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An Agricultural Law Research Article

**Lost in a Loophole: The Fair Labor Standards
Act's Exemption of Agricultural Workers
from Overtime Compensation Protection**

by

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I. INTRODUCTION

The Fair Labor Standards Act (FLSA) was created to regulate wages, working hours, and child labor within interstate commerce.¹ Originally packaged with President Roosevelt's New Deal legislation to combat the crippling effects of the Depression of the 1930s, the FLSA has continued to be an indispensable safeguard for wage-earners throughout the industrial workplace.² Yet, there is one segment of the working population that would likely disagree with that assertion.³

Particular groups of agricultural workers are exempted from the FLSA's protection of overtime pay.⁴ Thousands of workers employed by large vertically-integrated farms throughout the country, and, more specifically, those lower wage earners in the Midwest's pork and poultry industries "constitute the only numerically significant group of adult minimum-wage workers wholly excluded from . . . the overtime provision of the [FLSA], for a reason other than the size of the employing firm."⁵

The rationalizations and arguments behind the agricultural exemption range from reasonable, to antiquated, to politically motivated. A survey of legislators would most likely reveal that few of our lawmakers even know of the exemption.⁶ Nevertheless, the exemption has survived, or arguably been ignored, through more than sixty-five years of legislative amendments,⁷ political elections, societal changes, and technological agricultural advancements.

1. Fair Labor Standards Act of 1938, 29 U.S.C.A. §§ 201-219 (West 1998).

2. See S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3002-3003.

3. Although the author is very aware of the problems facing migrant workers in the fruit and vegetable industries found in the southern and western regions of the country, the focus of this Note will be on those workers employed in agriculture's vertically-integrated livestock production industries rather than fieldworkers. Specifically, this Note will focus on those workers employed in pork, poultry, and egg production.

4. Fair Labor Standards Act of 1938, § 213(b)(12) (stating that any "employee employed in agriculture" is exempt from the maximum hour or overtime compensation provision of the FLSA).

5. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1335 (1987).

6. See Chad Graham & Tish Williams, *Overtime? Not for Farm Workers*, DES MOINES REG., May 18, 2003, at 1A.

7. The FLSA of 1938 has been revised or amended by nearly every session of Congress since its passage. See, e.g., H.R. REP. NO. 101-260, at 8-14 (1989), reprinted in 1989 U.S.C.C.A.N. 696, 696-702.

LOST IN A LOOPHOLE: THE FAIR LABOR STANDARDS ACT'S EXEMPTION OF AGRICULTURAL WORKERS FROM OVERTIME COMPENSATION PROTECTION

Autumn L. Canny

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This Note will examine the original purpose of the FLSA and its exemption of agricultural workers from the protections afforded other industrial workers, specifically the security of guaranteed overtime compensation. It will begin with an overview of the societal, political, and economic factors that instigated the movement towards governmental regulation of labor. Next, this Note will discuss the various motives and explanations behind the creation of exemptions within the original language of the FLSA, particularly the legislative history of the agricultural exemption. Following the exemption's passage came the judicial struggle to define what agriculture is and thus who is an agricultural employee subject to the FLSA's exemption. Finally, this Note will shift towards the current status of American agriculture and how employees, and the communities they reside in, are affected by this particular exemption.

The field of agriculture has dramatically changed since 1938, as has the agricultural industry's workforce. This Note focuses on the current level of protection for agricultural workers within the FLSA and various arguments for policy change. For many, the time has come to amend the FLSA and provide overtime compensation to the thousands of workers this loophole has forgotten.

II. THE FAIR LABOR STANDARDS ACT OF 1938: A HISTORY IN BRIEF

In the 1930s, America's workforce was struggling with unprecedented levels of unemployment.⁸ Those who were employed often found themselves in hazardous conditions, working long hours, and poorly compensated with meager wages.⁹ Thus, the FLSA became the New Deal's attempt to meet the economic and societal problems of that era. President Roosevelt was notably aware of the impending depression and weakening state of the country in his message to Congress on May 24, 1934:

The overwhelming majority of our population earns its daily bread either in agriculture or in industry. One-third of our population, the overwhelming majority of which is in agriculture or industry, is ill-nourished, ill-clad, and ill-housed. . . . Today you and I are pledged to take further steps to reduce the lag in the purchasing power of industrial workers . . . and stabilize the markets for the farmer's markets. . . . Our Nation, so richly endowed with natural resources and with a capable and in-

8. From 1923 to 1929, the annual unemployment rate was an estimated 3.3 percent. In the 1930s, with the onset of the Great Depression, unemployment rapidly grew, peaking at 25 percent in 1933. U.S. DEP'T OF LABOR, REPORT ON THE AMERICAN WORKFORCE 69 (2001), available at <http://www.bls.gov/opub/rtaw/pdf/chapter2.pdf> (last visited Dec. 1, 2003).

9. See S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.A.N. 3002, 3002-3004.

dustrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.¹⁰

The device created to combat detrimental labor conditions was a piece of legislation entitled the Fair Labor Standards Act.¹¹ Immediately following President Roosevelt's speech, the FLSA was simultaneously introduced in the House and Senate.¹²

A. *Societal and Political Influences Leading to Labor Regulation*

The notion that industrial workers, as well as other wage-earners, had fewer resources or less bargaining power than their employers was not always an issue in America's labor market.¹³ In the early nineteenth century, the workforce consisted of few employees, and, therefore, little movement towards employment regulation existed.¹⁴ With slavery a rampant practice that provided the labor needed by the South's large agricultural enterprises, and most goods or services being produced or performed either in the home or by independent artisans or contractors, there was little need for a strong, united workforce.¹⁵

Yet, as the abolitionist movement grew, concluding in the eradication of slavery, many observers began to believe that fairness for workers meant more than being released from shackles of slave-owners' custody.¹⁶ Concurrently, the Industrial Revolution, with the rise of factories and an increase in goods being produced by assembly lines, created a significant increase in the need for labor.¹⁷ Those who opportunistically swarmed to cities searching for a more prosperous life were confronted with the realization that, as industrial workers, they possessed much less bargaining power than their employers.¹⁸

10. S. REP. NO. 884, at 1-3 (1937) *reprinted in* 4 AMERICAN LANDMARK LEGISLATION 117-119 (Irving J. Sloan, ed., 2d ed. 1984).

11. See S. REP. NO. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3002 (describing the FLSA's original policy of maintaining a minimum standard of living necessary for the improvement of health, efficiency, and the general well-being of laborers).

12. The bills were entitled "Bills to Provide for the Establishment of Fair Labor Standards in Employment In and Affecting Interstate Commerce and Other Purposes," S. 2475, 75th Cong. (1937); H.R. 7200, 75th Cong (1937).

13. See Seth D. Harris, *Conceptions of Fairness and the Fair Labor Standards Act*, 18 HOFSTRA LAB. & EMP. L.J. 19, 19-20 (2000) (discussing other disputes in America's Labor market from the end of the Civil War through the growth of the "living wage movement").

14. See *id.* ("The artisan who was the common 'worker' from colonial times until the Civil War controlled his means of production and reaped the full benefits of his labor.").

15. See *id.*

16. See *id.* at 20.

17. See *id.*

18. See *id.*

Early sources for employment and wage regulation advocacy included religious organizations, which encouraged a mandated minimum, or “living wage,” to counter labor market problems.¹⁹ American Catholics were guided by a Papal encyclical, specifically the 1891 encyclical entitled, *Rerum Novarum*, or “*The Condition of the Working Classes*,” which provided an initial moral conception of workers and their place in society and inspired those committed to enacting minimum wage laws.²⁰ Pope Leo XIII understood the then current labor situation when imploring:

[S]ome opportune remedy must be found quickly for the misery and wretchedness pressing so unjustly on the majority of the working class. . . . Hence, by degrees it has come to pass that working men have been surrendered, isolated and helpless, to the hardheartedness of employers and the greed of unchecked competition. . . . To this must be added that the hiring of labor and the conduct of trade are concentrated in the hands of comparatively few; so that a small number of very rich men have been able to lay upon the teeming masses of the laboring poor a yoke little better than that of slavery itself.²¹

The “living wage” movement believed that there is a natural right to a living wage derived from the recognition that God created the Earth for the sustenance of all.²² The movement preached that there are a certain minimum number of goods each and every worker is entitled to possess, and the employer owes an obligation to the employee to aid in providing this minimum standard, due to the benefit they receive from the worker’s labor.²³ As those in control of the community’s resources, the employer is “society’s paymaster” and must take care of its employee in a fair and decent matter.²⁴

Beyond religious instruction, the notion of governmental intervention, or regulation of industry, and of private employment contracts was a new concept in early America. The living wage movement initially framed the troubles plaguing the workforce as ones that could be solved privately by employers realizing their moral obligation to pay a living wage.²⁵ During that era, the only examples of

19. See *id.* at 39-42.

20. The *Rerum Novarum* has also been given the translated title of “*Encyclical of Pope Leo XIII on Capital and Labor*.” See, e.g., Pope Leo XIII, *Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor* (May 15, 1891), available at http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html (last visited Mar. 22, 2005).

