, 322 U.S. at 15.

104. *Id.*

105. *E.g.*, Act of Aug. 25, 1923, No. 181, 1923 Ala. Acts 208 (repealed 1977) (\$5,000 annual agent fee per county); Act of Aug. 25, 1927, No. 398, § 2, ¶51, 1928 Ga. Laws 56, 72 (repealed 1951) (\$1,000 per county); Privilege Tax Law of 1930, ch. 88, §§ 1, 3, 109, 1930 Miss. Laws 146, 147-48, 177 (codified as amended at MISS. CODE ANN. §§ 27-17-9, 27-17-225 (1972)) (\$500 annually per county); Act of Dec. 24, 1891, No. 697, 1891 S.C. Acts 1084 (codified as amended at S.C. CODE ANN. § 16-17-610 (Law. Co-op. 1976)) (\$1,000 annually per county); Occupation Tax on Emigrant Agents Act, ch. 11, § 1, 1929 Tex. Gen. Laws 16, 16 *repealed* by Labor Agents-Licenses Act, ch. 134, § 9, 1979 Tex. Gen. Laws 256, 259 (\$1,000 annually plus \$100-\$300 per county annually); Act of Feb. 21, 1928, ch. 45, § 183, 1928 Va. Acts 35, 117-18 (repealed 1984) (\$5,000 annually per county). See generally *Zeichner, supra* note 99, at 426 (discussing and describing such laws as they existed in 1940).

106. *E.g.*, Act of Feb. 16, 1866, 1866 Ala. Acts 111 (repealed 1977); Act of Mar. 21, 1883, No. 96, § 8, 1883 Ark. Acts 176, 179 (codified as amended at ARK. STAT. ANN. § 50-524 (1947)); Act of Dec. 13, 1866, No. 217, 1866 Ga. Laws 153, 154 (repealed 1979); Act of 1924, No. 250, § 3, 1924 La. Acts 585, 586 (codified as amended at LA. REV. STAT. ANN. § 9:3202 (West 1983)); Act of Mar. 29, 1924, ch. 160, 1924 Miss. Laws 213 (codified as amended at MISS. CODE ANN. § 97-23-29(1972)); Act of Feb. 25, 1905, ch. 299, § 4, 1905 N.C. Pub. Laws 334, 335 (codified as amended at N.C. GEN. STAT. § 14-104 (1986)); Act of 1913, No. 28, 1913 S.C. Acts 33,34 (repealed 1981). See generally *C. MAGNUM, THE LEGAL STATUS OF THE TENANT FARMER IN THE SOUTHEAST* 241-45 (1952) (describing the enticement statutes in the Southeast).

107. P. VAN DEN BERGHE, *RACE AND RACISM* 88 (1967).

This network of legislation, which permitted “whites to use Negro labor when and as they chose,”¹⁰⁸ restored “to the landlord legal control of the . . . laborers on the post-Civil War plantation” after 1865.¹⁰⁹ The laws helped to ensure an oversupply of labor that depressed wages to a fraction of the rates prevailing on northern farms.¹¹⁰ Consequently, plantation owners enjoyed a significant state-enforced economic benefit at the expense of the black race.

These laws were by no means unique in the South. Rather, they were part of a panoply of laws that attempted to substitute a federal system of racial subjugation for slavery as a device for maintaining the dominance of the southern planter.¹¹¹ Once the North’s victory in the Civil War threatened “equal status contact”¹¹² with a race that previously was inferior by law, southerners created this new regime of “free” labor to preserve the economic and the social status quo.

Occasionally, these coercive laws did not suffice to override the forces of supply and demand. Plantation owners then availed themselves of more effective self-help measures. On September 16, 1937, for example, a front page headline in the *New York Times* reported: “Armed Farmers Hold Cotton Pickers on Job; Refuse to Let Negroes Take Higher Pay Offer.”¹¹³ Although the farmers certainly were motivated in part by economic considerations, their resort to violent self-help also demonstrates the racism prevailing throughout the South. All too often, when blacks sought to exercise their rights, including their right to accept other employment for higher wages, white employers reacted with brutality and intimidation.¹¹⁴

108. Cohen, *Negro Involuntary Servitude in the South, 1865-1940: A Preliminary Analysis*, 42 J. S. HIST. 31, 60 (1976).

109. Zeichner, *supra* note 99, at 428.

110. See generally, Black, *Agricultural Wage Relationships: Geographical Differences*, 18 REV. ECON. STATISTICS 67, 68 (1936) (chart II) (showing that monthly wage with board for 1925-1929 ranged from \$23.80 to \$28.00 in traditional southern regions and from \$40.70 to \$53.10 in all other regions).

111. P. VAN DEN BERGHE, *supra* note 107, at 89-90.

112. *Id.* at 89.

113. N.Y. Times, Sept. 16, 1937, at 1, col. 6. The incident is especially illuminating because the vigilantes were planters in Warren County, where two-thirds of the population was black, and the enticers came from Glasscock County, where the proportion of white small farmers was large. G. MYRDAL, *supra* note 59, at 1243 n.78. The planters’ actions underscore the connection between the economic and racial animus and the plantation—“a feeling, on the part of the planters, of a sort of collective ownership of the workers in the community.” *Id.* at 248; see also American Civil Liberties Union, Peonage in Georgia (March 1938), reproduced in Southern Tenant Farmers Union Papers, reel No. 7 (microfilm of originals available in University of North Carolina Library, Chapel Hill) (giving a full account of the incident and the circumstances that led up to it).

114. P. VAN DEN BERGHE, *supra* note 107, at 90-92; see also A. RAPER, *supra* note 88, at 5 (“With the financial, educational and religious institutions maintaining the status quo and keeping the Negro ‘in his place,’ the threat of violence always hangs over his head and violence frequently is used upon slight provocation.”).

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3. *Southern Influence on Federal Legislation.*—The efforts of southern planters to perpetuate a system of racial subjugation did not end with state legislation. Southern members of Congress effectively represented and protected planters' interests at the national level.¹¹⁵ These members wielded such power and influence in Congress that they could compel President Roosevelt to conform the remedial New Deal legislation to their discriminatory interests.

Throughout the thirties, the representatives of Dixie remained entrenched in the most powerful seats in Congress. Southerners controlled over half the committee chairmanships and a majority of leadership positions in every New Deal Congress. The combination of a seniority rule determining access to congressional influence, a one-party political tradition below the Mason-Dixon line, and Democratic weakness outside the South prior to 1930 resulted in legislative hegemony for the advocates of white supremacy. Roosevelt had no alternative but to cooperate with the Southerners who ran Congress.¹¹⁶

The leadership of the Congress that enacted the FLSA in 1938 exemplified southern domination. In the Senate, for example, "Cotton" Ed Smith of South Carolina chaired the Agriculture Committee, Carter Glass of Virginia chaired the Senate Appropriations Committee, and Pat Harrison of Mississippi chaired the Finance Committee. In the House of Representatives, Marvin Jones of Texas chaired the Agriculture Committee and Robert Doughton of North Carolina chaired the Ways and Means Committee. Five other southerners sat on the powerful House Rules Committee. And, even more importantly, William Bankhead of Alabama and Sam Rayburn of Texas, as Speaker and Majority Leader, respectively, occupied the most powerful positions in the House.¹¹⁷ These same committee chairmen also had presided during the earlier Congress¹¹⁸ that passed the Social Security Act¹¹⁹ and the National Labor Relations Act.¹²⁰ President Roosevelt could be confident of the support of these leaders of Congress only "[s]o long as the New Deal did not

115. Southern congressmen could represent planters' interests exclusively because of the virtually complete expulsion of workers from civic and political life in the South. See R. BUNCHE, *THE POLITICAL STATUS OF THE NEGRO IN THE AGE OF FDR* 24-27 (1973). See generally C. MANGUM, *THE LEGAL STATUS OF THE NEGRO* 371-424 (1940) (discussing the history of the disenfranchisement of the Negro).

116. I H. SITKOFF, *A NEW DEAL FOR BLACKS: THE DEPRESSION DECADE* 45 (1978).

117. See CONGRESSIONAL DIRECTORY, 75th Cong., 3rd Sess., 173, 192 (1938).

118. See CONGRESSIONAL DIRECTORY, 74th Cong., 1st Sess., 175, 192 (1935).

119. Social Security Act, ch. 531, tit. II, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1937f (1982 & Supp. III 1985)).

120. National Labor Relations Act, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. § 151-169 (1982)).

disturb southern agricultural, industrial, or racial patterns."¹²¹

Despite the popular image of the "solid South," the only force that unified them was their common interest in the subordination of the black race. "Except on race legislation, the south was not 'solid' " in Congress.¹²²

We ought to be both specific and candid about the regional interest that the Democratic party of the South has represented in national affairs. It must be conceded that there is one, and only one, real basis for southern unity: the Negro. . . .

We need to be even more exact. . . . [I]t is not the Negro in general that provides the base for white Democratic unity in national affairs: it is fundamentally the rural Negro in areas of high concentrations of colored population. It is here that whites are relatively fewest, that the plantation system of agriculture is most highly developed, that the economic system is most dependent upon black workers, and that the white black socio-economic system, commonly thought to be characteristic of the entire South, is most highly developed. Here we find the persistent strain of southern unity.¹²³

Because of this controlling concern in southern politics, New Deal economic proposals posed unacceptable dangers. First, welfare provisions such as the minimum wage and overtime provisions of the FLSA would benefit primarily the lower socioeconomic strata. A large number of blacks, most of whom lived in the South, consequently stood to gain from the federal legislation—a dangerous step toward equality. Equally important, however, was the potential economic harm to white employers, especially plantation owners. The FLSA, for example, would impose the higher wage costs they had successfully avoided for so long. As one commentator noted, "cheap labor has been the life-blood of the plantation system and an attack on low labor incomes in the South would be interpreted . . . as a mortal blow."¹²⁴ From this political-economic complex flowed the panoply of extralegal and unconstitutional measures that

121. J. PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL: THE GROWTH OF THE CONSERVATIVE COALITION IN CONGRESS, 1933-1939, at 132 (1967); *cf. id.* at 42-45, 179-86, 193-98 (discussing the disenchantment of southern congressmen with the FLSA); D. GRUBBS, *supra* note 89, at 57 (describing the influence of southern committee chairmen on agricultural policy). The power of the southern delegation was so great that even Senator LaFollette, whose Committee on Education and Labor compiled a substantial record documenting the harassment of workers and labor unionists, never dared to investigate the plight of black sharecroppers because southern senators opposed such hearings. See D. CONRAD, THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL 74-76 (1965); Schapsmeier & Schapsmeier, *Farm Policy from FDR to Eisenhower: Southern Democrats and the Politics of Agriculture*, 53 AGRIC. HIST. 352, 353-60 (1979).

122. J. PATTERSON, *supra* note 121, at 330.

123. V. KEY, SOUTHERN POLITICS IN STATE AND NATION 315-16 (1949).

124. Lewis, *Black Cotton Farmers and the AAA*, 13 OPPORTUNITY 72, 72 (1935).

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southern planters and their agents utilized to preserve their virtually captive labor force.¹²⁵

The success of Franklin Roosevelt and the New Deal depended on the support of southern Democrats. Roosevelt, though born, raised, and first elected in the North, considered himself “a Georgian by adoption,”¹²⁶ and “understood and sympathized” with the South and its problems perhaps more than any other northern politician.¹²⁷ He believed firmly that “any direct attempt to reform traditional racial and class patterns” would cost his administration the support of the southern leaders in Congress.¹²⁸ As a result, Roosevelt was willing to compromise by modifying the New Deal, at least insofar as it operated in the South, to preserve white hegemony.¹²⁹ Most obviously, the New Deal failed to bring about any civil rights reform.¹³⁰ Indeed, despite a sharp increase in lynchings in 1935, Roosevelt refused to oppose a southern filibuster of an antilynching bill for fear that it would trigger southern retaliation against the administration’s pending economic legislation.¹³¹

C. *Racial Discrimination in the New Deal*

By the time the FLSA was drafted, the exclusion of farm workers from New Deal economic legislation had become such a fixed component of New Deal politics that the drafters no longer considered the issue.¹³² Consequently, understanding the purpose of the exclusion requires an examination of earlier New Deal legislation and the treatment accorded

125. W. CASH, *THE MIND OF THE SOUTH* 417-22 (1941).

126. 3 A. SCHLESINGER, *THE AGE OF ROOSEVELT* 410 (1960).

127. Friedel, *The South and the New Deal*, in *THE NEW DEAL AND THE SOUTH* 17, 23 (1984).

128. R. WOLTERS, *NEGROES AND THE GREAT DEPRESSION* 15 (1970); see Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST* 263, 279 (B. Bernstein ed. 1968). According to Justice Douglas, Roosevelt’s “political alliance with the liberals of the North and the southern Democrats made him freeze when it came to taking positive measures for the black sharecroppers. FDR could not overrule his leader in the Senate, Joe Robinson of Arkansas.” W. DOUGLAS, *GO EAST, YOUNG MAN* 361 (1974); see also Morrison, *The Secret Papers of FDR*, *NEGRO DIGEST*, Jan. 1951, at 3, 3.

129. See F. FREIDEL, *F.D.R. AND THE SOUTH* 36 (1965). Even Harold Ickes, the Secretary of Interior and perhaps the most outspoken high-ranking New Deal advocate of equal rights for blacks, assured southern senators that Roosevelt had no intention of attacking segregation. J. KIRBY, *BLACK AMERICANS IN THE ROOSEVELT ERA: LIBERALISM AND RACE* 33 (1980).