21. See *id.* at ¶ 3.

22. See, e.g., *id.* at ¶ 8. See also Harris, *supra* note 13, at 42 (discussing the fact that all persons have an inherent and equal claim upon nature’s products).

23. See, e.g., Harris, *supra* note 13 at 19-20.

24. See *id.* at 43.

25. See, e.g., Pope Leo XIII, *supra* note 20 at ¶ 45 (emphasizing Pope Leo XIII’s desire to give employers the first opportunity to regulate their own businesses). Pope Leo stated: “Let the

government intervention were foreign models of wage regulation, and, by the early 1900s, Australia, New Zealand, and Great Britain had each enacted some form of minimum wage laws.²⁶ For example, New Zealand conducted compulsory arbitration of labor disputes; Australia established wage floors for certain industries; and Great Britain created representative wage boards for those industries with notoriously low wages.²⁷

Both government agencies and charitable organizations took notice of foreign efforts by organizing budgetary studies to determine the minimum requirements for food, shelter, fuel, clothing, and utilities that an average unskilled wage-earner's family required.²⁸ During the early 1900s, these studies determined that an average working family needed a yearly income of \$800-900 for a mere subsistent lifestyle.²⁹ Despite these studies, observers found examples of people living far below that level. One example of the pervasive poverty includes a 1908 Pennsylvania report, finding families of steel workers with an average income of \$349 a year.³⁰

Due to these staggering findings, as well as the rising voice of the workforce, support for wage regulation began to gain momentum. The first American minimum wage law was passed in Massachusetts in 1912.³¹ Although the law failed to set a mandatory minimum wage for the increasingly industrious commonwealth, it did provide for certain information to be made available to the

working man and the employer make free agreements, and in particular let them agree freely as to the wages. . . ." He implored state involvement only in dire situations:

If through necessity or fear of a worse evil the workman accept harder conditions because an employer or contractor will afford him no better, he is made the victim of force and injustice. In these and similar questions, however-such as, for example, the hours of labor in different trades, the sanitary precautions to be observed in factories and workshops, etc. - in order to supersede undue interference on the part of the State, especially as circumstances, times, and localities differ so widely, it is advisable that recourse be had to societies or boards such as We shall mention presently, or to some other mode of safeguarding the interests of the wage-earners; the State being appealed to, should circumstances require, for its sanction and protection.

Pope Leo XIII, *supra* note 20, at ¶ 45.

26. See Harris, *supra* note 13 at 54-56 (noting that these foreign statutes "proved to Americans that minimum wage laws could succeed in industrial economies.").

27. *Id.*

28. *Id.* at 56.

29. *Id.* (discussing several economic studies found in W. JETT LAUCK, *THE NEW INDUSTRIAL REVOLUTION AND WAGES* 21 (1929)).

30. *Id.* at 57 (noting another extensive study of immigrant workers found a yearly income of \$442).

31. *Id.* at 58.

public, such as an employer's failure to pay wages.³² The goal of the Massachusetts General Court was not an expansive plan of state regulation but, rather, an optimistic desire for the public to become interested, if not outraged, at those industries that exploited their workers, with hopes that this outrage would cause employers independently to change their unfair practices.³³

The First World War played a major role in advancing the cause of the worker. With the Nation's men at war, industries found themselves in a labor supply crisis. In 1918, President Wilson responded by creating various oversight agencies and boards, including the War Industries Board and the National War Labor Board, to sustain pre-war wages throughout the war and assure workers periodic cost-of-living adjustments in regards to their wages.³⁴ These policies, enacted by way of the federal government's war powers, began the first federal regulation of wages and enforcement of a living wage.³⁵

After World War I ended, there remained many, if not more, problems to be resolved throughout the workforce. Attempts at regulation during the war had left various segments of employment unhappy. Employers wished to be free of government intrusion, and employees realized that the cost of living had advanced much more rapidly than wages during the war, with the promised cost of living adjustments failing to keep pace.³⁶

A significant population shift during the 1920s added to these problems, as employers began dropping their wages due to the influx of willing labor.³⁷ Between 1920 and 1929, nearly twenty million people fled the burgeoning rural depression, moving from farms or rural areas to the urban hubs they perceived as relatively prosperous.³⁸ In addition, between 1915 and 1928, 1.2 million African

32. *Id.* at 58-59.

33. *See id.*

34. *See generally* 50 U.S.C. Appendix § 1507 (1938) (*repealed* 1966); *see also* 50 U.S.C. § 3 (2003) (giving the Commission broad authority in "the coordination of . . . the increase in domestic production of articles and materials essential to the support of the armies and of the people during the interruption of foreign commerce.").

35. *See Paris v. Metro. Life Ins. Co.*, 68 F. Supp. 64, 68 (S.D.N.Y. 1946) (noting that the National War Labor Board was created by President Roosevelt by Executive Order 9017, codified at 50 U.S.C. Appendix §507 and "given jurisdiction over all controversies that might affect war production."). *See also* U.S. v. Kraus, 33 F.2d 406, 407-408 (7th Cir. 1929) (holding that the War Industries Board found its power in 50 U.S.C. § 3); 50 U.S.C. §3 (2000) (creating the duty of the Council of National Defense to direct the "increase of domestic production of articles and materials essential to the support of armies and of the people during the interruption of foreign commerce. . .").

36. *See Harris, supra* note 13, at 87.

37. *See id.* at 98.

38. *Id.* at 97 (noting further the agricultural market collapsed in 1921).

Americans migrated to northern states.³⁹ Urban America was flooded with option-less workers willing to work for low wages, long hours, and in deplorable situations.⁴⁰ Falling agricultural prices and a burdensome surplus of labor created record-setting levels of unemployment, setting the stage for the Great Depression.⁴¹ It was in these unfortunate circumstances that the FLSA found its beginnings.

B. *Roosevelt Responds With the FLSA*

The Great Depression became the gateway for governmental intervention towards industrial reform in an effort to recover the nation's economy. American workers saw the meager dollar they brought home losing its purchasing power, and government soon realized that, in order to achieve a healthy economy, the situation had to change. Industry was plentiful and innovative in the products they were processing, but no one could afford to buy them.⁴² In an address before the United States Chamber of Commerce, President Roosevelt recognized the urgency of this problem: "It is essential, as a matter of national justice, that the wage scale should be brought back to meet the cost of living and that this process should begin now and not later."⁴³

1. *New Deal Legislation*

President Roosevelt began this process with a plethora of "New Deal" legislation, including the National Industrial Recovery Act (NIRA).⁴⁴ The NIRA developed trade and industry association boards, comprised of both workers and employers, to create codes of fair competition regarding minimum wages and maximum working hours.⁴⁵ The codes would be submitted to advisory committees representing labor, employer, and consumer interests, which would suggest changes to the National Recovery Administrator, who would subsequently en-

39. *See id.*

40. *See id.* at 98.

41. *See* REPORT ON THE AMERICAN WORKFORCE, *supra* note 8, at 69.

42. *See id.* at 69-71.

43. Harris, *supra* note 13, at 99-100 (citing Franklin D. Roosevelt, Appealing for Cooperation on Recovery Program Address Before the United States Chamber of Commerce (May 4, 1933), in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: THE YEAR OF THE CRISIS 1933, 156 (Russell & Russell 1938)).

44. *See* 15 U.S.C. §§ 703-712 (2003). The NIRA was held unconstitutional by the Supreme Court and terminated by executive order in 1935.

45. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 521-524 (1935) (describing the administrative scheme of the NLRA).

force the codes.⁴⁶ With passage of the NIRA, Roosevelt's goals for agricultural and industrial workers were clear:

The law I have just signed was passed to *put people back to work*, to let them buy more of the products of farms and factories and start our business at a living rate again. . . . It seems to me to be equally plain that no business which depends for existence on paying less than living wages to its workers has any right to continue in this country. By "business" I mean the whole of commerce as well as the whole of industry; by workers I mean all workers, the white collar class as well as the men in overalls; and by living wages I mean more than a bare subsistence level—I mean the wages of decent living.⁴⁷

Despite these goals, the NIRA was held unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, as an invalid exercise of federal power affecting intrastate commerce,⁴⁸ and, therefore, terminated by executive order.⁴⁹ In *Schechter*, the Court overturned the convictions of several New York slaughterhouse operators convicted of violating the poultry codes regulating their industry.⁵⁰ The Court found that the operators' slaughterhouses only sold their products to local retailers and were, thus, not interstate commerce.⁵¹ Although the attempt to regulate wages and working hours was a legitimate goal for the federal government, the Court held that the NIRA was inconsistent with the Constitution's bar on regulation of *intrastate* commerce.⁵²

Although the NIRA took steps towards raising wages, the *Schechter* ruling left Roosevelt searching for his legislative cure. His next piece of legislation needed to regulate fair competition without crossing the constitutional boundaries concerning commerce.⁵³

46. See Harris, *supra* note 13, at 110 (noting the first code approved by the National Recovery Administrator was the Cotton Textile Code, which established a forty-hour work week with a minimum wage between twelve and thirteen dollars a week).

47. *Id.* at 109 n.568 (quoting President Roosevelt, Presidential Statement on NIRA, *To Put People Back to Work* (June 16, 1933), in 2 ROOSEVELT PAPERS 251-52 (1938)).

48. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 550.

49. See 15 U.S.C. § 703 (2003) (codifying Exec. Order No. 7252 and 7323, which terminated the functions and agencies of the NIRA).

50. *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 495-524 (stating that the purpose of the poultry codes as facilitating fair competition, by fixing the workweek to forty hours and the wage floor at fifty cents per hour).

51. *Id.* at 548.

52. *Id.* at 548-50.

53. See, e.g., *id.* at 537-38 (holding that "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."). President Roosevelt also needed to balance early disagreements arising between the living wage movement and labor unions. The living wage movement advocated for a federally-mandated minimum wage, while labor unions

2. *The FLSA's Careful Construction*

These concerns were taken under consideration in the language of the FLSA. It began with a declaration of its policy and goals for the Nation's workforce:

The Congress finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce.⁵⁴

The language of the FLSA clearly emphasizes that the Act derives its enforcement power from the Commerce Clause.⁵⁵ Accordingly, the FLSA's purpose was to "regulate commerce among the several States and with foreign nations, to correct and as rapidly as practicable eliminate the [detrimental] conditions . . . without substantially curtailing employment or earning power."⁵⁶ This language was clear enough to sustain constitutional muster in *United States v. Darby* in which the Court held the FLSA was "sufficiently definite to meet constitutional demands."⁵⁷

Not only did the FLSA regulate minimum wages, maximum working hours, and child labor, it also established mandatory overtime compensation.⁵⁸ A worker not exempt from this protection and working more than forty hours a week would receive compensation for employment "in excess of [forty] hours . . . at a rate not less than one-and-one-half times the regular rate at which he is employed."⁵⁹

When originally passed in 1938, the FLSA covered more than eleven million workers, 300,000 of whom were receiving wages below twenty-five cents

had traditionally opposed legislation that would replace the growing collective bargaining rights of workers, which enabled the negation of working hours. See Harris, *supra* note 13, at 102-03.

54. Fair Labor Standards Act of 1938, § 202(a).

55. The Commerce Clause gives Congress the power to regulate "among the several States." U.S. CONST. art. I, § 8, cl. 3.

56. Fair Labor Standards Act of 1938, § 202(b).

57. *U.S. v. Darby*, 312 U.S. 100, 125-26 (1941) (holding that employers must conform "to the prescribed wage and hour conditions, to work on goods which he ships or expects to ship across state lines. . .").

58. See Fair Labor Standards Act of 1938, § 207(a)(1).

59. Fair Labor Standards Act of 1938, § 207(a)(1).

an hour, and over one million with workweeks longer than forty-four hours, rarely receiving overtime compensation.⁶⁰ The FLSA was, and continues to be, administered by the presidentially-appointed Wage and Hour Division of the Department of Labor.⁶¹ The initial regulations set the minimum wage at twenty-five cents an hour,⁶² with a maximum workweek of forty-four hours.⁶³ Today's minimum wage has increased to \$5.15 an hour⁶⁴ with the work week standard decreasing to a forty-hour work week.⁶⁵

C. Exempting Agricultural Workers

Generally, the FLSA, in both its original and current construction, applied to all industries and their workers engaged in interstate commerce or in the production of goods for interstate commerce.⁶⁶ Yet, early federal and state employment laws broadly exempted agricultural workers from protections afforded other workers.⁶⁷ Similarly, the FLSA already contained the agricultural worker exclusion before it reached Congress for consideration.⁶⁸

The FLSA originally exempted all agricultural employees from the benefits of a nationally regulated minimum wage.⁶⁹ This exemption was amended in 1966⁷⁰ to extend the minimum wage protection to some agricultural employees.⁷¹ The FLSA also originally exempted all agricultural employees from a nationally regulated workweek, leaving them vulnerable to continued long hours without overtime compensation.⁷² This exemption has not been amended as it relates to agricultural workers.⁷³

60. Harris, *supra* note 13, at 140 (citing Carroll R. Daughtery, *The Economic Coverage of the Fair Labor Standards Act: A Statistical Study*, 6 LAW & CONTEMP. PROBS. 406, 406-407 (1939)).

61. Fair Labor Standards Act of 1938, § 204(a).

62. *Id.* at § 206.

63. *Id.* at § 207.

64. *Id.* at § 206(a).

65. *Id.* at § 207(a).

66. See generally Fair Labor Standards Act of 1938, § 207.

67. See Martha L. Noble, *Erosion of Agricultural Labor Exemptions in Employment Law: Recent Developments Relevant to Arkansas*, ARK. L. NOTES 71, 73 (1996).

68. See 81 CONG. REC. 7648 (1937) (including the statement by Senator Black, "The bill specifically and unequivocally excludes certain industries and certain types of businesses from its scope and effect. It specifically excludes workers in agriculture of all kinds and of all types.>").

69. See Fair Labor Standards Act of 1938, § 213.

70. S. REP. NO. 89-1487, at 5 (1966), *reprinted in* 1966 U.S.C.C.A.N 3002, 3006.

71. The 1966 Amendment extending minimum wage protection will be discussed in detail subsequently in this Note.

72. See Fair Labor Standards Act of 1938, §§ 207, 213.

73. Fair Labor Standards Act of 1938, § 213(a)(6).

Although there is little legislative history on the specific reason for exempting agricultural workers from New Deal legislation, including the FLSA, there are a variety of factors which initially led to their exclusion: Congress wanted to pass a constitutionally viable bill; lobbyists urged their special interests; and legislators claimed to protect family farms.

1. *Constitutional Concerns*

The Constitution's Commerce Clause limits the federal government's reach in regulating commerce.⁷⁴ President Roosevelt realized those limits as he encountered opposition from the courts on various pieces of his New Deal legislation.⁷⁵ The FLSA was carefully constructed to avoid these problems, and its writers did not intend to regulate local business.⁷⁶ When introducing the bill, Senator Black of Alabama elaborated that agriculture was local in nature and stressed:

[T]he prevailing sentiment of the committee, if not the unanimous sentiment of the committee, . . . [is] that businesses of a purely local type which serve a local community, and which do not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the [s]tates in which the business units operate.⁷⁷

Lawmakers perceived agricultural markets as merely intrastate commerce with small, local farmers selling only to their immediate communities and feared that interfering with agricultural employees would be viewed as a violation of the Commerce Clause.⁷⁸

2. *Lobbyists' Concerns*

The major agricultural lobby during the New Deal era was powerful in its voice while weak in its representation.⁷⁹ Organized lobby action typically

74. See U.S. CONST. art. I, § 8, cl. 3 (granting Congress the power to only "regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes.").

75. See, generally, e.g., *A.L.A. Schechter Poultry Corp.*, 295 U.S. 495; *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (finding by the Court that invalidated the Bituminous Coal Conservation Act of 1935, which regulated minimum wages and maximum hours in coal mines, viewing it as a local evil over which the federal government has no control).