130. See generally H. SITKOFF, *supra* note 116, at 34-83 (discussing the struggle to include blacks in the New Deal).

131. See F. FREIDEL, *supra* note 129 at 88-90; 3 A. SCHLESINGER, *supra* note 126, at 436-38; N. WEISS, *FAREWELL TO THE PARTY OF LINCOLN: BLACK POLITICS IN THE AGE OF FDR* 96-119, 241-49 (1983). For express linkage of the FLSA to the antilynching bill from the southern perspective, see 82 CONG. REC. 1388 (1937) (statement of Rep. Martin Dies of Texas).

132. Telephone interview with Judge Gerard B. Reilly, Solicitor, Department of Labor, 1937-1941 (May 5, 1985) (Chief drafter of the FLSA). See generally Reilly, *Madame Secretary*, in *THE MAKING OF THE NEW DEAL* 172-75 (K. Louchheim ed. 1983) (describing the drafting of the FLSA).

racial minorities by these programs.¹³³ Only by analyzing the pervasive exclusions of minorities from the New Deal, especially the treatment accorded minority farm workers, is it possible to grasp the effect of racial discrimination on congressional consideration of the FLSA.

1. *The National Industrial Recovery Act.*—The National Industrial Recovery Act¹³⁴ (NIRA) sought to stimulate the economy by attacking the depression-induced focus on wage cutting. The NIRA led to the adoption of codes of “fair competition” in many industries. The codes attempted to increase purchasing power by fixing minimum wages and maximum hours for employees.¹³⁵ The National Recovery Administration (NRA) was empowered to enforce the codes. Agricultural workers were excluded from this “industrial recovery” act; nevertheless, discrimination against blacks permeated the structure and enforcement of the industry codes.

For example, “some codes provided that certain jobs in an industry would be covered by NRA while other jobs would not, and these occupational classifications frequently were arranged so that minimum wage scales covered only that work which was generally performed by whites.”¹³⁶ Even when a black employee performed the same task as a white employee, and sometimes when he performed more important tasks, he often would be listed for NRA wage purposes within a lower job classification.¹³⁷

In addition, the NRA allowed certain industries to adopt codes containing geographical wage classifications. Most NRA codes narrowed the difference in wages between the South and the rest of the nation; when blacks constituted a large proportion of the work force in an industry, however, the regional pay differential was considerably larger because much lower minimum wages were permitted for southern

133. See generally B. Harrison, *Racial Factors Attending the Functioning of the New Deal in the South* (1936) (unpublished M.A. thesis) (available in University of Atlanta Library) (describing how New Deal legislation and its administration affected blacks).

134. Ch. 90, 48 Stat. 195 (1933) (held unconstitutional in *Schechter Poultry Co. v. United States*, 295 U.S. 495 (1933)).

135. See 3 A. SCHLESINGER, *THE AGE OF ROOSEVELT*, *supra* note 126, at 87-102; see also E. HAWLEY, *THE NEW DEAL AND THE PROBLEM OF MONOPOLY: A STUDY IN ECONOMIC AMBIVALENCE* 19-52 (1966) (reconstructing the drafting of the NIRA, and discussing how it was perceived); P. IRONS, *THE NEW DEAL LAWYERS* 17-34 (1982) (describing the birth and adoption of the NIRA as a struggle between corporate leaders, who were willing to accept government regulation in order to be relieved of rigorous enforcement of the antitrust law; organized labor, who desired a guarantee that workers could organize into unions and bargain collectively; and populists, who were strongly against corporate monopoly and advocated confiscatory taxation and public works spending).

136. R. WOLTERS, *supra* note 128, at 124-25.

137. *Id.* at 125.

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employers.¹³⁸

Further evidence of discriminatory intent is the inconsistent denomination of states as “southern” in the codes. The number of southern states permitted to pay lower minimum wages ranged from nine to seventeen; in general, an industry code listed a state as southern if most of the employees in the industry within that state were black.¹³⁹ For example, Delaware was in the North for 449 industry codes, with the higher northern wage rates, while the fertilizer industry code placed Delaware in the South. The reason was simple: nine out of ten workers employed in the fertilization industry in Delaware were black.¹⁴⁰

President Roosevelt, whose signature is under each code Congress required,¹⁴¹ refused to redress these inequities. He explained: “‘It is not the purpose of the Administration, by sudden or explosive change, to impair southern industry by refusing to recognize traditional differentials.’”¹⁴² The sparse representation of blacks at code hearings,¹⁴³ despite the statutorily imposed obligation of representativeness,¹⁴⁴ “made it almost impossible for blacks to seek effective redress.”¹⁴⁵

Blacks also were generally excluded from the wage and hour benefits of the NIRA because of their concentration in two sectors of employment for which no codes of fair competition were established: agriculture and domestic service.¹⁴⁶ Unlike later New Deal legislation, however, the NIRA did not expressly exclude agriculture.¹⁴⁷ Indeed, whether agriculture and related industries should be subject to the NIRA was much debated at the administrative level, and created conflict among

138. *Id.* at 126, 128-30; Davis, *Blue Eagles and Black Workers*, THE NEW REPUBLIC, Nov. 14, 1934, at 7, 8. One NRA official justified the geographical classifications and pay differentials on the basis of economic necessity and an acceptance of racially discriminatory employment in the South. The South, he maintained, was economically backward and needed lower wages in order to develop and compete with the North. Higher wages would not only hamper the South's economic development, but also would displace many black workers because southern employers would hire unemployed white laborers to perform the now higher paying tasks. Peck, *The Negro Worker and the NRA*, 41 CRISIS 262, 279 (1934).

139. See R. WOLTERS, *supra* note 128, at 128-30.

140. *Id.* at 129.

141. National Industrial Recovery Act, ch. 90, § 3(b), 4 Stat. 195, 196 (1933).

142. THE BROOKINGS INST., THE NATIONAL RECOVERY ADMINISTRATION: AN ANALYSIS AND APPRAISAL 328 n.9 (1935) (quoting President Roosevelt's statement of April 22, 1934, concerning the bituminous coal agreement).

143. See J. FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 535 (3d ed. 1967).

144. See 48 Stat. at 196.

145. 3 A. SCHLESINGER, *supra* note 126, at 431-32.

146. R. WOLTERS, *supra* note 128, at 150. See generally Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939, 1945-51 (1966) (stating that domestic service was excluded because it was not an “industry”).

147. See National Industrial Recovery Act, ch. 90, §§ 3, 7(a)-(b), 48 Stat. 195, 196, 199 (1933).

concerned New Deal agencies.¹⁴⁸ Some agricultural labor was excluded from the NIRA definitionally, but a large portion of farm labor was excluded as a result of the resolution of these administrative conflicts.

First, the submission of codes, which was the NRA's sole mechanism for controlling an industry, was voluntary.¹⁴⁹ Agricultural industries, however, had little incentive to present a code to the government, because the only benefit of doing so—exemption from the antitrust laws—posed no problem for agriculture in the first place.¹⁵⁰ Second, the NRA itself interpreted the NIRA as applying, as its title suggested, only to industry.¹⁵¹ Because the interests of farmers presumably were protected by the Agricultural Adjustment Act,¹⁵² passed during the same period as the NIRA, the NRA concluded that "Congress did not intend that codes of fair competition under the NIRA be set up for farmers or persons engaged in agricultural production."¹⁵³

The conflict over the NRA's coverage of agriculture-related industries—which were merely an extension of primary agricultural production and which employed many of the same laborers otherwise classified as agricultural¹⁵⁴—was not resolved so easily. The conflict arose initially because of the joint authority granted to the NRA and to the Department of Agriculture through its subordinate, the Agricultural Adjustment Administration (AAA).

The NIRA itself provided that

[t]he President may, in his discretion, in order to avoid conflicts in the administration of the Agricultural Adjustment Act and this title, delegate any of his functions and powers under this title with respect to trades, industries, or subdivisions thereof which are engaged in the handling of any agricultural commodity or product thereof . . . to the Secretary of Agriculture.¹⁵⁵

148. The Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933) clearly covered agricultural labor, and therefore the Agricultural Adjustment Administration had a direct interest in any regulations concerning farm labor. The National Industrial Recovery Act was ambiguous as to the scope of its coverage of agriculture-related industries. Congress recognized the potential conflict between the interested agencies and expressly provided that the President might delegate certain powers to the Secretary of Agriculture in order to obviate some of the conflict. See *infra* note 155 and accompanying text. The conflict over the extent of authority of the two agencies, the AAA and NRA, is described in R. WOODBURY, *supra* note 12, at 6-24.

149. Although NIRA § 3(d) and § 7(c) provided a procedure for imposing a code on an industry, it never was used. R. WOODBURY, *supra* note 12, at 2.

150. See National Industrial Recovery Act, ch. 90, § 5, 48 Stat. 195, 197 (1933).

151. See R. WOODBURY, *supra* note 12, at 2-4.

152. Agricultural Adjustment Act, ch. 25, 48 Stat. 31 (1933) (held unconstitutional in *United States v. Butler*, 297 U.S. 1 (1935)).

153. R. WOODBURY, *supra* note 12, at 3.

154. *Id.* at 16, 20.

155. National Industrial Recovery Act, ch. 90, § 8(b), 48 Stat. 195, 199-200 (1933).

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President Roosevelt exercised this provision,¹⁵⁶ delegating to the Secretary of Agriculture all functions and powers except those relating to the labor provisions of the NIRA. The executive order defined the industries involved in the delegation of power as those “engaged principally in the handling of milk and its products, tobacco and its products, and all foods and foodstuffs.”¹⁵⁷ The President also reserved the power to approve or disapprove of the provisions of any code of fair competition submitted in accordance with title I of the NIRA. A later executive order¹⁵⁸ amended the earlier one by enlarging the number of industries over which power was delegated to the Secretary of Agriculture. This larger power now embraced industries “engaged principally in the handling of . . . Agricultural commodities . . . up to the point of first processing off the farm, including all distribution, cleaning, or sorting, ginning, threshing, or other separation, or grading, or canning, preserving, or packing, of such commodities occurring prior to such first processing”; human and animal food (including beverages); and nonfood products directly derived from animals or farm crops; as well as industries engaged in the crushing of cotton seed or flax seed.¹⁵⁹ The order also provided that whether a specific industry was included among those delegated to the Secretary of Agriculture “was to be finally and conclusively determined by agreement between the Secretary of Agriculture and the Administrator” of the NRA, or, failing that, by the President.¹⁶⁰

By the beginning of 1934, only six codes had been approved for industries falling within the jurisdiction of the AAA. This leisurely pace of action was understandable. The AAA

had a mandate to promote and protect the interests of farmers; among other policies the Agricultural Adjustment Administration sought . . . [the] elimination of groups of workers who might be termed agricultural, from the scope of codes; [and] elimination of industries from NRA codes which might be deemed to fall within the scope of agricultural production.¹⁶¹

As a result of political pressure, yet another executive order¹⁶² was issued which transferred back to the NRA codification of all agricultural industries subsequent to the first processing. The so-called first processors

156. Exec. Order No. 6182 (June 26, 1933), *reprinted in* 1 NATIONAL RECOVERY ADMIN., CODES OF FAIR COMPETITION 712 (1933).

157. *Id.*

158. Exec. Order No. 6345 (Oct. 20, 1933), *reprinted in* 6 NATIONAL RECOVERY ADMIN., CODES OF FAIR COMPETITION 647 (1934).

159. *Id.*

160. *Id.*

161. R. WOODBURY, *supra* note 12, at 8.

162. Exec. Order No. 6551 (Jan. 8, 1934), *reprinted in* 6 NATIONAL RECOVERY ADMIN., CODES OF FAIR COMPETITION 649 (1934).

also were redelegated to the NRA, except that questions of price, marketing, and production control remained subject to approval by the Secretary of Agriculture.¹⁶³

The ambiguity created by this series of executive orders led many industries engaged in agricultural activities to seek the protection of the AAA from coverage by the NRA. These industries, especially the citrus growing and packing industry and the cotton ginning industry, "claimed to be outside the jurisdiction of National Recovery Administration entirely as engaged solely in agricultural production or employing solely agricultural workers."¹⁶⁴ They argued that their "labor" did not come within the jurisdiction of the NRA, on the ground that it was "agricultural labor."¹⁶⁵

The citrus growing and packing industry was

one of the most highly industrialized fields of agriculture. Structurally the industry [was] highly centralized, and it use[d] quasi-factory methods of growing, packing, and shipping produce. . . . Besides their relatively industrial functions of packing and shipping, these establishments usually [bought] the fruit "on the tree," and hire[d] the labor as well as provide[d] the equipment required for harvesting operations. Many of them specialize[d] also in "caretaking" the groves of individual owners for stipulated fees; they hire[d] the maintenance labor required for plowing, planting, fertilizing, spraying, pruning and thinning.¹⁶⁶

The grove workers, pickers, and packers, consequently, were all employees of the packing houses, lived in the same towns, and were recruited from the same general industrial labor market.¹⁶⁷ Nevertheless,

[t]he citrus packing houses wished to have all the labor, including packing house labor, declared "agricultural" and exempted from the scope of the National Recovery Administration labor codes. . . . The NRA tended to cover all wage earners in all codified industries . . . save only those specially exempted. Accordingly, if the Citrus Packing Industry was subject to a code, all employees of this industry were subject to the labor provisions unless they were exempted by the terms of the code. So far as concerned the type of labor involved, [much of] the work appeared to partake of the character of industrial rather than of agricultural labor.¹⁶⁸

The NRA and the AAA proceeded to promulgate conflicting rules,

163. *Id.*

164. R. WOODBURY, *supra* note 12, at 12.

165. *Id.* at 15.

166. S. JAMIESON, *supra* note 12, at 328.

167. R. WOODBURY, *supra* note 12, at 16, 36-37.

168. *Id.* at 16.

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definitions, and interpretations concerning the extent of NRA coverage for these agricultural industries. Ultimately, the AAA refused to accept the narrower NRA definition of agricultural labor and began negotiating marketing agreements without reference to any NRA labor codes. By December 1933, the AAA had negotiated marketing agreements for the citrus industry in Florida, Texas, Arizona, and California even though labor codes did not exist.¹⁶⁹ As a result, the citrus industry had the protection it needed, a marketing agreement, while citrus workers were left unprotected by any labor code. In the citrus industry alone, approximately 200,000 workers, the majority of whom were nonwhite, were deprived of the protective benefit of labor codes, which extended to virtually every other segment of the nation's depression-suffering labor market.¹⁷⁰ On January 17, 1934, the NRA rejected the requests of its own Foods Division of the Labor Advisory Board and acquiesced in the AAA's broader definition of agricultural labor.¹⁷¹ The AAA's efforts on behalf of the citrus growing industry established the precedent of broadly excluding farm workers from the benefits of New Deal programs.¹⁷²

The NRA and the AAA waged a similar battle, with similar results, over the cotton ginning industry, which employed more than 100,000 workers. Once again, the employers claimed an exemption on the ground that their employees were agricultural workers.

In many cases the same Negro farm hands who picked the cotton in the fields were also employed in the cotton ginning operation. Where the identical individuals were not hired, others with the same general agricultural background were employed. The operators urged that higher wages paid to labor in cotton ginning would affect labor costs in the cotton fields, since the workers would demand the same pay. The Agricultural Adjustment Administration supported the industry in this contention.

The National Recovery Administration, on the other hand, was faced with similar but opposite problems in the possible tendency of lower paid cotton ginning labor to pull down industrial wage rates for somewhat similar tasks or to present problems of unfavorable competition through lower wage costs to industrial employers. The National Recovery Administration consequently insisted the labor in the cotton ginning industry was industrial and

169. *Id.* at 19.

170. See A. Ross, *supra* note 90, at 97-102, 112-19, 133-71, 219-64. See generally Grubbs, *The Story of Florida's Migrant Farm Workers*, 40 FLA. HIST. Q. 103, 105-09 (1961) (describing living conditions for black migrant workers in Florida in the 1930s).

171. See R. WOODBURY, *supra* note 12, at 17-20 & n.* (discussing the debate between the AAA and NRA over definitions and the scope of the NIRA coverage).

172. See *id.* at 29 ("The consequences of the exclusion of agricultural labor [by] both the AAA and the NRA extended beyond the field of labor engaged in agricultural production and to labor engaged in certain of the borderline industries."); A. Ross, *supra* note 90, at 119.

subject to a labor code.¹⁷³

Despite the recommendation of the NRA's Advisory Council that an "agricultural worker becomes . . . an industrial worker whenever he leaves the land and enters any plant, factory, or other establishment in which agricultural products are processed or prepared for the market,"¹⁷⁴ neither the NRA nor the AAA officially supported it.¹⁷⁵ Ultimately, the cotton ginning industry successfully avoided codification. Like their counterparts in the citrus industry, minority workers in the cotton industries were deprived of New Deal benefits.

Even when the NRA prevailed in the battle to specify industry codes for minimum wages—as was the case for agriculture-related industries—racial discrimination continued to deny protection to minorities. The NRA's own Division of Review recognized the effects of racism in the authorization of lower minimum wages for these industries.

The justification adduced—the relatively low living costs in agricultural communities—was not the sole or even the principal ground for lower rates.

The relative inefficiency of the type of labor employed was often alleged as a ground for lower rates for these industries. In certain of these industries, a large proportion of the unskilled labor was Negro. Though no open racial differential or discrimination was admitted in any NRA code, a low rate might be demanded by industry employing largely Negro labor as requisite to its continuing in operation.¹⁷⁶

It might be argued that the efforts of the AAA and the agricultural industries to subjugate minority employees were motivated solely by economic concerns, not by racial animus. Considering the history of the South and of southern agriculture, however, that explanation seems unlikely. The more likely explanation is that agricultural discrimination, like slavery, originally was attributable to *both* economics and race.¹⁷⁷ Slavery spread through the plantations and farms of the South, through

173. R. WOODBURY, *supra* note 12, at 20.

174. *Id.* at 21 (quoting 1 NRA ADVISORY COUNCIL DECISIONS No. 2 (June 26, 1934)).

175. *Id.* at 20-21; *see also* T. SALOTOS, *THE AMERICAN FARMER AND THE NEW DEAL* 182 (1982) (describing the controversy surrounding the reclassification of cotton gin workers as "agricultural").

176. R. WOODBURY, *POLICY IN THE CONTROL OF WAGES UNDER NRA: INTRODUCTION AND MINIMUM WAGE POLICY* 57-58 (Division of Review, Office of Nat'l Recovery Admin., Work Mat., No. 45, The Labor Program Under the NIRA, pt. C, 1936).

177. *See, e.g.*, Memorandum from Col. Philip Murphy, Chief, Commodities Purchase Section, Commodities Division, AAA to Chester Davis, AAA Administrator (Feb. 20, 1935) (available in Nat'l Archives, Record Group 145: U.S. Dep't of Agric., Subject Correspondence 1933-45, Folder: Citrus Fruit) ("It is my opinion that very early in any study of the agricultural labor problem in Florida, a division should be made between White labor and Black labor, so that proper attention may be given to certain racial conditions and habits.").

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the cotton and citrus industries, because it provided white agricultural “employers” with the distinct economic advantage of cheap labor. This same advantage was pursued by the same beneficiaries of slavery throughout the New Deal.

2. *The Agricultural Adjustment Act.*—Unlike the NIRA, the Agricultural Adjustment Act¹⁷⁸ (AAAct) unambiguously covered agricultural labor. Like the NIRA, however, the AAAct was enacted and administered in a manner contaminated by racism. The AAAct sought to alleviate the problems of the Depression through crop reduction policies, relief expenditures, and loan services. One result of the program was a temporary “rejuvenat[ion] of the decaying plantation economy.”¹⁷⁹ Under the AAAct, as under other federal relief programs, the resources tended “to be spent in conformity with the plantation, the philosophy and practices of which root back into slavery.”¹⁸⁰

The crop reduction policy had especially severe consequences for the black tenant farmers and sharecroppers who grew cotton in the South. To induce higher prices for cotton in the marketplace, the AAA would limit the acreage dedicated to cotton farming. The agency then would allocate a reduced number of acres to each white planter-landowner. Invariably, the first acres to be eliminated from production by these landowners were those worked by black tenant farmers and sharecroppers.¹⁸¹

In 1935, one group of legal officials within the Department of Agriculture, appalled by this inequity, drafted an opinion that prohibited landowners from evicting tenants during the life of the AAA contract.¹⁸² The proposal “seemingly threatened the existence of the southern caste and class system.”¹⁸³ As a result, both southern congressmen and promi-

178. Ch. 25, 48 Stat. 31 (1933) (declared unconstitutional in *United States v. Butler*, 297 U.S. 1 (1935)).

179. A. RAPER, *supra* note 88, at 67. See generally DIVISION OF SOCIAL RESEARCH, WORKS PROGRESS ADMIN., LANDLORD AND TENANT ON THE COTTON PLANTATION 145-61 (1936) (discussing relief programs used to aid displaced sharecroppers); C. JOHNSON, E. EMBREE & W. ALEXANDER, THE COLLAPSE OF COTTON TENANCY 50-57 (1935) (describing the impact of the AAA’s crop reduction policy on sharecroppers); C. JOHNSON, SHADOW OF THE PLANTATION 103-28 (1934) (describing the economic exploitation of blacks on plantations); T. SALOTOS, *supra* note 175, at 179-91 (discussing problems confronting black farmers under the New Deal); Frey & Smith, *The Influence of the AAA Cotton Program upon Tenant, Cropper and Laborer*, 1 RURAL SOC. 483, 489-501 (1936) (discussing the impact of the AAA’s cotton control program on the number of sharecroppers and tenant farmers on plantations).

180. A. RAPER, *supra* note 88, at 67.

181. 3 A. SCHLESINGER, *supra* note 126, at 431.

182. See E. SCHAPSMEIER & F. SCHAPSMEIER, HENRY A. WALLACE OF IOWA: THE AGRARIAN YEARS, 1910-1940, at 202-03 (1968).

183. R. WOLTERS, *supra* note 128, at 56.

ment administration officials, such as Secretary of Agriculture Henry Wallace and AAA Administrator Chester Davis, opposed the order. They believed that the conditions of all farmers, including tenants, could be improved “without launching a frontal assault on traditional southern practices.”¹⁸⁴ Secretary Wallace was

very much aware of the adverse effect the Triple-A was having upon the lives of the lowly sharecroppers. He was not insensitive to the plight of these poor people, but he was trapped in a moral paradox. If strong remedial steps were taken to prevent the wanton discharge of tenants, landowners would rebel and refuse to participate in the AAA. This step might antagonize southern congressmen and in turn jeopardize the entire Triple-A. . . . In fact, it would spell doom for the entire New Deal.¹⁸⁵

This moral paradox, characteristic of the entire New Deal, was resolved in the customary fashion—accommodation of southern racist interests.¹⁸⁶ Secretary Wallace confided years later that he decided to purge the AAA of the protenant officials because he feared the repercussions from southerners in Congress.¹⁸⁷ He believed that, had he not carried out the purge, he would have been forced to resign to “‘make way for someone else who could get along with the men from the South in Congress.’”¹⁸⁸

Some officials within the AAA actively sought to purge those individuals who were sympathetic to the plight of tenant farmers. For example, Cully Cobb, the head of the AAA Cotton Section, “unabashedly represented the planter class,”¹⁸⁹ and “implanted into AAA policies all the prejudices acquired from a lifetime of work with the white southern

184. *Id.* at 57.

185. E. SCHAPSMEIJER & F. SCHAPSMEIJER, *supra* note 182, at 202.

186. *See id.* at 202-04.

187. *See* D. CONRAD, *supra* note 121, at 146-47.

188. *Id.* at 147 (quoting a letter from Henry A. Wallace to David Conrad (June 13, 1959)). *See generally* D. HOLLEY, *UNCLE SAM'S FARMERS: THE NEW DEAL COMMUNITIES IN THE LOWER MISSISSIPPI VALLEY* 82-104 (1975) (describing the experience of Arkansas sharecroppers); J. KIRBY, *supra* note 129, at 25 (noting that Wallace warned against bold reforms to help minority groups); Baker, *'And to Act for the Secretary': Paul H. Appleby and the Department of Agriculture, 1933-1940*, 45 *AGRIC. HIST.* 235, 246-52 (1971) (describing the conflict between the Department of Agriculture staff and the AAA, and the subsequent purge); A. Kifer, *The Negro Under The New Deal 1933-1941*, at 142-56 (1961) (unpublished dissertation, University of Wisconsin). For an explanation of Wallace's and the Department of Agriculture's relationship with Edward O'Neal, the Alabama planter who presided over the Farm Bureau during the entire New Deal period, see R. LORD, *THE WALLACES OF IOWA* 411-12 (1947); Davis, *A Survey of the Problems of the Negro Under the New Deal*, 5 *J. NEGRO EDUC.* 3, 6 (1936); Saloutos, *Edward O'Neal: The Farm Bureau and the New Deal*, 28 *CURRENT HIST.* 356 (1955).

189. Daniel, *The New Deal, Southern Agriculture, and Economic Change*, in *THE NEW DEAL AND THE SOUTH* 37, 50 (1984). Given the power of persons such as Oscar Johnston, the chief financial officer of the AAA and president of the country's largest cotton plantation, the purge was inevitable. *See* Nelson, *The Art of the Possible: Another Look at the "Purge" of the AAA Liberals in 1935*, 57 *AGRIC. HIST.* 416-418 (1983); *see also* Nelson, *Oscar Johnston, the New Deal, and the*

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agricultural establishment.”¹⁹⁰ Cobb arranged for several powerful southern congressmen to call on President Roosevelt. They issued him an ultimatum: fire the sympathetic Department of Agriculture officials, or “no major farm legislation Roosevelt might want would be passed.”¹⁹¹ Soon after that visit, the Secretary of Agriculture canceled the advisory opinion stating that cotton farmers were obligated to retain the same tenants on their plantations when they signed AAA contracts.¹⁹²

The second part of the AAA crop reduction program included the payment of “rental” fees for those acres taken out of production. This provision was intended to offset the loss of revenue to farmers from the acreage reduction. Theoretically, the landowner and the tenant were to share these benefits. The AAA, however, did little to ensure that the tenants received a fair portion of the payments. For example, to gain the cooperation of as many landowners as possible, the AAA offered landowners “operating with sharecroppers . . . nearly 90 percent of the total payment.”¹⁹³ The AAA proposed a reduction of the landowner’s percentage in 1936,¹⁹⁴ but the agency could find “no way of writing a contract that would guarantee the cropper his share of the benefit payments.”¹⁹⁵ Moreover, many landlords appropriated even the minimal benefits that formally accrued to sharecroppers. Unless a cropper signed the AAA contract, he would not receive benefit checks; often, however, the landlord simply signed the contract without the consent of the cropper. Although the sharecropper was legally a lienholder, “it was not likely that . . . he would be regarded as being on an equal footing with other persons interested in the crop, such as mortgagees or the landlord. This was particularly true in the blackbelt where most of the croppers were Negroes.”¹⁹⁶ Perhaps the easiest way for a landowner to avoid sharing any part of the AAA benefits was to convert sharecroppers or

Cotton Subsidy Payments Controversy, 1936-1937, 40 J. S. HIST. 399, 400 (1974) (describing the power wielded by large scale planters, especially Oscar Johnston).

190. Sitkoff, *The Impact of the New Deal on Black Southerners*, in *THE NEW DEAL AND THE SOUTH*, *supra* note 189, at 117, 123.