76. See 81 CONG. REC. 7648 (1937).

77. *Id.*

78. See *id.*

79. See Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLINE L. REV. 649, 656-657 (1989).

represented only the interests of larger producers who employed many workers.⁸⁰ The impact of suddenly paying a livable, albeit minimum, wage coupled with the potential of expensive overtime compensation would be greatly felt by producers with large-scale operations; therefore, these producers lobbied extensively for the exemption.⁸¹ Their employees, the field and farm workers, unlike their industrial counterparts, were left with little political influence due to their lack of persuasive organization.⁸²

In addition, the southern lobby was also powerful in its control over legislation affecting agriculture.⁸³ The majority of wage-earning agricultural employees at this time were in the southern states. Inexpensive and unregulated labor formed the plantation system's backbone, and southern legislators fought hard to avoid higher wages and overtime costs.⁸⁴ In 1938, congressional leadership was inundated by the "Southern Domination" with congressional members from the agrarian south serving in numerous influential positions.⁸⁵ In order to secure votes from this southern block, and gain protection for the rest of the Nation's employment, the agricultural exemption was added to the FLSA and other New Deal legislation to appease those legislators.

This voting block did not go unnoticed by those opposed to the agricultural exemption. New Jersey Representative Hartley recognized the disparity and unequal treatment between farm and factory workers in his argument against the exemption:

We are told that this measure will raise the wages and lower the working hours of the exploited workers of America. If that is the case then why is it that the poorest paid labor of all, the farm labor whose weekly average for 1937 was \$4.76 has been omitted from this bill? The answer is that the votes of the farm bloc in the House, the best organized bloc we have here, would have voted against the bill and defeated it.⁸⁶

Those lobbying in this employment regulation debate and asserting agriculture voices were primarily advocating for the exemption of agricultural workers. Support against the agricultural exemption was less influential.⁸⁷ The Na-

80. See *id.*

81. See Noble, *supra* note 67 at 71.

82. See Anderson, *supra* note 79, at 656-657.

83. See *id.* (arguing that southern members of Congress pursued this control over agricultural and employment legislation based on racially and economically motivated reasons).

84. See Linder, *supra* note 5 at 1352.

85. See *id.* at 1351-52 (citing CONG. DIRECTORY, 75th Cong., 3rd Sess., 173, 192 (1938)).

86. 83 CONG. REC. 9257 (1938) (statement of Representative Hartley after the Conference Committee's report on the bill to the House).

87. See Noble, *supra* note 67, at 71-72.

tional Farmers Union advocated for applying this federal wage and hour legislation to farm workers, in hopes that it would restore fair competition between large and small farmers by lessening larger farmers' ability to hire cheap labor.⁸⁸ A different response to the southern lobby came from the National Negro Congress, which admonished the exemption as a form of discrimination against southern field workers, the majority of whom were black.⁸⁹

3. *Concern for the Farmer*

Legislators feared the consequences of applying wage and hour regulations to agriculture, based on their perceived notions of America's farming communities. This concern arose from three central arguments, including the farmer's traditional position in American society, the seasonal nature of agriculture production, and the financial burden on farmers.

Historically, American government has treated agriculture as an industry uniquely worthy of protection.⁹⁰ This concept originated with early American theorists and has echoed throughout much of the legislation affecting agriculture.⁹¹ Benjamin Franklin pronounced agriculture as "the only honest way" for "a nation to acquire wealth,"⁹² while Alexander Hamilton observed that "cultivation of the earth, as the primary and most certain source of national supply . . . has intrinsically a strong claim to pre-eminence over every other kind of industry."⁹³ Legislators have continued to idolize the farmer, producers of the country's food, as good, God-fearing, stalwart defenders of the Republic.⁹⁴ The minimum wage and overtime exemptions were viewed as multi-level assistance for the revered farmer. One congressman proudly summarized the exemption as helping agriculture both "directly and indirectly" because "an increase in the income of one large group of consumers [industrial laborers] creates a correspondingly better market for all producers."⁹⁵

Many legislators were convinced that applying federal wage and hour regulations to farm workers would be incredibly burdensome on farmers due to

88. See *id.* at 71 (citing testimony from the National Farmers Union Legislative Secretary).

89. See Linder, *supra* note 5 at 1373.

90. See Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 818 (1995).

91. See *id.* at 817-819.

92. *Id.* at 818 (quoting Benjamin Franklin, *Positions to Be Examined* in THE PAPERS OF BENJAMIN FRANKLIN 107 (1972)).

93. *Id.* at 818 (quoting Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* 27 (1955)).

94. See *id.* at 817-819.

95. 83 CONG. REC. H9264 (1938) (statement of Rep. Keller, Ill.).

the seasonal nature of agriculture.⁹⁶ Congress arduously argued that agriculture products could simply not be regulated like a factory's production line. One senator dramatically described the difficulties in regulating a particular agricultural activity:

May I say that the cow cannot be regulated by any law you may pass here. She gives down her milk at 6 o'clock in the morning. You can pass law until hell freezes over and you cannot change that. . . . So I say, for God's sake, Mr. Chairman, do not attempt to invade the God-given province of the cow by this legislation.⁹⁷

The administrative and financial costs of compliance with the FLSA were viewed by some as potentially overwhelming for small farmers. During the era of the FLSA's passage, an agricultural worker's income was often supplemented beyond cash wages, including room and board.⁹⁸ This was viewed as a roadblock against regulation.⁹⁹ Furthermore, with countless small farmers scattered throughout the country, there were also reservations regarding the ability of government agencies to administer the FLSA.¹⁰⁰

These concerns were often exaggerated and unsubstantiated against the reality of America's agriculture industry in the 1930s. Within the legislative history is a minimal amount of congressional hearing testimony that argued the majority of farmers would not be affected by the FLSA's regulations because they hired an insignificant amount of labor.¹⁰¹ Family farms hiring little additional labor would have been exempt from the FLSA's regulations, even without the agricultural exemption.¹⁰² In addition, the relation of agricultural labor to consumer's price of farm products is less significant than some may reason. A 1960s study found that raising agricultural wages just \$1.25 equaled a slight corresponding one-cent increase in vegetable and fruit prices.¹⁰³

96. See 81 CONG. REC. 7653 (1937) (statement by Senator Black, "I cannot imagine that any board with common sense . . . would ever handicap the operation of a law by attempting to bring within its scope activities that are purely and wholly seasonal.").

97. 82 CONG. REC. 1476 (1937) (statement of N.Y. Sen. Culin).

98. See Noble, *supra* note 67, at 74.

99. See *Bowie v. Gonzalez*, 117 F.2d 11, 18 (1st Cir. 1941) (finding that attempts to regulate agricultural wages would be difficult due to the practice of providing room and board by some employers).

100. See Noble, *supra* note 67, at 74.

101. Anderson, *supra* note 79 at 655 (examining testimony of Gardner Jackson, who was Chairman of the National Committee on Rural and Social Planning).

102. Linder, *supra* note 5, at 1375-76 (noting further that in 1935, only one in seven farms employed hired labor; fewer than one percent of farms employed more than four workers).

103. S. REP. NO. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N 3002, 3022.

Finally, in comparison with the increasingly vocal advocacy of industrial workers and their stories of deplorable factory conditions, the peril of the farm worker was lessened, if not misunderstood. The FLSA's exemption of agricultural workers was accepted by some "because agricultural labor was not subject to the usual evils of sweatshop conditions of long hours indoors at low wages."¹⁰⁴

D. *Struggling to Define Agriculture*

There was little debate surrounding the agricultural worker exemption in the FLSA, with politicians willing to compromise away wage and hour protections for this group of workers. The real debate occurred over the definition of agriculture and which employees would be covered by the exemption. Since its passing, the FLSA has created frustration amongst employers, employees, the Department of Labor, and the courts as they struggle to understand what is and what is not properly included within the exemption.¹⁰⁵

The following is the FLSA's definition of "agriculture," which, despite its length, has proven a continuing struggle to decipher:

"Agriculture" includes farming in all its branches and among other things includes cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparations for market, delivery to storage or to market or to carriers for transportation to market."¹⁰⁶

There are two separate strands of the definition.¹⁰⁷ The first strand beginning the definition includes activities ordinarily considered "farming."¹⁰⁸ The second strand of the definition includes practices "performed by a farmer or on a farm" related to farming operations.¹⁰⁹ Deciding what practices are "incident to or in conjunction with" farming has proven difficult.¹¹⁰

104. *Bowie*, 117 F.2d at 18 (holding that the FLSA should only apply to "typical factory workers or laborers engaged in maintaining industrial facilities."). *But cf.* 82 CONG. REC. 1484 (1937) (statement of Mich. Rep. Dondero, regarding the exclusion of farm workers: "That group works longer hours at lower wages than any other class in the Nation. Their lot is a real sweatshop.").

105. *See Holly Farms Corp. v. NLRB*, 517 U.S. 392, 406 (1996) (observing that the Department of Labor's regulations are not free from ambiguity).

106. Fair Labor Standards Act of 1938, § 203(f).

107. *See id.*

108. *Id.*

109. *Id.*

110. *Id.*

1. Congressional Confusion

The language of the agricultural definition was carefully considered by Congress. This consideration arose in response to the original bill that limited the agricultural exemption to only those practices performed by a farmer.¹¹¹ Concern arose outside of the committee that there were many activities not performed by a farmer that should be considered agricultural labor and included within the exemption.¹¹² Specific agricultural activities, such as the canning of perishable produce, apple picking, fishing, and using the cotton gin, were raised by several senators interested in protecting their district's agricultural markets and constituents.¹¹³

One example of these local concerns included Kansas Senator Tydings' questioning of the bill as it was introduced on the Senate floor:

What I am thinking is that quite often the threshing crew is not part of the farmer's organization. There are men who make a business of going around with threshing and baling machines with enough help to come upon a farm and make a contract with the farmer to thresh his wheat. I should like to know if . . . the threshing crew would be exempt or whether they would be under the operation of the hours provision of the bill.¹¹⁴

The senators voicing concerns over this apparent "loophole" in the definition asked for a more detailed definition of agriculture in an attempt to include more workers within the exemption.¹¹⁵ It was argued that farmers, although exempt, would still be affected by the wage and hour regulations.¹¹⁶ Support for that argument grew from "the increased cost of operating all industries which handle agricultural products" and fear that those costs would be "passed on to the farmer and will be reflected in reduced prices to him for his products."¹¹⁷ Beyond asking for a clarifying definition, other members of Congress proposed specific amendments. One unsuccessful example included a proposal to specifically exempt all canning, packing, or packaging of seasonal products where those activities occur in a six months or less time period.¹¹⁸

111. See *Farmer's Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 767 (1949).

112. See 81 Cong. Rec. 7653-60 (1937).

113. See *id.*

114. *Id.*

115. See *id.* (quoting Sen. Tydings, "inadvertently, a loophole has been left [in the definition] which I am sure the proponents of the bill do not mean to leave.").

116. See 81 CONG. REC. 7778 (1937) (statement of Sen. Austin, "The farmer will not be exempted as the bill pretends that he will be from the effects of its provisions.").

117. *Id.* (statement of Sen. Austin).

118. *Id.*

In response to these concerns, Senator Black, who introduced the bill, stressed it did not “attempt to draw the lines in the shadowy regions that might divide one condition from another,” but he recognized that the definition needed to be expanded.¹¹⁹ Accordingly, the definition of agriculture was modified to include practices “performed by a farmer or *on a farm*,” thereby including activities which may not be performed by the farmer but which are generally considered agriculture in nature.¹²⁰

Congress clearly wanted a “line of demarcation” in its definition distinctly exempting “occupations which are of a peculiarly seasonal nature.”¹²¹ The exemption was meant to “include any seasonal activity as to which it is necessary to have quick, speedy work.”¹²² It was deemed necessary due to the perishable temperament of agriculture, with harvest needing to be completed in a timely matter to avoid losing or spoiling crops.¹²³

2. *Primary v. Secondary Agriculture*

The FLSA’s administrative definition of agriculture has two independent strands, including what is traditionally considered farming as well as those practices incident to farming.¹²⁴ This latter strand encompasses those activities that are incidental or imperative to farming, and it is this strand that has required extensive judicial interpretation.¹²⁵

Initial reviews limited incidental activities to those before the actual processing of the commodity. Processing operations, such as wheat milling and cider making, were routinely held not to be within the agriculture definition. One example found the grinding and processing operations required to turn sugarcane into raw sugar to be the processing of agricultural products rather than the pro-

119. *Id.* at 7653.

120. 29 C.F.R. § 780.128 (2004); *see* 81 Cong. Rec. 7653 (1937) (stating the Senate’s concern about the inclusion of independent contractors like wheat threshers in the definition of agricultural employees).

121. 81 CONG. REC. 7652.

122. *Id.* (quoting Sen. Black).

123. *See id.* (referring to the statement of Sen. Black).

124. *See* Fair Labor Standards Act of 1938, § 203(f).

125. *See, e.g., Jimenez v. Duran*, 287 F. Supp. 2d 979 (N.D. Iowa 2003) (finding that historically farmers have repaired, or even made, their own equipment and tools which led the courts to exempt activities such as repair work from the FLSA’s regulations even though the activities may have occurred in a shop rather than on a farm).

duction of them.¹²⁶ Therefore, sugarcane mill employees were not employed in agriculture and, thus, were not awarded wage and hour protection.¹²⁷

The Supreme Court first addressed the scope of the agricultural exemption in *Farmers Reservoir and Irrigation Company v. McComb*, in which the Court determined that the employees of a ditch-digging company were not involved in agriculture, and, therefore, were subject to wage and hour regulations.¹²⁸ This case further clarified the two definitional strands by dividing agriculture into "primary" and "secondary" agriculture.¹²⁹

Primary agriculture, or the first definitional strand, is "farming in all its branches," including the "elemental process of planting, growing, and harvesting crops."¹³⁰ The Court observed that the ditch company did not own farms or raise crops and, therefore, was not engaged in primary agriculture.¹³¹

Secondary agriculture, or the second definitional strand, includes activities that may not, independently, be considered farming practices but are necessary to those practices.¹³² For a particular activity to be deemed secondary agriculture it must meet two requirements.¹³³ First, the activity must either be performed by a farmer or on a farm.¹³⁴ Secondly, the activity must be incidental to or in conjunction with farming operations.¹³⁵

The ditch company in *Farmers Reservoir* built canals that diverted water from public streams to the company's reservoirs, then through the company's canals, and, finally, to surrounding farmers' lands.¹³⁶ When a farmer needed to irrigate crops, the company would be contacted and its employees would open the necessary head gates to release water to the farmer's land.¹³⁷ The company argued that their employees' activities were incidental to or in conjunction with farming because, without the irrigation, the farmer's crops would fail.¹³⁸ The Court disagreed, considering the FLSA's limiting definition, holding that it did

126. See *Bowie*, 117 F.2d at 17.

127. See *id.* (holding that their ruling was in accordance with the legislative intent of the FLSA).

128. *Farmers Reservoir & Irrigation Co.*, 337 U.S. at 762-64.

129. See generally *id.*

130. *Id.* at 762.

131. *Id.* at 763-64 (elaborating that the company was also not engaged in cultivating, tilling, or growing any agricultural commodity).

132. See *id.* at 763.

133. See *id.* at 766-67.

134. See *id.*

135. See *id.*

136. *Id.* at 763.

137. *Id.*

138. *Id.* at 763-64.

not require all occupations necessary to farming to be exempt.¹³⁹ Those activities that are incidental to or in conjunction with agriculture must be performed by a farmer or on a farm.¹⁴⁰ It distinguished the ditch company by noting that the employees' involvement ceased when water was released and a farmer takes over, at which point the farmer has control over the water for irrigation.¹⁴¹ It was the farmer, not the employee, who actually irrigated the crops.¹⁴² Merely because particular work may be necessary to agriculture production does not require that the work be deemed agriculture production or exempted by the definition of secondary agriculture.¹⁴³

a. *Defining Agricultural Processing*

While determining whether an employer or employee is involved in primary agriculture has not proven difficult, the scope of secondary agriculture continued to be an issue after *Farmers Reservoir*.

The Court attempted to clarify its reach several years later in *Maneja v. Waiiula Agricultural Company*.¹⁴⁴ An employer of more than thirty employees engaged in harvesting and processing sugar cane at its Hawaiian plantations sought a declaratory judgment that its employees were agricultural workers and, therefore, exempt from the overtime provisions of the FLSA.¹⁴⁵ The Court denied the motion, finding the plaintiff's company an "agricultural analogue of the modern industrial assembly line" and exempting only those employees directly engaged in the fields, loading and unloading of sugarcane, or working in the company's railroad and repair shops.¹⁴⁶

In holding the company's processing plant workers outside the agricultural exemption, and therefore subject to the overtime regulations, the Court considered the entire operation to determine whether the processing was incidental to or in conjunction with farming.¹⁴⁷ If the activity was found to be *purely* processing, or changing the product from its raw or natural state, the activity would not

139. See *id.* at 764.

140. *Id.*

141. *Id.* at 763.

142. *Id.*

143. *Id.* at 758.

144. See generally *Maneja v. Waiiula Agric. Co.*, 349 U.S. 254 (1955).

145. *Id.* at 256-57.

146. See *id.* (noting that the Court extended the exemption to include those activities which were performed as subordinated and necessary tasks incidental to the company's agricultural operations).