191. W. BRIGGS & H. CAUTHEN, *THE COTTON MAN: NOTES ON THE LIFE AND TIMES OF WOFFORD B. (BILL) CAMP* 133-34 (1983).

192. *Id.*

193. H. RICHARDS, *COTTON AND THE AAA* 140 (1936); *see also* Daniell, *AAA Aims at an End to Share Cropping*, N.Y. Times, Apr. 22, 1935, at 7, col. 2 (“[T]he landlord was ‘induced to sign the cotton contract by an inducement obtained at expense of the share-tenant and share-cropper’ . . .”). The inequity of this distribution of AAA payments emerges from a comparison to the landlord’s and cropper’s traditional equal division of the product of the cropper’s labor. *See* Vance, *supra* note 55, at 269.

194. *See* H. RICHARDS, *supra* note 193, at 139-40; R. VANCE, *supra* note 89, at 211.

195. E. NOURSE, J. DAVIS & J. BLACK, *THREE YEARS OF THE AGRICULTURAL ADJUSTMENT ADMINISTRATION* 342 (1937).

196. Bruton, *Cotton Acreage Reduction and the Tenant Farmer*, 1 LAW & CONTEMP. PROBS. 275, 285 (1934).

tenant farmers into wage laborers.¹⁹⁷ The AAA fostered such conversions by introducing incentives to reduce acreage and by enriching planters, making it more profitable for landowners to pay laborers in cash rather than in shares.¹⁹⁸

This accommodation of racist goals in implementing AAA policies¹⁹⁹ clearly reflected the political power of southern congressmen. Many AAA administrators were southern landlords who "hesitated to take any step that might alienate Southern landlords."²⁰⁰ And, predictably, "[n]ot a single Negro served on an AAA county committee throughout the South."²⁰¹

[T]he day-to-day management of the New Deal in the South . . . remained in the hands of the hierarchy that had traditionally oppressed Afro-Americans and still stood to profit by discriminating against blacks. Because the most powerful whites in the South kept the records and wrote the reports that determined the activities of the AAA, the Resettlement Administration, and the Farm Credit Administration, blacks never shared equitably in the benefits from these programs.²⁰²

3. *Social Security*.—Although much of the discrimination in the NIRA and the AAA Act took place in the administration of those programs, the discrimination in the Social Security Act²⁰³ surfaced at an earlier stage—during the consideration of the bill itself. While the Social Security bill was pending in Congress in 1935,

Southerners worried about its implications for race relations. "The average Mississippian," wrote the Jackson *Daily News*, "can't imagine himself chipping in to pay pensions for able-bodied Negroes to sit around in idleness on front galleries, supporting all their kin-folks on pensions, while cotton and corn crops are crying for workers to get them out of the grass."²⁰⁴

197. See D. ALEXANDER, *supra* note 80, at 59.

198. E.g., D. GRUBBS, *supra* note 89, at 22-23; G. MYRDAL, *supra* note 59, at 254, 257. See generally R. VANCE, *FARMERS WITHOUT LAND* 7-8 (1938) (discussing the fallacy of the agricultural ladder); N.Y. Times, Jan. 12, 1939, at 5, col. 4 (describing a sharecropper protest against AAA policies).

199. See E. NOURSE, J. DAVIS & J. BLACK, *supra* note 195, at 68-77 (discussing the division of labor that was used to implement AAA policies on the state and local level).

200. R. KIRKENDALL, *SOCIAL SCIENTISTS AND FARM POLITICS IN THE AGE OF ROOSEVELT* 98-99 (1966); see also R. VANCE *supra* note 89, at 201, 211 (describing the relationship of AAA administrations with southern landholders).

201. I. H. SITKOFF, *supra* note 116, at 53.

202. *Id.* at 48.

203. Social Security Act, ch. 531, tit. II, 49 Stat. 620 (1935) (codified as amended at 42 U.S.C. §§ 301-1397f (1982 & Supp. III 1985)).

204. W. LEUCHTENBURG, *FRANKLIN D. ROOSEVELT AND THE NEW DEAL, 1932-1940*, at 131 (1963); cf. *Unemployment, Old Age and Social Insurance: Hearings on H.R. 2822 Before the House Comm. on Labor*, 74th Cong., 1st Sess. 147 (1935) (statement of Manning Johnson, Nat'l Executive

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At the same time, the National Association for the Advancement of Colored People (NAACP) warned Congress of its opposition to the racial compromises manifest in the bill—compromises that would exclude 3.5 million of 5.5 million black workers because they were employed as farm workers or domestics.²⁰⁵ “The more [the NAACP] studied the bill, the more holes appeared, until from a Negro’s point of view it looks like a sieve with the holes just big enough for the majority of Negroes to fall through.”²⁰⁶

Despite the views of the NAACP, Congress decided to respond to southern concerns by excluding agricultural and domestic employees²⁰⁷—the vast majority of southern black workers. This indirect exclusion of blacks, however, did not satisfy most southern congressmen. They bitterly attacked the old age assistance provision because it gave the federal government the power to dictate to the states how much relief should be paid and to whom it should be paid.²⁰⁸

In this position, Senator Byrd [of Virginia] was supported by nearly all of the southern members of both committees [with jurisdiction over Social Security], it being very evident that at least some southern senators feared that this measure might serve as an entering wedge for federal interference with the handling of the Negro question in the South. The southern members did not want to give authority to anyone in Washington to deny aid to any state because it discriminated against Negroes in the administration of old-age assistance.²⁰⁹

This southern opposition forced an accommodation that reduced federal control over social security.²¹⁰ The compromise allowed southern states to impose racial discrimination on the administration of the program. For example, many social security programs in the South operated on “the assumption that the Standard of living of the Negro and

Council, League of Struggle for Negro Rights) (“Practically 85 percent of the Negroes in the South are agricultural workers.”).

205. See *Economic Security Act: Hearings on S. 1130 Before the Senate Comm. on Finance*, 74th Cong., 1st Sess. 644 (1935) [hereinafter *Social Security Hearings*] (statement of Charles Houston representing the NAACP).

206. *Id.* at 640-41. For contemporary accounts of the racial deficiencies of the Social Security Act, see J. FRANKLIN, *supra* note 143, at 538; R. STERNER, *THE NEGRO’S SHARE* 214-15 (1st ed. 1943); Haynes, *Lily-White Social Security*, 42 *CRISIS* 85 (1935).

207. Social Security Act, ch. 531, tit. II, § 210(b)(1)-(2), 49 Stat. 620, 625 (1935) (codified as amended at 42 U.S.C. § 410(a)(1)-(2) (1982)).

208. *Social Security Hearings*, *supra* note 205, at 71-78 (testimony of Edwin E. Witte, Executive Director of the Comm. on Economic Security).

209. E. WITTE, *THE DEVELOPMENT OF THE SOCIAL SECURITY ACT* 143-44 (1962) (Mr. Witte was Executive Director of the Committee on Economic Security from 1934 to 1935); *cf.* 79 CONG. REC. 9293-94 (1935) (speech by Sen. Long of Louisiana voicing support for an old-age pension).

210. E. WITTE, *supra* note 209, at 144.

his cost of living do not rise above the barest subsistence.”²¹¹ Consequently, “there was a tendency to grant lower sums, especially in the South, to aged Negroes than to aged Whites.”²¹² Because blacks consistently were excluded from appointments as administrators in southern states, and because the federal social security agency lacked authority to correct the imbalance,²¹³ blacks had no opportunity to correct the inequity.

As a result of these political and administrative infirmities, the actual discriminatory impact of the Social Security Act on blacks corresponded closely to the hopes of southern congressmen. Aside from the exclusion of agricultural and domestic labor, those blacks still eligible for social security assistance received significantly lower benefits than whites. By 1940, for example, 78.1 percent of employed white workers were receiving wage credits under the old age and survivors insurance program, compared to 53 percent of blacks.²¹⁴ Similar occupational exclusions from the unemployment compensation provisions of the Act²¹⁵ produced a similarly disproportionate impact on blacks.²¹⁶

4. *Other New Deal Programs and Agencies.*—The discrimination against minority farm workers was most pronounced in the NIRA, AAAct, and Social Security programs, in which agricultural workers were excluded outright from some of the benefits. Other programs did not exclude farm workers, but the structure of the programs and their administration inflicted equally invidious results on blacks and other mi-

211. F. Davis, *The Effects of the Social Security Act upon the Status of the Negro*, 157 (1939) (unpublished Ph.D. dissertation, State University of Iowa) (available from the University or the author). In rural areas, where the vast majority of Negro recipients were located, the amount allowable to the Negro was based on the subsistence level of Negro sharecroppers and tenants in the immediate locality. See *id.* at 149. Whether it is based on tenant, sharecropper or agricultural wage laborer status, “their position is at the bottom, considered from a standard-of-living or income viewpoint.” Maris, *Farm Tenancy*, in UNITED STATES DEPT. OF AGRIC., YEARBOOK OF AGRICULTURE, 1940, H.R. DOC. NO. 695, 76th Cong., 3d Sess. 887, 891 (1940).

212. J. FRANKLIN, *supra* note 143, at 538.

213. See F. Davis, *supra* note 211, at 198.

214. See U.S. BOARD OF OLD-AGE AND SURVIVORS INSURANCE, HANDBOOK OF OLD-AGE AND SURVIVORS INSURANCE STATISTICS: EMPLOYMENT AND WAGES OF COVERED WORKERS: 1940, at 8 (1943) (table 5); [Population: Comparative Occupation Statistics for the United States, 1870 to 1940] CENSUS 1940 *supra*, note 52, at 196-97, 200-01; see also W. WOYTINSKY, LABOR IN THE UNITED STATES 43 (1938) (noting that in 1930 the old-age insurance provisions of the Social Security Act would have covered only 48% of the “colored” salary and wage earners, compared to 74% of “native white” and 82% of “foreign born white” workers); F. Davis, *supra* note 211, at 99, 102 (tables XXI and XXIII) (stating that 53.56% of the male and 86.69% of the female Negro workers (nonsalary, salary, and wage) in 1930 were excluded from the old-age insurance provisions of the Social Security Act).

215. Social Security Act, ch. 531, tit. IX, § 907(c)(1)-(2), 49 Stat. 620, 643 (1935) (codified as amended at 42 U.S.C. § 1107 (1982)).

216. See F. Davis, *supra* note 211, at 97.

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norities. Discrimination against black agricultural workers was part of the “[i]nexorable discrimination [that] stalked Negroes in every Federal program.”²¹⁷

(a) *Civilian Conservation Corps*.—The Civilian Conservation Corps (CCC) was an attempt by the Roosevelt administration to bring together “two wasted resources, the young men and the land, in an attempt to save both.”²¹⁸ The program was simple: unemployed young men were sent to rural camps where they worked on projects such as reforestation, fire control, and soil conservation. From its inception, however, the CCC was fraught with discrimination.

The Great Depression affected every ethnic group in the United States, leaving millions unemployed; none, however, was hit harder than American blacks. Unemployment among blacks was twice the national average in 1933.²¹⁹ No other class had a greater need for the relief offered by the CCC. Despite the unambiguous wording of the CCC enabling act, “that no person shall be excluded on account of race, color, and creed,”²²⁰ blacks consistently were denied the benefits of the CCC program.

First, in southern states, the CCC enrolled many fewer blacks than was appropriate given their share of the general population.²²¹ The most egregious example of discriminatory enrollment occurred in Georgia, where blacks composed “36 percent of the state’s population and an even higher percentage of its unemployed.”²²² But the Georgia director of the CCC refused to enroll a single black, despite pressure from the federal official responsible for CCC selection, W. Frank Persons.²²³ It was only after Persons delivered an ultimatum to Georgia Governor Eugene Talmadge that a few token blacks were finally enrolled.²²⁴ Discriminatory selection was not unique to Georgia. In Mississippi, for example, blacks totaled more than 50 percent of the population but only 1.7 percent of the CCC enrollment.²²⁵ In addition, few blacks held positions of respon-

217. 10 G. TINDALL, *A HISTORY OF THE SOUTH: EMERGENCE OF THE NEW SOUTH 1913-1945*, at 545 (1967).

218. J. SALMOND, *THE CIVILIAN CONSERVATION CORPS, 1933-1942*, at 88 (1967).

219. *Id.*

220. Act of June 28, 1937, ch. 383, § 8, 50 Stat. 319, 320. The demise of the Civilian Conservation Corps occurred in June 1942 when the House and Senate agreed to stop funding the program, except for providing \$8 million for the liquidation of the CCC. See J. SALMOND, *supra* note 218, at 216-17.

221. See J. SALMOND, *supra* note 218, at 88-91.

222. G. MARTIN, *MADAM SECRETARY: FRANCES PERKINS 297* (1976).

223. *Id.*; J. SALMOND, *supra* note 218, at 88-89, 94-95.

224. G. MARTIN, *supra* note 222, at 297; J. SALMOND, *supra* note 218, at 90.

225. J. SALMOND, *supra* note 218, at 91.

sibility within the CCC, even at segregated, all-black camps.²²⁶ Segregation of the CCC's camps created controversy for the CCC. The Corps' director, Robert Fechner from Tennessee, insisted that the camps remain segregated.²²⁷ Few white communities, however, wanted all-black camps placed nearby, and Fechner immediately was bombarded with angry letters whenever a new site was proposed.²²⁸

Fechner took other discriminatory steps that exacerbated the racial tensions surrounding the CCC. First, he refused to allow blacks to be transported to camps outside their own states,²²⁹ and later insisted that those who had been placed in another state be returned as soon as possible.²³⁰ In addition, Fechner implemented a policy designed formally to restrict black enrollment, using as a pretext incidents of unrest in California, Arkansas, and Texas.²³¹ Frank Persons objected to these policies and refused to enforce them.²³² President Roosevelt, however, for whom the racial issues were " 'political dynamite,' asked that his name 'be not drawn into the discussion' and acquiesced completely in the restrictions on Negro enrollment."²³³ When Persons' objections threatened to embarrass the President, Secretary of Labor Frances Perkins acted to silence Persons.²³⁴ As in other New Deal programs, therefore, discrimination was not confined to local administrators, or even national program officials, but extended to the highest levels of the federal government.