147. See *id.* at 272 (holding further that village workers in the company-owned town were also not exempt because their activities were not in close and immediate proximity to the sugarcane production).

be exempt as agricultural labor.¹⁴⁸ The Court borrowed several factors from the Department of Labor's Wage and Hour Administrator in developing a seven-part test regarding the second element of secondary agriculture.¹⁴⁹ In determining whether a particular processing activity is incidental to or in conjunction with agriculture, the following factors should be considered:

- (1) The size of the ordinary farming operations;
- (2) The type of product resulting from the operation in question;
- (3) The investment in the processing operation as opposed to ordinary farming activities;
- (4) The time spent in processing and in ordinary farming;
- (5) The extent to which ordinary farm workers do processing;
- (6) The degree of separation by the employer between the various operations;
- (7) And the degree of industrialization.¹⁵⁰

The Court further recognized that these factors must be considered along with what is ordinarily done by farmers in the particular operation in question.¹⁵¹

One of the first cases to include agriculture processing within the agricultural exemption came in the late 1960s with the Eighth Circuit's ruling in *Wirtz v. Tyson's Poultry Inc.*¹⁵² Tyson's was, and remains today, a large vertically-integrated company engaged in processing and marketing eggs, including all aspects of assembling, grading, handling, sizing, candling, packing, and shipping the eggs.¹⁵³ Tyson provided the hens to the independent contract growers and retained management control, while the growers provided the day-to-day labor, feed, and medication.¹⁵⁴ Tyson's form of vertical-integration has become a mod-

148. *See id.* at 265 (noting that the legislative intent was to draw a dividing line between processing as an agricultural function and processing as a manufacturing function).

149. *See id.* at 270 (holding that sugar milling is not within the definition of agriculture and therefore not exempt from the FLSA's minimum wage and maximum hour regulations).

150. *Id.* at 264-65. This sentiment was first articulated in *Farmers Reservoir* where the Court remarked that "whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society." *McComb*, 337 U.S. at 760-61.

151. *See Maneja*, 349 U.S. at 263. These considerations were first articulated in *Farmers Reservoir* where the Court remarked that "whether a particular type of activity is agricultural depends, in large measure, upon the way in which that activity is organized in a particular society." *McComb*, 337 U.S. at 760-61.

152. *See generally* *Wirtz v. Tyson's Poultry, Inc.*, 355 F.2d 255 (8th Cir. 1966).

153. *See id.* at 255-57.

154. *Id.*

ern model for the majority of pork, poultry, and egg production within this country, employing hundreds of thousands of employees.¹⁵⁵ The decision the court reached as to their level of wage and hour protection had a lasting important impact on food processing and agricultural industries.

The court held that the egg handling and processing involved in this integrated farm unit should not be segregated from the entire agricultural enterprise; therefore, the employees fell within the FLSA's agricultural exemption and were not guaranteed overtime compensation.¹⁵⁶ A persuasive factor included Tyson's assumption of all the risk involved by furnishing and owning the producing stock.¹⁵⁷ The independent contract growers were merely found to be Tyson's agents.¹⁵⁸

Vertical integration, involving industrialized and specialized tasks by numerous employees, will not serve as a limit on the agricultural exemption as long as a company, or employer, is involved in what is ordinarily considered farming. The court found that Tyson was engaged in "farming," due to the fact that without the company's investment, the independent growers, arguably, would not have raised the egg-producing birds.¹⁵⁹ Of particular importance in an increasingly industrial agriculture was the Eighth Circuit's analysis of Congress' intention not to have the "availability of the agriculture exemption turn upon the technicalities of corporate organization. . . ."¹⁶⁰

b. *Activities Beyond Processing*

The FLSA's definition of agriculture has implications beyond agricultural processing or even the administration of the FLSA. The definition is used by Congress in the creation and administration of various other regulatory measures.

Another piece of New Deal legislation included the National Labor Relations Act ("NLRA"), which regulates organized labor and its relationships with employers.¹⁶¹ The NLRA contains a definition of "agricultural labor" that courts

155. See generally Tyson Foods, Inc., *Company Information*, available at <http://www.tysonfoodsinc.com/corporate/info/today.asp> (last visited Mar. 15, 2004) (noting that Tyson remains a leader in the agricultural processing and food industries.).

156. *Wirtz*, 355 F.2d at 259-60.

157. See *id.*

158. *Id.*

159. *Id.*

160. *Id.* at 258 (quoting *Wirtz v. Jackson & Perkins Co.*, 312 F.2d 48, 50 (2d Cir. 1963)).

161. See generally National Labor Relations Act, § 151.

have considered interchangeable with the FLSA's definition of agriculture.¹⁶² Consequently, when analyzing the scope of the FLSA's agricultural exemption, cases involving the NLRA's definition are also relevant.¹⁶³

One of those pertinent cases arose in *Bayside Enterprises, Inc. v. NLRB*.¹⁶⁴ Employees who transported poultry feed from a feed mill to nearly one hundred twenty farms asserted they were not "agricultural laborers" and, therefore, covered by organized labor protections secured by the NLRA.¹⁶⁵ Their employer, a "vertically-integrated poultry business," claimed an exemption from the NLRA by asserting the drivers were agricultural laborers.¹⁶⁶ The issue, in determining the scope of agricultural labor beyond the processing operations discussed earlier, had a substantial impact on the agricultural exemption due to the growth of vertical-integration pervading livestock production in this country, with thousands of independent farmers under production contracts.¹⁶⁷

In this case, the employer retained ownership and pervasive control over the production of the chickens.¹⁶⁸ The independent contractors were engaged in primary agriculture, easily characterized as farmers working on farms; the more difficult question involved whether the drivers were engaged in secondary agriculture.¹⁶⁹ The Court held that the status of employees is determined by the "character of their employer's activities."¹⁷⁰ Here the employer's direct operation was running a feed mill, a nonagricultural activity.¹⁷¹ The work of the contract farmer cannot make the drivers agricultural laborers.¹⁷²

162. See *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 299 (1977). See also *Holly Farms*, 517 U.S. at 397 (noting that the NLRA does not contain a definition of "agricultural laborer" and Congress has derived its meaning from the FLSA 29 U.S.C. §3(f)).

163. See, e.g., *id.*

164. See generally *Bayside Enters.*, 429 U.S. 298. The National Labor Relations Board ("NLRB") is the regulatory body which administers the NLRA. NLRB, FACT SHEET ON THE NATIONAL LABOR RELATIONS BOARD, at <http://www.nlr.gov/nlr/press/facts.asp> (last visited Apr. 12, 2005).

165. *Bayside Enters.*, 429 U.S. at 299-300. According to the NLRA, employers, generally, must recognize and bargain with union representatives unless they represent a group of exempted employees. Agricultural laborers are a group of exempted employees under the NLRA.

166. *Id.* at 299.

167. See generally Doug O'Brien, *Policy Approaches to Address Problems Associated with Consolidation and Vertical Integration in Agriculture*, 9 DRAKE J. AGRIC. L. 33 (2004) (discussing the general growth of vertical integration in United State agriculture).

168. See *Bayside Enters.*, 429 U.S. at 302.

169. See *id.* at 300-301 (discussing the concepts of primary and secondary farming and their application).

170. *Id.* at 301.

171. *Id.*

172. *Id.* at 303.

The Supreme Court most recently heard the agricultural exemption issue in 1996 in *Holly Farms Corp. v. NLRB*,¹⁷³ the case that remains controlling today. Again, the Court dealt with a vertically-integrated company “engaged in the production, processing, and marketing of poultry products.”¹⁷⁴ Holly Farms, a subsidiary of Tyson Foods, Inc., contracts with growers who care for the broilers, while the company supplies feed and medicine and retains title to the broilers.¹⁷⁵ When the broilers are seven weeks old, Holly Farms sends live-haul crews to catch and bring the birds to the processing plant.¹⁷⁶ Similar to *Bayside*, the issue was whether the live-haul crews were considered agricultural laborers.¹⁷⁷

The independent growers, who raise the broilers on their farms, were engaged in what is ordinarily considered farming or primary agriculture.¹⁷⁸ More difficult to ascertain was whether the live-haul crews participated in secondary agriculture.¹⁷⁹ The Court reiterated that secondary agriculture consists of those activities “incident to or in conjunction with such farming operations” that are either performed by a farmer or on a farm and that the activities of the employer determine the status of the employee.¹⁸⁰

The Court first considered the “farmer or on a farm” requirement of secondary agriculture and held that Holly Farms lost its “farmer” status when the chicks were delivered to the independent farms and did not regain the “farmer” status when the live-haul crews arrived seven weeks later.¹⁸¹ The Court further held that the live-haul crews were not working on a farm because the farm actually belonged to the independent farmers.¹⁸² Had the independent farmer employed the live-haul crews, rather than Holly Farms, the crew members may have met this requirement and found themselves exempt from the NLRA.

In regards to the further requirement of secondary agriculture, Holly Farms argued that the live-haul crews’ activities of catching and loading the broilers was work performed on a farm “incident to” the raising of poultry.¹⁸³ But the Court disagreed, holding that catching and caging was not incidental to farm-

173. See generally *Holly Farms*, 517 U.S. 392.

174. *Id.* at 394-395.

175. *Id.* at 395.

176. *Id.*

177. Compare *Holly Farms*, 517 U.S. at 394, with *Bayside Enters.*, 429 U.S. at 301-04 (discussing whether truckers were considered agricultural laborers).

178. See *Holly Farms*, 517 U.S. at 399-400.

179. See *id.* at 403 (finding the NLRB’s decision that live-haul crew’s acts were not incident to farming operations was reasonable).

180. *Id.* at 400.

181. *Id.* at 400-01.

182. *Id.* at 403-05.

183. *Id.* at 401.

ing but, rather, tied to slaughtering and processing operations, which was not held to be farming.¹⁸⁴

Incidentally, the Court noted that “the line between practices that are and those that are not performed ‘as incident to or in conjunction with’ such farming operations is not susceptible of precise definition.”¹⁸⁵ The applicable statute need only be construed towards a reasonable interpretation for the regulatory board, or other governmental body, to prevail, not necessarily the best interpretation.¹⁸⁶

3. *Today’s Agricultural Exemption Test*

When introducing the bill for the FLSA, Senator Black boasted, “There is contained in the measure, perhaps, the most comprehensive definition of agriculture [that] has been included in any one legislative proposal.”¹⁸⁷ Despite the proclaimed comprehensiveness, the agriculture definition within the FLSA is far from a complete or precise interpretation. For that reason, deference is given to the Department of Labor’s interpretation of the statute and its applicability to the particular facts. Reviewing courts have not set aside these regulations merely because they would have interpreted the situation differently but defer as long as there is some reasonable basis for the Department’s interpretation.¹⁸⁸

Historically, the FLSA’s exemptions from wage and hour regulation have been construed narrowly.¹⁸⁹ The narrowness of the exemption can be described with a straightforward suggestion: if the employer does not own the farm or if the employees do not directly work for the farmer, the agricultural exemp-

184. *Id.* at 407. The Court also found the fact that the crew members punched a clock and are functionally integrated with other processing plant employees to be indicative of their industrial, rather than agricultural, status. *See Holly Farms*, 517 U.S. at 404-05 (finding the live-haul crews as a separate and distinct business from farming).

185. *Id.* at 408 (quoting 29 C.F.R. § 780.144 (2004)). *See also* 29 C.F.R. § 780.144 (recognizing that 29 U.S.C. §3(f), which is the FLSA’s definition of agriculture, may bear more than one permissible construction in a particular context).

186. *See, e.g., Holly Farms*, 517 U.S. at 401 (citing *Bayside Enters.*, 429 U.S. at 303).

187. 81 CONG. REC. 7648 (1937) (noting that the Alabama Senator continued that the definition was “drawn liberally from Mr. Webster’s definition of agriculture.”).

188. *See Baldwin v. Iowa Select Farms*, 6 F. Supp. 2d 831, 840 (N.D. Iowa 1998) (noting that courts should turn to the Secretary of Labor’s regulations when interpreting agriculture for guidance rather than the “scant case law addressing the issue.”). *See also Heath v. Perdue Farms*, 87 F. Supp. 2d 452, 459-60 (D. Md. 2000) (holding that deference should be given to the Department of Labor, as the agency responsible for implementing and interpreting the FLSA).

189. *See Holly Farms*, 517 U.S. at 399 (construing *Mitchell v. Kentucky Finance Co.*, 359 U.S. 290, 295 (1959)).

tion is inapplicable.¹⁹⁰ In today's agricultural environment, employers with associations, or relationship to farmers, farms, or agriculture may need to consider several factors when determining if a particular activity is considered agriculture labor, including:

- the relationship of the activity involved to activities ordinarily considered farming
- the size of the farm(s) involved
- the amount of money invested in the farm versus that invested in the activity
- the payroll for the farm versus that for the activity
- the number of employees involved in farming versus those involved in the activity
- whether the activity is one ordinarily done by farmers
- the interchange of employees between the two operations
- the amount of revenue generated by farming versus the separate activity
- the degree of separation.¹⁹¹

Creating a specific test to determine whether an activity is agriculture and therefore included within the exemption may not be a simple endeavor. But, developing a workable analysis is imperative for employers, Department of Labor administrators, and employees in agricultural regions of the country. A recent Iowa case attempted to outline the appropriate analysis in determining whether an employer was exempt from the overtime pay provisions of the FLSA:

Step 1: Is the *employer* engaged in *primary agriculture*? (those activities ordinarily considered farming)

- if the answer is yes, the employee is exempt from mandatory overtime compensation;
- if the answer is no, move on

190. See 5 LES A. SCHNIEDER & J. LARRY STINE, WAGE AND HOUR LAW: COMPLIANCE AND PRACTICE ¶ 5.85 (2002) (developing the following test: if, as an employee, you do not work for the farmer or own the farm, you are not going to receive the exemption).

191. See *id.* at ¶ 5.85 (noting authors' suggestion consider whether the activity involved changes the product from the raw/or natural state, in which case it is probably not considered farming).

Step 2: Is the *employee* engaged in *secondary agriculture*? (those activities incidental to or in conjunction with farming performed by a farmer or on a farm)

- if the answer is yes, the employee is exempt from mandatory overtime compensation;
- if the answer is no, there is no sufficient connection to agriculture and the employee will not be exempt from overtime compensation under the FLSA's definition of agriculture entitling the employee to overtime compensation unless another exemption is found applicable.¹⁹²

III. IS IT TIME TO CHANGE THE FLSA'S AGRICULTURAL OVERTIME EXEMPTION?

A. *Previous Amendments to the FLSA*

The FLSA has not remained stagnant since its creation in 1938. Rather, legislators have attempted to adapt its regulations in accordance with America's changing workforce. The minimum wage has increased numerous times¹⁹³ and various industries or segments of the working population have been added or removed from FLSA regulation. Agricultural workers have been, to a degree, affected by these amendments.

The largest amendment affecting agricultural workers came in 1966 when the FLSA's protection of a minimum wage was extended to employees engaged in agriculture and agricultural processing with the protection of overtime compensation extended only to agricultural processing employees.¹⁹⁴ President Johnson began his "war on poverty," by pushing for the 1966 amendments, persuaded by social reformers and the civil rights movement.¹⁹⁵ The changes were estimated to reach 390,000 agricultural employers.¹⁹⁶

192. *Jimenez*, 287 F. Supp. 2d at 985-91 (finding *Holly Farms* to be the controlling regarding the agricultural exemption issue).

193. *See* Fair Labor Standards Act, § 206(1) (2003) (noting that the present minimum wage is \$5.15 an hour due to enacted increases).

194. Minimum wage protection was extended at this time to many industries previously exempted including retailing, construction, laundering and dry-cleaning, transportation systems, food service, logging, hotels and motels, hospitals, and federal civil service employees. Overtime compensation was also extended, while retaining several exemptions, to retailing, construction, laundering, logging, hospitals, gasoline service stations, and federal government employees. *See* S. REP. NO. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3006.

195. *See* Anderson, *supra* note 79, at 661-662 (noting Cesar Chavez' leadership towards relief for the field workers). *See also* S. REP. NO. 89-1487 (1966), *reprinted in* 1966 U.S.C.C.A.N. 3002, 3004-3005 (quoting President Johnson's message to Congress, "Many American workers whose employment is clearly within the reach of this law have never enjoyed its benefits. Unfortu-

The FLSA's exemption section retained a minimum wage exemption for employers using less than 500 man-days (i.e., approximately seven full-time employees)¹⁹⁷ of agricultural labor "during any calendar quarter during the preceding calendar year."¹⁹⁸ Also, continuing to be exempt from a federally mandated minimum wage were the employer's spouse or immediate family members, certain hand harvest laborers paid on a piece-rate, and employees engaged in livestock range production.¹⁹⁹

Although this opened the door to a better employment situation, the 1966 amendments continued to limit agricultural workers' wage and hour protection.²⁰⁰ The minimum wage for agricultural workers was set at fifty cents lower than the national average mandated for other industries.²⁰¹ Furthermore, contradicting President Johnson's promises to agricultural workers, these workers were once again not included within the maximum hours or overtime compensation protection.²⁰²

The continued exemptions arose from legislators' fears of market collapse or other adverse reactions to suddenly forcing agricultural employers to comply with all FLSA regulations.²⁰³ The seasonal nature of agriculture that created the original exemption in 1938 continued to play a prominent role with these new amendments. Legislators feared the extraordinary number of potential overtime hours, due to the sporadic nature of harvesting, would devastate agricultural employers.²⁰⁴ In the 1960s, agriculture was well on its way towards vertically-integrated domination. Nine percent of America's farms produced fifty percent of all farm output.²⁰⁵ It was believed that increasing employment costs for larger farms would provide a more competitive situation for smaller family farms.²⁰⁶

The agricultural exemption was considerably affected again in 1974 when Congress amended the FLSA to include farm workers employed by con-

nately, these workers are generally in the lowest wage groups and most in need of wage and hour protection. We must extend minimum wage and overtime protection to them.").