(b) *Farm Security Administration.*—The general practice of racial discrimination throughout the New Deal reached the Farm Security Administration (FSA) through its leadership, most of whom were southerners. As southerners, they "adhered fairly consistently to southern attitudes and practices regarding race in matters pertaining to allocation of loan and grant funds, personnel and appointments, cooperative and group enterprises, resettlement projects and public information activities."²³⁵ The power exercised by the alliance of southern democrats, and the willingness of the Roosevelt administration to compromise, pre-

226. *Id.* at 95.

227. G. MARTIN, *supra* note 222, at 297; J. SALMOND, *supra* note 218, at 96.

228. J. SALMOND, *supra* note 218, at 92-93.

229. *Id.* at 92.

230. *Id.* at 96.

231. *Id.* at 97-99.

232. *Id.* at 98-99.

233. G. MARTIN, *supra* note 222, at 297; J. SALMOND, *supra* note 218, at 98-99.

234. G. MARTIN, *supra* note 222, at 297.

235. S. BALDWIN, *POVERTY AND POLITICS: THE RISE AND DECLINE OF THE FARM SECURITY ADMINISTRATION* 279 (1968); *see also* P. MERTZ, *NEW DEAL POLICY AND SOUTHERN RURAL POVERTY* 193-95 (1978) (documenting discrimination by loan committees against black applicants).

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vented installation of a more balanced leadership. For example, when Will Alexander, the first administrator of the FSA, appointed blacks to state advisory committees, Senator James Byrnes of South Carolina told him not to “disturb the friendly relations now existing between the races.”²³⁶ When Alexander refused to comply, Senator Byrnes went directly to Secretary of Agriculture Henry Wallace, who was willing to accommodate the Senator’s wishes.²³⁷

(c) *Tennessee Valley Authority*.—Local administrators of the Tennessee Valley Authority (TVA) discriminated by hiring far fewer blacks than the black proportion of the population, and by relegating them to the least skilled and lowest paying tasks.²³⁸ Moreover, the model towns constructed by the TVA and owned by the federal government were kept “lily-white” by totally excluding blacks.²³⁹

(d) *Relief programs*.—Because the federal relief programs initiated during the depression years of the New Deal channeled their funds to the states for administration, relief not surprisingly accommodated the agrarian racism of the South. “Because Negroes were usually among the people most in need of welfare, many southerners also had racial objections to heavy relief payments. . . . [I]n the South, they complained [that relief spending] raised the Negro to the white man’s economic level and created a shortage of *cheap farm labor*.”²⁴⁰ Some southern landlords “oppose[d] relief for any but those actually on the verge of starvation,” because relief payments weakened their traditional power over black farm workers, who had been dependent upon them for food and shel-

236. S. BALDWIN, *supra* note 235, at 307; *see also* Holley, *The Negro in the New Deal Resettlement Program*, 45 AGRIC. HIST. 179, 192 (1971) (“[T]he FSA dealt cautiously, even timidly, with racial problems.”).

237. S. BALDWIN, *supra* note 235, at 307.

238. *See* I H. SITKOFF, *supra* note 116, at 50-51; Wolters, *The Negro and the New Deal*, in 1 THE NEW DEAL: THE NATIONAL LEVEL 170, 197-200 (1975); *see also* Davis, *The Plight of the Negro in the Tennessee Valley*, 42 CRISIS 294, 294 (1935) (discussing the employment practices of the TVA and asserting that blacks received lower wages and were employed in low numbers).

239. Houston & Davis, *TVA: Lily-White Reconstruction*, 41 CRISIS 290, 291 (1934); *see also* Davis, *supra* note 238, at 295, 314 (follow-up article to Houston & Davis, *supra*, asserting that TVA worker housing was “notoriously inferior” for blacks, and that they were excluded from white model communities).

240. J. PATTERSON, *supra* note 121, at 145 (emphasis added); *see also* R. VANCE, *supra* note 89, at 226 (“[D]iscrimination against Negroes . . . in some areas of the South in the administration of public relief . . . was exercised in an effort to keep relief expenditures for Negroes in line with low wages prevailing in agriculture.”). This sentiment was also held by southern congressmen. *See* R. TUGWELL, THE DEMOCRATIC ROOSEVELT 443-44 & n.7 (noting that men such as Sen. Byrd of Virginia, Sen. Hull of Tennessee, Sen. Harrison of Mississippi, and Vice President Garner of Texas objected to spending programs that helped the disadvantaged because they “upset the class distinctions and the economic cleavages that were the fundamentals of their world”).

ter.²⁴¹ As a result of the accommodation of these fears, payments to rural black families under the Federal Emergency Relief Administration, the chief New Deal relief agency from 1933 to 1935, "ran considerably lower" than those to whites.²⁴²

Similar race differentials appeared in work-relief programs such as the Works Progress Administration (WPA). As "a concession by the federal government to southern opposition to the payment of Negroes of wages of thirty cents an hour"²⁴³ under the short-lived Civil Works Administration, the advent of the WPA in 1935 occasioned a drastic reduction in wages below the thirty cents an hour level.²⁴⁴ The WPA, like the NRA, employed racist geographic wage differentials and classified blacks into unskilled occupations in administering work relief. Local control of administration and the nearly nonexistent participation of blacks as supervisors²⁴⁵ precluded any successful effort by blacks to rectify the discrimination.²⁴⁶

In addition to general discrimination, the WPA took steps to benefit southern planters by discriminating against minority farm workers. First, it established a racially bifurcated wage structure that deterred black workers from remaining on the relief rolls. Because

Negro workers [were] accustomed to relatively low standards of living . . . [they were] denied WPA employment on the ground that they [were] not in need whereas workers accustomed to relatively higher standards of living [were] declared eligible for such employment even though they [had] as large and possibly larger resources than the former. Similarly, since workers [were] denied WPA employment if they refused private employment at pay prevailing in the community for the type of work offered, Negro workers refusing jobs at prevailing rates of \$3.00 or \$4.00 a week [were] denied WPA employment whereas white workers might not be required to accept jobs at such rates if these were lower than those customarily paid white workers.²⁴⁷

241. Douty, *FERA and the Rural Negro*, 70 SURVEY 215, 215 (1934). Esther Morris Douty reports comments such as, "Ever since federal relief . . . came in you can't hire a nigger to do anything for you," and "I don't like this welfare business. I can't do a thing with my niggers. . . . They know you all won't let them perish." *Id.* at 215-16.

242. "In July, 1933, when the national average monthly payment per family was \$15.07, southern averages ranged from \$3.96 in Mississippi to \$13.89 in Louisiana." 10 G. TINDALL, *supra* note 217, at 480, 547; *see also* A. RAPER & I. REID, *supra* note 80, at 237 (showing relief amount differentials ranging from 33 to 191% in favor of whites); N. WEISS, *supra* note 131, at 58-59 (discussing the "inequities in the way in which FERA relief was distributed").

243. Davis, *supra* note 188, at 10.

244. 10 G. TINDALL, *supra* note 217, at 481.

245. In 1940, for example, only 11 of more than 10,000 southern supervisors were black. *Id.* at 548.

246. *Id.*

247. D. HOWARD, *THE WPA AND FEDERAL RELIEF POLICY* 291 (1943).

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These policies ensured a large supply of unemployed workers, thus allowing planters to continue to pay low wages.

When, despite these efforts, the farm labor supply fell below planters' immediate needs, the WPA often would simply force primarily minority workers off the relief rolls. For example, WPA administrator Harry Hopkins began the practice in 1936 of closing projects and releasing workers during the cotton-picking season.²⁴⁸ State relief agencies rendered a similar service to the white planters by developing "elaborate procedures to prevent the diversion of surplus farm workers to relief."²⁴⁹

5. *Summary.*—The general, widespread discrimination against minorities in the New Deal cannot be gainsaid. State officials, agency officials, high executive branch officials, and congressmen all helped to perpetuate racial discrimination. Equally undeniable is the racially motivated mistreatment of black farm workers. It is true, of course, that part of the explanation for the discrimination against farm workers was the private economic interests of white planters and other large employers of farm labor, and the consequent political interests of southern congressmen and administrators. But the pervasiveness and the virulence of the discrimination belies any claim that economics provides the sole explanation. Instead, race and economics in the New Deal, like race and economics in slavery, were intertwined explanations: whites discriminated against blacks because of racism *and* because racism was good for them financially. The degree of discrimination is too great to be justified by economics alone.

D. *The Fair Labor Standards Act*

1. *Legislative History.*—The legislative history of the FLSA²⁵⁰ contains little revealing discussion of the provisions excluding farm workers.²⁵¹ As originally drafted by the Roosevelt administration and

248. 10 G. TINDALL, *supra* note 217, at 479-80; see also R. VANCE, *supra* note 89, at 228-29 (stating that Texas farmers successfully induced FERA officials "to displace all Mexican casuals who had got on their relief rolls in [San Antonio] during the winter so the area might have its accustomed supply of cheap [truck farming] labor").

249. 10 G. TINDALL, *supra* note 217, at 479-80.

250. For discussions of the legislative history, see J. BURNS, CONGRESS ON TRIAL 68-82 (1949); O. PHELPS, THE LEGISLATIVE BACKGROUND OF THE FAIR LABOR STANDARDS ACT 3-4 (1939); Douglas & Hackman, *The Fair Labor Standards Act of 1938* (pt. 1), 53 POL. SCI. Q. 491-515 (1938); Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, MONTHLY LAB. REV., June 1978, at 22, 24-28; G. Paulsen, The Legislative History of the Fair Labor Standards Act (1959) (unpublished dissertation, Ohio State University); G. Paulsen, A Living Wage for the Forgotten Man: The Origins of the Fair Labor Standards Act (n.d.) (unpublished manuscript) (copy on file with the author).

251. At several places in the Congressional Record for 1937 the FLSA and its agricultural exclusion were debated, without shedding much light on the motivations for the exclusion. See 81 CONG.

introduced in both houses of Congress, the proposed legislation already contained the exclusion.²⁵² It was an exclusion that Congress had come to expect, and even to help enforce, in other New Deal programs. Most of the debate in Congress concerned what industries and occupations were actually included in the definitional exclusion of agriculture.²⁵³

The FLSA originated in the office of Secretary of Labor, Frances Perkins, in the mid-1930s as a substitute for the wage and hours standards that would become void when the Supreme Court held the NRA codes unconstitutional.²⁵⁴ Although the President may have envisioned the FLSA as "a comprehensive minimum wage and maximum hour bill,"²⁵⁵ his court-packing fiasco required compromises to reunite the Democratic party, including the continued accommodation of southern agrarian interests.²⁵⁶ The NRA had wholly excluded agricultural labor; this exclusion had been administratively extended to closely related agricultural labor. Accommodation of southern interests meant that broader minimum wage and maximum hour coverage would fail to pass if the extensions offended the agricultural interests that southern congressmen had so vigorously protected.²⁵⁷

President Roosevelt's message to Congress on May 24, 1937, in

REC. 7648-49, 7652-54, 7656-61, 7784, 7789, 7873-74, 7876-77, 7881-83, 7927-28 (1937). As to wage differentials by regions, see the statements of Sen. George of Georgia in 81 CONG. REC. 7786-89 (1937) (also opining that sending a federal agent such as John L. Lewis to the South to set wage and hour limits would be dangerous).

252. The original and identical bills, S. 2475, 75th Cong., 1st Sess. § 2(7) (1937) and H.R. 7200, 75th Cong., 1st Sess. § 2(7) (1937), are summarized in the Congressional Record. See 81 CONG. REC. 7750 (1937) (bill as introduced in the Senate defined employees to exclude agricultural workers); 81 CONG. REC. 8205 (1937) (short analysis of the bill describes exemptions from bill in § 2, including agriculture). In describing S. 2475 to his colleagues, the bill's sponsor, Sen. Hugo Black of Alabama, later Supreme Court Justice, stated that

[t]he bill specifically and unequivocally excludes certain industries and certain types of business from its scope and effect. It specifically excludes workers in agriculture of all kinds and of all types. There is contained in the measure, perhaps, the most comprehensive definition of agriculture which has been included in any one legislative proposal.

We have placed together in the bill definitions of agricultural work which have been fixed from time to time in other legislative enactments, and in addition to that we have drawn liberally from Mr. Webster's definition of agriculture.

81 CONG. REC. 7648 (1937). Sen. McGill asked Sen. Black in "what part of the bill" the agricultural exemption occurred, and Sen. Black referred him to the definition of "employee." *Id.* at 7649.

253. Most of the debates published in the Congressional Record are limited to this scope of coverage issue. See *supra* note 251.

254. See F. PERKINS, *THE ROOSEVELT I KNEW* 246-56 (1946). The NRA codes were held unconstitutional in *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 550 (1935).

255. F. PERKINS, *supra* note 254, at 256.

256. *Id.* See generally W. LEUCHTENBURG, *supra* note 204, at 238-39 (concerning Roosevelt's court-packing plan).

257. See D. POTTER, *THE SOUTH AND THE CONCURRENT MAJORITY* 70 (1972) ("[T]he South's misgivings about social change derived in considerable measure from the fact that almost any kind of change might challenge the bi-racial system. Wage and hour laws were resisted because they might mean equal wages for Negroes and whites.").

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which he urged support of the minimum wage bills introduced that day, reflected this acquiescence to the racially motivated demands of the largest solid bloc of Democratic voting strength. Using euphemistic language, Roosevelt admitted his acquiescence: “Even in the treatment of national problems there are geographic and industrial diversities which practical statesmanship cannot wholly ignore.”²⁵⁸ The committee reports in both houses of Congress echoed the President’s call for “having due regard to local and geographic diversities.”²⁵⁹

Congress knew, as it considered and voted on the FLSA, of the racial implications of the Act’s provisions. Opponents of discrimination, such as the National Negro Congress’ John P. Davis, refused to allow Congress to ignore the attitude among white southerners toward racial issues and the interests of the white South in the continuation of racism. In his testimony before the House and Senate committees considering the bill, John Davis reminded the congressmen that

[i]n the period of the N.R.A. code hearings Negro workers were helpless to defend themselves against demands, especially by representatives of southern industry, for longer hours and lower wages for those occupations, industries and geographic divisions of industries in which the predominant labor supply was Negro. Unorganized and without perceptible collective bargaining power, the Negro worker was soon singled out by pressure groups of employers as the legitimate victim for all manner of various differentials.²⁶⁰

Davis warned that the provisions of the FLSA promised even greater discriminatory treatment of blacks, and he complained specifically about the exclusion of “Negro domestic and agricultural [labor]—representing the bulk of Negro labor”—from New Deal programs.²⁶¹

Blanket exclusions of agricultural workers and domestic servants, local participation in the administration of programs, and political pressure on federal agencies had succeeded in protecting white southern interests from the perceived dangers of previous social welfare legislation. Southerners feared that if the benefits of such programs were extended on an equal basis to whites and blacks, the southern racial and economic caste system would be destroyed. Those same concerns were articulated by southern congressmen in the debate over the FLSA.

258. S. REP. NO. 884, 75th Cong., 1st Sess. 1, 3 (1937).

259. *Id.* at 3, 4; H.R. REP. NO. 1452, 75th Cong., 1st Sess. 8 (1937).

260. *The Fair Labor Standards Act of 1937: Joint Hearings on S. 2475 and H.R. 7200 Before the Senate Comm. on Education and Labor and the House Comm. on Labor, 75th Cong., 1st Sess. 571 (1937)* [hereinafter *FLSA Hearings*] (statement of John P. Davis, representative of the National Negro Congress).

261. *Id.* at 573-74.

For example, during the debate over the FLSA, Senator "Cotton" Ed Smith from South Carolina described the tribulations of the South since "the War between the States."²⁶² He bemoaned the fact that emancipation had "injected into the blood stream of American politics . . . [former slaves] totally unfit for [participation in politics]."²⁶³ He described the antilynching bills, introduced by "men who claim to be white people," as designed to "get the votes of a certain race in this country."²⁶⁴ Senator Smith also discussed the constitutional "two-thirds rule," which gave southern states added representation in Congress according to their Negro population, and the rule's abolition after the Civil War as depriving the South of its just share of political power.²⁶⁵ Finally, the Senator likened the FLSA to these federal actions that interfered with white hegemony in the South.

Antilynching, two-thirds rule, and, last of all, this unconscionable—I shall not attempt to use the proper adjective to designate, in my opinion, this bill! Any man on this floor who has sense enough to read the English language knows that the main object of this bill is, by human legislation, to overcome the splendid gifts of God to the South.²⁶⁶

These "splendid gifts" included a warm climate, which did not require much clothing, and other attributes making labor, black labor, cheaper in the South.²⁶⁷

Even more pointed were the remarks of Representative J. Mark Wilcox of Florida:

Then there is another matter of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result.

. . . [T]hose who know the facts know that when employers

262. 81 CONG. REC. 7881 (1937).

263. *Id.*

264. *Id.*

265. *Id.* at 7881-82.

266. *Id.* at 7882.

267. *Id.*; see also Richter, *Four Years of the Fair Labor Standards Act of 1938: Some Problems of Enforcement*, 51 J. POL. ECON. 91, 99 (1943) (noting that Smith, representing cotton farmers, had opposed the FLSA because he found that the application to covered industries would exert pressure to drive up agricultural wages).

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are forced to pay the same wage to the Negro that is paid to the white man the Negro will not be employed. This in turn will mean that he will be thrown onto the relief roll to be fed in idleness. This is just another instance of the well-intentioned but misguided interference of our uninformed neighbors in a delicate racial problem that is gradually being solved by the people of the South. This bill, like the antilynching bill, is another political goldbrick for the Negro²⁶⁸

His colleague, E. E. Cox of Georgia, stated for the record that:

The organized Negro groups of the country are supporting [the FLSA] because it will, in destroying State sovereignty and local self-determination, render easier the elimination . . . of racial and social distinctions

I say to you that these local problems cannot be so administered. It is . . . dangerous beyond conception to try to so adjust all of these intimate questions of daily life and associations by a political power sitting in Washington²⁶⁹

For black agricultural workers, no “goldbrick” had ever existed. No better method could be devised for maintaining the “difference in the wage scale of white and colored labor” than by excluding altogether an entire class of laborers, containing such a large portion of black labor, from the protections provided by the Act.²⁷⁰ It was clearly understood by Senator Smith, Representative Wilcox, and all of their colleagues that the South perceived the FLSA to be a threat to the established discriminatory employment practices in the South. For the agrarian, rural South, the agricultural exemption significantly reduced the federal intrusion, and protected that portion of the southern society and economy still most dependent on cheap black labor.

2. *The Beneficiaries.*—At the time of the enactment of the FLSA, relatively few farms employed any hired labor at all and still fewer employed large numbers of workers. “Only the plantations of the South and a comparatively few farms elsewhere [were] too large for family operation.”²⁷¹ In 1935, only one in seven farms employed any hired labor; fewer than one percent employed four or more workers; and less than one-quarter of one percent employed eight or more workers.²⁷² Family-operated farms that hired no additional labor would have been exempt

268. 82 CONG. REC. 1404 (1937).

269. *Id.* app. at 442.

270. For statements by a Southern senator regarding the importance of regional wage differentials, see 81 CONG. REC. 7786-89 (1937) (statements of Sen. George of Georgia).

271. H. TURNER, A GRAPHIC SURVEY OF FARM TENURE 1 (United States Dep't of Agric., Misc. Pub. No. 261, 1936).

272. See Wendzel, *Distribution of Hired Farm Laborers in the United States*, 45 MONTHLY LAB. REV. 561, 568, (1937) (table 5).

from FLSA coverage even without the agricultural exemption.²⁷³ Consequently, only the larger farms, mainly in the South and Southwest, consequently stood to benefit from the exclusion of agricultural labor.²⁷⁴

For the period in which the FLSA was enacted, farms in the eleven states of the former Confederacy employed the greatest concentration of black farm workers.²⁷⁵ These farms accounted for 40.1 percent of all farms, 25.1 percent of farms using any hired laborers, and 55.0 percent of farms reporting ten or more hired laborers.²⁷⁶ If the states in which other nonwhite farm workers were concentrated (California, Arizona, and New Mexico) are included, these fourteen states accounted for 77.6 percent of all farm laborers employed on farms using hired laborers,²⁷⁷

273. There is little direct evidence for the proposition. Nonetheless, no one in Congress and no one concerned with the enforcement of the FLSA apparently ever considered that it could be applied to nonpaid family labor.

274. Even nonfamily farms with a limited number of farm workers would probably have been excluded without the agricultural exclusion. As initially introduced, the FLSA excluded employees of small businesses with fewer than a fixed number of workers. See Letter from John Possel to William Green (June 3, 1937), reprinted in 81 CONG. REC. 7895, 7896 (1937) (discussing § 6(a) of S. 2475). The Senate Committee on Education and Labor, which passed the bill to the Senate floor, considered provisions in the bill to exclude employers with fewer than "three or five or eight or some other number" of employees. See *id.* at 7651 (remarks of Sen. Black in response to question of Sen. Walsh); see also *id.* at 7661-62 (debate over exemption provision according to firm size). This size exclusion was deleted in favor of an interstate commerce restriction. See Fair Labor Standards Act of 1938, ch. 676, § 6(a), 52 Stat. 1060, 1062 (current version at 29 U.S.C. § 206 (1982)); see also Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 483-85 (1939). Nevertheless, the chief economist of the Wage and Hour Division of the Department of Labor used six employees as a surrogate for interstate commerce. See Daugherty, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Survey*, 6 LAW & CONTEMP. PROBS. 406, 407 (1939). Although almost all agricultural products end up in interstate commerce, the application of a surrogate to small farms would require an even higher threshold due to the seasonal nature of the work involved.

275. The use of census data for this purpose, see *supra* notes 49-82 and accompanying text, presupposes that the farm workers lived in the same states as they worked. This presupposition is justified because there was relatively little seasonal nonwhite migration from the South to the North. See *Free Speech and Labor Hearings*, *supra* note 67, pts. 1 & 2, at 145-51, 316-18, 322, 329-34, 337-38, 354, 457-58, 461-62 (describing only isolated cases of such migration). The vast majority of black migratory farm workers migrated within the South to Florida (citrus and sugar cane), Louisiana (sugar cane), and along the Eastern seaboard (various crops). A smaller number migrated as far north as New Jersey, New York, and Connecticut, harvesting potatoes and truck crops. See HOUSE SELECT COMM. TO INVESTIGATE THE INTERSTATE MIGRATION OF DESTITUTE CITIZENS, INTERSTATE MIGRATION, H.R. REP. NO. 369, 77th Cong., 1st Sess. 351-54, 357 (1941) [hereinafter INTERSTATE MIGRATION]; C. MCWILLIAMS, *ILL FARES THE LAND: MIGRANTS AND MIGRATORY LABOR IN THE UNITED STATES* 168-84 (1967); Taylor, *Migratory Farm Labor in the United States*, 44 MONTHLY LAB. REV. 537, 542-43 (1937). The sole example of significant nonwhite migration from the South to the North was a group of largely Mexican-Americans from Texas who worked in sugar beet fields in several midwestern states. See *Free Speech and Labor Hearings*, *supra* note 67, pts. 1 & 2, at 147, 442-44. But even this migration had no effect on the lack of incentives for northern planters to oppose the FLSA's regulations. Sugar beet workers stood outside that framework, because wages for agricultural workers engaged in beet or cane sugar production were set by the Department of Agriculture. See S. MENEFFEE, *MEXICAN MIGRATORY WORKERS OF SOUTH TEXAS* 23-24 (1941); INTERSTATE MIGRATION, *supra* at 338 n.16.

276. Wendzel, *supra* note 272, at 564 (table 1).

277. *Id.*

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and 80.5 percent of all farms with ten or more hired laborers.²⁷⁸ In comparison, the farms in the North Central States,²⁷⁹ the classical American family farms, accounted for 33.2 percent of all farms but only 6.5 percent of all farms employing ten or more workers, and only 5.7 percent of hired farm laborers worked on these larger farms.²⁸⁰

The relatively few larger plantations and industrialized farms in the South and Southwest, specializing in cotton, citrus, sugar, fruits, and vegetables, accounted for the majority of farm workers.²⁸¹ On these farms, nonwhite farm workers predominated.²⁸² The owners depended on the extraordinarily cheap labor of these workers.²⁸³ The refusal of Congress to apply the minimum wage provision allowed these farmers to “subject their workers to unusual legal disabilities. They . . . preferred to use racial groups with subordinate social status Although slavery and serfdom [we]re forbidden in the United States, second-class citizenship [was] still the badge of agricultural labor.”²⁸⁴

In summary, only a minuscule number of large farms and plantations, employing a small minority of United States farm workers, benefited from the exclusion of agricultural labor from the FLSA. These employers were virtually all southern planters and California factory

278. *See id.* at 565 (table 2); [3 General Report] BUREAU OF THE CENSUS, DEP'T OF COMMERCE, CENSUS OF AGRICULTURE 166-67 (1935) (table 11). The census of agriculture was conducted in January; as a result, it “may understate the proportion of Negroes, who were concentrated in cotton production,” a summer occupation. L. DUCOFF, WAGES OF AGRICULTURAL LABOR IN THE UNITED STATES 21 (United States Dep't of Agric., Technical Bull. No. 895, 1945).

279. Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, North Dakota, Ohio, South Dakota, and Wisconsin.

280. *See Wendzel, supra* note 272, at 564-65 (tables 1 & 2). Nationally, 14.8% of all farm laborers worked on farms with ten or more hired laborers. The greatest centralization of farm employment was found in Arizona (65.0%), Louisiana (44.9%), Florida (42.2%), and California (37.3%). *See id.* at 565 (table 2). These data are for January 1935; estimates for July of that year indicate that the major relative shift was in favor of California. *See id.* at 568 (table 5). Inclusion of sharecroppers among hired laborers would, of course, have increased the figures for the South. *See id.*

281. *See* [Agriculture: Large-Scale Farming in the United States, 1929] CENSUS 1930, *supra* note 62, at 27 (table 6); [Agriculture: Analysis of Specified Farms Characteristics for Farms Classified by Total Value of Products] CENSUS 1940, *supra* note 52, at 103-54 (table 6) (reporting that farmers with one hundred or more employees were concentrated in the South and Southwest). In January 1935, the heaviest concentrations of farm workers were employed in the Salt River district of Arizona; the Rio Grande, Corpus Christi, and Black Prairie districts of Texas; the sugarcane district of Louisiana; the Mississippi and Arkansas Delta cotton areas; and scattered districts in Florida and along the Atlantic Coast. *Free Speech and Labor Hearings, supra* note 67, pt. 1, at 123.

282. *See* A. MORIN, THE ORGANIZABILITY OF FARM LABOR IN THE UNITED STATES 97-98 (1952) (commenting that, in the Mississippi Delta cotton areas, where most wage laborers worked in gangs of ten or more, “[v]irtually all of the . . . wage laborers [we]re Negroes”); *see also* C. BRANNEN, *supra* note 83, at 22 (“[P]ractically all common laborers working for wages in the plantation are negroes, except in Texas and southern Louisiana where the Mexican has recently come to play an important secondary roll [*sic*]. Indians . . . are also used as plantation labor in the coastal plain section of the Carolinas.”).

283. A. Ross, *supra* note 90, at 321.

284. *Id.* at 5.

farmers. Moreover, statistics concerning farm wage labor fail to impart the full extent of the impact on southern planters, which traditionally also made use of sharecroppers and tenant farmers.

3. *The Victims.*—Previous discussion has established that the majority of wage laborers, sharecroppers, and tenant farmers on large southern and southwestern farms were blacks and other minorities. In contrast, only a small percentage of the workers on farms outside the South and Southwest were minorities. For farmers outside these areas, exclusion from minimum wage and overtime provisions were of little consequence. Only southern and southwestern laborers stood to gain significantly from these provisions; thus primarily minority workers, the employees of the exclusion beneficiaries, were harmed by the denial of protection.

This sectional and racial differentiation among workers affected by the exclusion was due in large part to the sectional wage gap prevailing in the 1930s.²⁸⁵ Northern farmers already paid their employees wages approximating the new lawful minimum wage under the FLSA. These employees naturally stood to receive little benefit, and their employers consequently had little incentive to oppose their inclusion.²⁸⁶

The wage gap between southern states and others states was enormous. On July 1, 1937, during congressional proceedings concerning the FLSA, daily farm wage rates, without board, ranged from a low of eighty cents in South Carolina to a high of \$3.15 in Connecticut.²⁸⁷ On October

285. The sectional wage gap pre-dates the 1930s. *See supra* note 110 and accompanying text.

286. After the FLSA became law, the National Farmers Union, which comprised mainly small farmers, advocated application of the FLSA to farm workers. Its members felt that this measure would restore fair competition between large and small farmers by eliminating the large farmers' ability to "hire labor at sweatshop and sub-sweatshop wages." *Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Comm. on Labor*, 79th Cong., 1st Sess. 722 (1945) (statement of Mr. Russ Smith, Legislative Secretary, National Farmers Union, reiterating position adopted by organization at its convention in 1944).

287. 14 UNITED STATES DEP'T OF AGRIC., CROPS AND MARKETS 145 (1937). During the period in question no governmental agency collected nationally uniform data on the hourly wage rates of farm laborers. The Department of Agriculture compiled the only national time series data on the basis of the quarterly responses of a voluntary corps of farmers. These farmers would provide information on monthly and daily rates with and without board. The rates generated by these compilations, however, suffered from a number of defects. First, farmers were not asked what they paid their workers, but rather about the "average rates being paid to hired farm labor at the present time in your locality." R. HALE, RELIABILITY AND ADEQUACY OF FARM WAGE RATE DATA exhibit F (1940) (reproducing AGRICULTURAL MARKETING SERVICE, U.S. DEP'T OF AGRIC., OCTOBER GENERAL SCHEDULE (1939)) (available at the National Agriculture Library in Maryland). Because most responding farmers operated general crop and livestock farms, *id.* at 4, these averages likely did not reflect the wages on other kinds of farms such as fruit and dairy farms. Second, the coverage of piece rates and of earnings of employees hired through labor contractors was spotty. *See id.* Because these workers along with hourly employees "constitute[d] the bulk of the hired workers on the large farms," *Free Speech and Labor Hearings*, *supra* note 67, pt. 3, at 1029 n.52, broad interregional

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1, 1937, when the national average daily wage without board for farm laborers was \$1.73, the regional averages were:

Pacific	\$3.08
New England	2.73
Middle Atlantic	2.54
Mountain	2.42
East North Central	2.37
West North Central	2.24
West South Central	1.34
South Atlantic	1.25
East South Central	1.11. ²⁸⁸

The only regions with averages below the national average were the three areas that included southern states. Considering only the eleven states of the former Confederacy, the regional average daily wage for the South approached one dollar and ranged from eighty cents in South Carolina to \$1.35 in Virginia.²⁸⁹ In addition, because black farm workers were paid less than whites,²⁹⁰ southern black farm workers doubtless received significantly less than one dollar.²⁹¹ In the northern and western regions of the country, however, wages approached or exceeded \$2.50 per day.²⁹²

comparisons of wage rates are more meaningful than studies using subsets of the survey population. Third, and most important, before 1939 only the wages of adult male farm workers were used as weights for computing regional and national averages. See BUREAU OF AGRICULTURAL ECONOMICS, U.S. DEP'T OF AGRIC., FARM WAGE RATES, FARM EMPLOYMENT AND RELATED DATA 2 (1943). Although farm labor outside the South consisted primarily of white men, labor on southern farms included many black women and children. Ham, *The Status of Agricultural Labor*, 4 LAW & CONTEMP. PROBS. 559, 563 (1937); cf. C. BRANNEN, *supra* note 83, at 25-26, (table 8) (reporting that 29% of all plantation acreage in 1920 was cultivated by women and children, virtually all of whom were black). The regional wage rates discussed in the text thus underestimate the gap in wage rates between North and South.

288. R. HALE, *supra* note 287, exhibit B, at 10. The regional averages were calculated by weighting the average for each state according to farm employment in each state.

289. 14 UNITED STATES DEP'T OF AGRIC., CROPS AND MARKETS, *supra* note 287, at 73. Florida, North Carolina, and Texas were the only southern states other than Virginia to pay more than \$1.00 daily. *Id.*

290. See G. MYRDAL, *supra* note 59, at 240.

291. It is instructive that in 1938, President Roosevelt himself was paying three black farm workers in Warm Springs, Georgia twenty dollars per month—slightly more than the state average. F. FREIDEL, *supra* note 129, at 68-69 (1965).

292. See 14 UNITED STATES DEP'T OF AGRIC., CROPS AND MARKETS, *supra* note 287, at 73. A few North Central States—e.g., Kansas, Nebraska, and Wisconsin—exhibited average daily rates closer to two dollars. R. HALE, *supra* note 287, table 3 (unpaginated). This relatively low level may be socially meaningless because few farm workers in those states worked for daily wages without board: 7.9% compared to 20.6% nationally. *Id.*; cf. UNITED STATES DEP'T OF AGRIC., INCOME PARITY FOR AGRICULTURE, pt. II, § 1, at 12 n.8 (1939) (showing data for 1927 with a similar distribution). A special collection of data from volunteer crop reporters in 1938, relating to the daily rates paid for harvesting wheat, oats, and corn, revealed that farmers in these three states were paying near or above \$2.50 daily, in addition to providing two or three meals, while their counterparts in the South offered little more than \$1.00 and one meal per day. R. HALE, *supra* note 287, at 10 (table 4).

When these daily rates are reduced to hourly rates based on an average work day of ten hours,²⁹³ it is apparent that farmers outside the South already exceeded the twenty-five cent per hour minimum wage required by the Act when it went into effect in 1938.²⁹⁴ But farm workers in the Cotton Belt States were being paid only about ten cents per hour, a rate well below the federal minimum wage. Black farm workers in the South, of course, undoubtedly were being paid even less.²⁹⁵

IV. Conclusion

The Supreme Court has recognized that a statute may have a discriminatory purpose that is neither "express nor appear[s] on the face of the statute."²⁹⁶ Consequently, courts can consider the "totality of the relevant facts"²⁹⁷ in deciding whether legislation—or, in this case, an exclusion from legislation—was racially motivated. As the Supreme Court emphatically recognizes, "racial discrimination is not just another competing consideration"²⁹⁸ in the passage of legislation. Instead, the history of racial oppression in this country requires that statutes challenged on grounds of race discrimination be subjected to stringent scrutiny.

This Article has presented evidence that surpasses a mere "naked

293. In order to convert daily wage rates into data relevant to the study of minimum wage rates, it is necessary to know how many hours farm workers worked daily in the 1930s. The Department of Agriculture conducted such a study in 1939-1940. The results are methodologically flawed and severely limited as a basis for calculating minimum wage rates because the respondents were, once again, chiefly crop and livestock farmers whose workers were hired typically by the month or day. "It is doubtful whether these working hours reflect the conditions characteristic of piece workers . . . [who] generally work longer hours than other farm workers in order to maximize their earnings through the performance, within the limited season, of as much work as possible." *Free Speech and Labor Hearings*, *supra* note 67, pt. 3, at 1030. As a result, the hours reported for the South were underestimated, because the major crop—cotton—required the greatest amount of labor and typically was paid by the piece. See L. DUCOFF, *supra* note 278, at 28. In spite of these methodological problems, the regional average deviated little from the estimated national average of 10.0 hours per day. See *Free Speech and Labor Hearings*, *supra* note 67, pt. 3, at 1030 (table 7). They ranged from a low of 9.1 hours in the Pacific region, to a high of 10.4 in the West North Central States. *Id.* In all three regions encompassing the South, the average was 9.7 hours. *Id.* Because California fruit and vegetable pickers generally were paid by the piece, *id.* at 1026, it may be assumed that the hours for the Pacific region were underestimated.

Because it is no longer possible to rectify the methodology, the overestimates and underestimates are compromised by assuming a ten hour day in all regions. *But see* C. BRANNEN, *supra* note 83, at 29 ("The workday on the plantation is from 'sun to sun,' except where the plantations are near a factory. Such plantations usually have a 10-hour workday . . .").

294. Fair Labor Standards Act of 1938, ch. 676, § 6(a)(1), 52 Stat. 1060, 1062 (1938) (codified as amended at 29 U.S.C. § 206(n)(1) (1982)).

295. That black farm laborers in the South were earning even less than the day rates is confirmed by a report that, in the late 1930s, "the average daily earnings of cotton pickers were lower than the prevailing day rates (without board) in nine of the 13 States and were equal to the day rates in 2 other States." L. DUCOFF, *supra* note 278, at 86.

296. *Washington v. Davis*, 426 U.S. 229, 241 (1975).

297. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

298. *Id.*

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statistical argument.”²⁹⁹ Rather, it is apparent that the concentration of blacks and Hispanics in such a vulnerable position is rooted in institutional racism and has proved impervious to both the free market and the political process. Low levels of educational attainment and political participation³⁰⁰ lock today’s generation of minority farm workers into their current socioeconomic status, and virtually guarantee that the same conditions will be reproduced in the next generation. The educational and political deficiencies are due in part to low annual income. In March 1981, for example, more than two-fifths of black and Hispanic farm workers fell below the federal poverty level, compared with only one-fourth of white farm workers.³⁰¹ Long working days are also partially to blame. As Louis Brandeis noted, long working days are inconsistent with the leisure that workers require to continue their education and participate in a democratic society.³⁰² The FLSA was designed to discourage and diminish both low wages and long hours. Denying its benefits to agricultural workers allows these problems to persist.

Because the overtime provision of the FLSA was intended primarily to relieve unemployment, rather than to raise the wages of those already employed,³⁰³ it has been argued that the application of overtime restrictions to agricultural workers would only force employers to hire additional workers, and to reduce the hours of employment for those already

299. *Jefferson v. Hackney*, 406 U.S. 535, 547 (1972).

300. In 1981, Hispanic and black farm workers twenty-five years and older had completed respectively a median of 5.9 and 8.2 years of school compared to the national median of 10.7 and 12.1 for Hispanics and blacks. With 12.2 years of school, however, white farm workers were virtually indistinguishable from the white population at large, which had completed 12.6 years. Whitener, *supra* note 47, at 51; BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 1982-83, at 143 (103d ed. 1982) (table 226).

Voting patterns are similar. In the 1980 federal elections only 12.3% of Spanish origin farm workers eighteen years and older voted. This represented the lowest percentage for any Hispanic occupational group except private household workers and a lower percentage than any white or black occupational group. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS, SER. P-20, NO. 370, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1980, at 65 (1982) (table 12). The corresponding figure for black farm workers was 21.3%, the lowest of all black occupation groups. *Id.* at 64. The percentage of white farm workers voting, 44.4%, was not only much higher than that of blacks and Hispanics, it was the only percentage that was even close to the voting percentage of blue-collar workers of the same race. *Id.* at 63-65. These figures should be contrasted with the participation rate of 74.8% for all farmers and 59.2% for the entire population eighteen and older. *Id.* at 3, 62 (tables B & 12). The minuscule participation rate of minority, especially Hispanic, farmworkers reflects not only the general residual legacy of decades of unconstitutional action by state and local governments, but more particularly the jurisdictional, residency, and linguistic barriers confronting migrant farm workers. The political powerlessness and hence vulnerability of Hispanic farm workers is highlighted by the fact that in 1980 65.0% of them were not even eligible to vote because they were not United States citizens. *Id.* at 65 (table 12).

301. Whitener, *supra* note 47, at 51.

302. L. BRANDEIS, *Hours of Labor*, in *BUSINESS—A PROFESSION* 28, 29 (E. Poole ed. 1925) (originally delivered as an address in 1906).

303. See *Overnight Motor Transp. Co. v. Missel*, 316 U.S. 572, 578 (1942).

hired.³⁰⁴ Thus, the already low earnings of farm workers would be reduced further. During the Depression, when unemployment rose to record heights, the potential for the overtime provision actually to reduce a laborer's income instead of raising it was even greater. The FLSA, however, sought not just to raise wages, a purpose accomplished primarily through the minimum wage provisions, but to lower the unemployment rate as well. Congress enacted the overtime provisions to combat unemployment.³⁰⁵ Although unemployment in general has remained below Depression levels, unemployment among minorities is still unacceptably high. These unemployed minorities would benefit just as much from the overtime protections of the FLSA as other types of workers whom Congress has deemed worthy of protection. No legitimate justification exists for relegating farm workers to second-class status.³⁰⁶

There is no legitimate reason for the exclusion, but there is an illegitimate one: racial discrimination. The Civil War ended slavery, but it ended neither racial discrimination nor the efforts of southern planters and farmers to take advantage of a former slave class for their own economic benefit. Racial discrimination consequently infected the New Deal and the FLSA. The circumstances underlying the exclusion of agricultural labor from the FLSA point unambiguously to its discriminatory purpose. The nexus between agricultural economics and slavery is indisputable. The efforts of white southern planters to oppress their emancipated slaves through state legislation is fact. The strength of southern democrats in New Deal Congresses, and the willingness of Roosevelt to accommodate their interests, is fact. The specific efforts of these southern congressmen to protect southern society, agriculture, and racism from federal interference is fact. The specific New Deal discrimination against minority farm workers is fact. The identity of the beneficiaries of the farm worker exclusion from the FLSA—southern agricultural employers—and the victims—minority agricultural employees—is fact. Last, the continued disparate impact of the agricultural exclusion is fact.

304. *E.g.*, *Exemptions from the Fair Labor Standards Act*, in 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 107, 118, 127 (1981).

305. *See, e.g.*, *Missel*, 316 U.S. at 577-78 (discussing Congressional purposes behind the overtime provisions); S. REP. NO. 884, 75th Cong., 1st Sess. 4 (1937) (stating purposes of overtime and minimum wage provisions); H.R. REP. NO. 1452, 75th Cong., 1st Sess. 14-16 (same).

306. Labor-intensive fruit and vegetable farming operations, which represent the major source of agricultural employment for nonwhite farm workers, are not subject in the same measure to the current agricultural depression as are family grain or livestock operations. *See* S. Short, *Developing Financial Indicators for U.S. Farms by Type of Farm 10* (Economic Research Serv., U.S. Dep't of Agric., Staff Report No. AGES850712, Aug. 1985) (table 6) (giving the rate of return on equity capital by type of farm); Lindsey, *Who Wins and Loses in Trend to Fresh Food*, N.Y. Times, July 19, 1986, at 1, col. 2.

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Appendix A: The Racial and Ethnic Composition of Agricultural Workers

The first step in determining the racial and ethnic composition of agricultural workers is to obtain information on the racial and ethnic distribution of hired farm workers by crop and livestock activity: table 1.³⁰⁷ Second, the number of workers employed in firms subject to the minimum wage provision is calculated by commodity:³⁰⁸ columns (1), (2), and (3) of table 2. Third, the minority employment in subject firms is calculated using the minority estimates by crop or livestock activity found in table 1: columns (4) and (5) of table 2. Last, the estimated minority employment in the various crops and commodities and the total estimated (unadjusted) minority employment as a percentage of total employment in subject firms is calculated. These initial calculations show that 36.3 percent of the farm worker population is minority. This figure, however, does not accurately represent the racial composition of the relevant farm worker population. Further adjustments and refinements of the data are necessary. These adjustments have been classified as unquantifiable and quantifiable.

The most important unquantifiable adjustment is made necessary by the fact that fruit and vegetable work was going through “a midsummer lull in activity” during the survey week in July 1980, while “[c]ash grain firms . . . would have been in harvest peak at the time of the survey.”³⁰⁹ The authors of the special Minimum Wage Study Commission report, however, never sought to adjust their data for this distortion. Because fruit and vegetable work represents the largest source of minority agricultural employment, while only a minuscule number of nonwhites are employed on grain farms, the timing of the survey significantly skews the data concerning racial composition.

Several other unquantifiable adjustments are also necessary for complete accuracy. First, data from *The Hired Farm Working Force of*

307. See Hired Farm Working Force, *supra* note 47, at 48 (table 17).

308. See Holt, Elterich & Burton, *supra* note 4, at 420 (table 5.3). The commodity categories listed in Hired Farm Working Force differ somewhat from those in Holt, Elterich & Burton. To combine the two sets of data, certain assumptions were made and the data in Holt, Elterich & Burton's table 7 were adjusted as follows: (1) the category “grain” was assumed to be the same as “cash grain” in Holt, Elterich & Burton; (2) the category “other field crops” in both sources was assumed to be the same; (3) the category “vegetables” in Hired Farm Working Force was assumed to include melons; (4) the category “beef cattle” was assumed to correspond exactly to the category “livestock” in Holt, Elterich & Burton; and (5) the categories “nursery” and “others” in Hired Farm Working Force were collapsed and the resulting combination was assumed to correspond to Holt, Elterich & Burton's “miscellaneous” category.

309. Holt, Elterich & Burton, *supra* note 4, at 457. For the raw data, see *infra* table 4, col. 1.

Table 1

Number of Hired Farm Workers by Commodity and Distribution by Racial and Ethnic Groups, 1981

<u>Type of Commodity</u>	(1) <u>Total</u> 1000s	(2) <u>% Whites</u>	(3) <u>% Hispanics</u>	(4) <u>% Blacks & Others</u>	(5) <u>% Total Minority</u>
Grain	488	91	3	6	9
Cotton	115	30	38	31	70
Tobacco	277	66	1	33	34
Other field crops	358	79	11	10	21
Vegetables	307	47	35	18	53
Fruit & tree nuts	272	54	29	17	46
Beef cattle	176	82	6	11	18
Dairy	169	95	3	2	5
Other livestock	127	91	5	4	9
Nursery & other	203	82	9	8	18
TOTAL	2492	73	13	14	27

Note: Percentages may not add up to 100 as a result of rounding.

Source: Calculated according to S. POLLOCK & W. JACKSON, *THE HIRED FARM WORKING FORCE OF 1981*, at 16 (table 7) (U.S.D.A., Econ. Research Service, Agric. Econ. Rep. No. 508, 1983).

Table 2

Estimated Minority Employment in Firms Subject to FLSA Minimum Wage: Agricultural Coverage, by Commodity

<u>Type of Commodity</u>	(1) <u>Total Survey</u> <u>Week</u> <u>Employment</u> 1000s	(2) <u>Employed by</u> <u>Subject Firms</u> <u>%</u>	(3) <u>Total Employed</u> <u>by Subject Firms</u> <u>1000s</u>	(4) <u>Est.</u> <u>Minority*</u> <u>%</u>	(5) <u>Est. Minority</u> <u>Employment in</u> <u>Subject Firms</u> <u>1000s</u>
Grain	207.0	21.3	44.1	9	4.0
Tobacco	141.0	32.9	46.4	34	15.8
Cotton	124.9	52.0	64.9	70	45.4
Other field crops	93.1	47.8	44.5	21	9.3
Vegetable/Melon	115.2	78.7	90.7	53	48.1
Fruit & tree nuts	295.2	83.9	247.7	46	113.9
Beef cattle	248.5	13.3	33.1	18	6.0
Dairy	146.0	21.4	31.2	5	1.6
Other livestock	45.5	64.8	29.5	9	2.7
Miscellaneous	138.3	68.1	94.2	18	17.0
TOTAL			726.3		263.8

The total estimated unadjusted minority employment, as a share of total employment in subject firms is 36.3% (263.8/726.3).

*Col. (4) is derived from table 1, *supra*; col. (5) is the product of cols. (3) and (4).

Source: Cols. (1), (2), and (3) are calculated from Holt, Elterich & Burton, *Coverage and Exemptions of Agricultural Employment Under the Fair Labor Standards Act*, 4 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 420 (table 5.3) (1981).

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1981³¹⁰ include farm operators and paid family laborers, who are specifically exempt from the minimum wage provision of the FLSA³¹¹ and thus should not be included in calculating the effect of the general exclusion of agricultural workers from the overtime provision of the FLSA. Relatively few blacks or Hispanics own farms; therefore the elimination of operators and family laborers would raise the aggregate share of minorities for the relevant population. Second, within a given commodity, minorities may be more likely than whites to work on larger farms subject to the FLSA. If this supposition is true, the percentages of minority workers are underestimated further. Finally, an undercount of migrant (minority) farm workers is built into the sampling procedures of the Current Population Survey (CPS).³¹²

The quantifiable adjustments should include estimates of the number of international migrants excluded by *The Hired Farm Working Force of 1981*, including 300,000 undocumented foreign national fruit and vegetable workers; 15,000 migrant fruit and vegetable workers; and 10,000 Puerto Rican contract migrants.³¹³ Adding these 325,000 minority workers results in an increase of the estimated minority share of employment of firms otherwise subject to the FLSA from 36.3 percent to 41.8 percent.³¹⁴ Second, the inclusion of approximately 18,000 farm workers in Hawaii omitted from the July 1980 survey raises the share of minority employment in subject firms to 43.1 percent.³¹⁵

310. See *supra* Table 1; *supra* note 307 and accompanying text.

311. 29 U.S.C. § 203(e)(3) (1982).

312. See Whitener, *supra* note 47, at 49.

313. These figures has been used by various growers groups in recent discussions of immigration law reform as an estimate of the number of supplemental legal workers needed to replace the existing undocumented agricultural workforce. It is a very conservative estimate.

314. This result was obtained by adjusting the values as follows:

	Total	Minority	
Vegetables	307,000	163,000	(307,000 x .53)
Fruit & Tree nuts	<u>272,000</u>	<u>125,000</u>	(272,000 x .46)
Total before adjustment	579,000	288,000	
Adjustment	<u>325,000</u>	<u>325,000</u>	
Adjusted totals	904,000	613,000	
Adjusted total minority share		68%	

If this figure of 68% is used in column 4 of Table 2 in the rows for "vegetable" and "fruit," the new total number of minority employees in subject firms in these commodities rises from 162,000 to 230,100 (*i.e.*, 68% of 338,400). If these additional 68,100 workers are added to the "totals" row of table 2, the minority share becomes 41.8% (331,900/794,400).

315. The Census of Agriculture enumerated 18,463 farm workers in Hawaii in 1978 and 17,442 in 1982, five-sixths of whom worked on farms with ten or more workers. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1982 CENSUS OF AGRICULTURE, GEOGRAPHIC AREA SERIES: UNITED STATES SUMMARY AND STATE DATA pt. 15, at 206 (1984). Almost all were subject to the mini-

Third, the data in table 2 include two groups of workers who are excluded from the minimum wage provisions of the FLSA even when they are employed by otherwise covered farm employers. The first group is commuting (that is, nonmigrant) hand-harvest laborers who are paid at a piece-rate and who were employed fewer than thirteen weeks in agriculture during the preceding year.³¹⁶ The second group is laborers principally employed in the range production of livestock.³¹⁷ The 35,500 local hand-harvest piece-workers and the 5,400 range-livestock employees enumerated during the July 1980 survey week³¹⁸ must be subtracted from column 3 of table 2. This calculation raises the minority share to 44.9 percent.³¹⁹

The last adjustment takes into account the fact that nonwhite farm workers work on the average almost one month longer than white farm workers and therefore account for a greater share of total days worked than is indicated by their numbers alone.³²⁰ Thus, while nonwhites accounted for 26.8 percent of all farm workers enumerated in 1981, they accounted for 32.1 percent of all days worked. If the resulting intensity adjustment factor, 19.8 percent,³²¹ is applied to the previously derived

minimum wage provision of the FLSA, and virtually all may be presumed to be nonwhite. Adding these 18,000 Hawaiian farm workers to the bottom-line totals of columns (3) and (5) of table 2 raises the minority share to 43.1% (349,900/812,400).

316. 29 U.S.C. § 213(a)(6)(C) (1982).

317. *Id.* § 213(a)(6)(E).

318. Holt, Elterich & Burton, *supra* note 4, at 422 (table 5.5).

319. On the assumption that only 5% of range employees ("cowboys") are nonwhite, reducing the number of livestock employees from 33,100 to 27,700 reduces that of minorities from 6,000 to 5,700. Local hand-harvesters who worked fewer than thirteen weeks in agriculture the previous year are predominantly white housewives or mothers and students. Shapley, *Comments*, in 4 REPORT OF THE MINIMUM WAGE STUDY COMMISSION, *supra* note 4, at 487, 488. On the assumption that 10% of these are minority workers, the latter must be reduced by 3,550. The bottom-line totals for columns (3) and (5) of table 2 thus become 703,400 and 277,980 respectively. The minority share thus rises to 44.9% (346,100/771,500).

320. In 1981, 1,824,000 white farm workers worked on the average 91 days for a total of 165,984,000 worker-days; 328,000 Hispanics worked on the average 131 days for a total of 42,968,000 worker-days; and 340,000 blacks worked on the average 104 days for a total of 35,360,000 worker-days. HIRED FARM WORKING FORCE, *supra* note 47, at 34, (app. A, table 7).

321. This figure itself represents a significant underestimate for the following reason: The commodities in which whites worked most intensively (livestock and dairy) were also those in which the share of white employment was the highest and the share of employment subject to the minimum wage provisions of the FLSA the lowest. Conversely, the commodities in which nonwhites worked most intensively (fruit, vegetable, and field crops) were also those in which the shares of nonwhite and subject employment were highest. Thus, for example, whites in livestock and dairy worked on the average 171 days and constituted between 92 and 85% of the work force, almost four-fifths of which, however, was exempt. In contrast, Hispanics in fruits worked 152 days and constituted almost one-quarter of a work force, almost five-sixths of which worked for subject firms. Telephone interview with Leslie Whitener, Economic Research Serv., U.S. Dep't of Agric. (Sept. 19 1985) (performing and conveying tabulations from *Hired Farm Working Force* data); *supra* tables 1 and 2.

To quantify the effect of the commodity-specific work intensity on the figure of 19.8% is, owing to the following limitations of the underlying data base, not possible: (1) the U.S. Department of Agriculture does not run special tabulations for categories of fewer than 50,000 workers; (2) a

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share, the final estimated share of labor performed by nonexempt non-white employees of subject firms rises to 53.8 percent. This figure necessarily contains a degree of uncertainty. But the assumptions are supported and conservatively applied. In addition, the unquantifiable adjustments cannot be calculated accurately, further reinforcing the fact that 53.8 percent is undoubtedly an underestimate.

number of race-commodity classifications (*e.g.*, black fruit workers, all minority livestock and nursery workers) fail to reach this threshold; and (3) the U.S. Department of Agriculture combined a number of commodity categories in order to make the tabulations possible. The fragmentary race-commodity data strongly suggest, however, that the adjustment of 19.8% must be a significant underestimate.