196. See S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3010.

197. S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3011.

198. Fair Labor Standards Act of 1938, § 213(a)(6).

199. See *id.*

200. S. REP. NO. 89-1487 (1966), reprinted in U.S.C.C.A.N. 3002, 3021.

201. See S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3021.

202. See S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3024 (stating only agricultural processing employees were extended overtime protection).

203. See Anderson, *supra* note 79, at 662 (noting economic concerns of legislators).

204. See *id.* (explaining further concerns that agricultural employers would hire more workers merely to "get around" the overtime requirement).

205. S. REP. NO. 89-1487, reprinted in 1966 U.S.C.C.A.N. 3002, 3021.

206. See S. REP. NO. 89-1487, reprinted in 1966 U.S.C.C.A.N. 3002, 3021-3022.

glomerates with annual gross sales of more than ten million dollars.²⁰⁷ The conglomerate's employers must comply with the FLSA minimum wage requirements even if the conglomerate would have been exempted under the man-day requirements previously established.²⁰⁸ If the conglomerate is found to materially support an agricultural entity and that conglomerate has annual gross sales of ten million dollars or more, the employees are subject to minimum wage provisions, regardless of whether the agricultural entity meets the otherwise established requirements for the agriculture minimum wage.²⁰⁹

Unfortunately, for the agricultural worker, the agricultural minimum wage remains fifty cents lower than the federal standard for *all* other workers falling under FLSA protection.²¹⁰ Further disappointing is that employees of these multi-million dollar conglomerates currently receiving a minimum wage benefit have yet to be extended overtime compensation protection.²¹¹

B. Working Without Overtime Compensation

Since the FLSA's inception, agricultural workers have gradually been incorporated into most of its protections, with today's agricultural employers having to comply with minimum wage and child labor regulations. Yet, the general exemption excluding agricultural workers from the maximum hours and overtime protections remain. Denying this level of employment protection to agricultural workers affects not only their personal paychecks but also the communities in which they reside.

There are approximately 1.2 million hired workers on farms and ranches throughout this country, with nearly thirty percent of those workers employed in livestock, dairy, and poultry production.²¹² The USDA reports the average wage of an agricultural worker employed in livestock and poultry production is \$8.64 per hour.²¹³ Those employed in agriculture typically work longer hours than those employed in nonagricultural industries.²¹⁴ Full-time agricultural employees

207. H.R. REP. NO. 93-913 § 18, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2823.

208. *See* 29 U.S.C. § 213(g) (2003).

209. H.R. REP. NO. 93-913 § 18, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2823.

210. *See* H.R. REP. NO. 93-913 § 4, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2820.

211. *See* H.R. REP. NO. 93-913 § 4, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2820.

212. NAT'L AGRIC. STATISTICS SERV., U.S.D.A., FARM LABOR (Nov. 21, 2003), at <http://usda.mannlib.cornell.edu/reports/nassr/other/pfl-bb/2003/fmla1103.pdf> (noting twenty-seven percent of agricultural workers are considered livestock workers). For purposes of this section's statistics, livestock workers are those employees tending livestock, milking cows, or caring for poultry.

213. *Id.*

214. *See* BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, PERSONS AT WORK IN AGRICULTURAL AND NONAGRICULTURAL INDUSTRIES BY HOURS OF WORK, 2004, *available at*

average a work week of 49.4 hours while their nonagricultural counterparts average 42.8 hours a week.²¹⁵

Considering the above statistics, an average agricultural worker employed in livestock production, and working nearly 50 hours a week, makes approximately \$427 a week and \$22,194 a year, before taxes and other deductions are removed. If those hours above the FLSA's forty hour workweek were compensated at time and a half, the livestock worker would take home approximately \$6,457 more each year. Overtime compensation for the exempted agricultural workers, most of whom are less-educated, minorities, or immigrants, could provide necessary funds for the improvement of these workers' general financial well-being.²¹⁶

The number of agricultural workers employed by industrial agriculture and on vertically-integrated farms is increasing. In 1997, the most recent census data available regarding agricultural figures, the number of farms in America fell to nearly 91,000, a statistic in decline since the FLSA's creation in 1938.²¹⁷ Despite the decline in farms, the market value of agricultural products has continued to grow, reaching nearly 12 million dollars.²¹⁸ These figures are important in recognizing the changing landscape of agriculture. Agricultural production is led by large agribusinesses whose farms require more employees than typical family farms, employees whose earnings have not kept pace with their industrial counterparts.

To understand the agricultural workers' situation, it is important to analyze the population affected by the FLSA's overtime exemption. States traditionally dotted with family farms have decreased in population as family farms decline and agribusiness grows. During the 1990s, one quarter of non-metro counties lost population.²¹⁹ Where rural or non-metro counties in farm states either maintained or gained population, it was often a result of industrial agriculture.²²⁰ New meatpacking plants and their auxiliary operations, cattle feedlots,

<http://www.bls.gov/cps/cpsqat19.pdf>.

215. *Id.*

216. *See generally* NAT'L CATHOLIC RURAL LIFE CONFERENCE, RURAL ADVOCACY 2003: SUPPORTS RIGHTS OF WORKERS IN AGRICULTURAL INDUSTRIES, at <http://www.ncrlc.com/03rights-of-ag-workers.html> (detailing the organization's efforts in assisting agricultural workers).

217. USDA: NAT'L AGRIC. STATISTICS SERV., 1997 CENSUS: HIGHLIGHTS OF AGRICULTURE, available at <http://www.nass.usda.gov/census/census97/highlights>.

218. *Id.*

219. David A. McGranahan & Calvin L. Beale, *Understanding Rural Population Loss*, 17 RURAL AMERICA, Winter 2002, at 2, available at <http://www.ers.usda.gov/publications/ruralamerica/ra174/ra174a.pdf> (last visited Apr. 13, 2005).

220. *See id.* at 2-3.

and poultry and hog confinement operations, have created thousands of jobs in areas where few jobs existed.²²¹

While industrial agriculture is providing an increase in population and job growth, the new employment opportunities typically consist of long, arduous working days. Not all demographics are flocking to these difficult jobs. Growth in these rural counties has consisted primarily of an increase in minority and immigrant populations.²²² The growth of these populations can cause a strain on rural communities' school districts and social services. These workers continue to be less organized or vocal as compared with other groups of industrial workers. Many of today's agricultural workers "are simply happy to have jobs" and are less outspoken about their lack of overtime compensation because, as one advocate stated, they may "have no clue that this is not the standard for American workers."²²³

III. CONCLUSION

The FLSA was designed to promote economic opportunity for the Nation's workers. When convincing Americans of the need for wage and hour regulation, President Roosevelt distinctly mentioned agricultural workers alongside their industrial brethren as the Nation's "ill-nourished, ill-clad, and ill-housed."²²⁴ American workers anxiously waited to reap the benefits of living wages and manageable workweeks.

Agricultural workers were left waiting, and the thousands working without overtime compensation continue to feel the affect of being lost in a loophole. Even as the FLSA has been amended to include some agricultural workers, many are still left out of overtime compensation protection. The FLSA's exemption hinges on its interpretation of agriculture, an interpretation that is often unclear not only to courts, agency administrators, and members of Congress, but also to those most affected by its implications - employers and employees.

As agriculture has become more technically advanced and industrially-centered, the traditional definition of agriculture has been broadened. This Note does not suggest that agriculture's definition remain impervious and unaffected by the realities of modern farming operations. In earlier or less-advanced socie-

221. See *id.* at 10.

222. *Id.* at 10 (noting that the growth has primarily consisted of Hispanic population, while the white population in these areas has continued to dwindle).

223. *Advocates Say Farm Workers Should Get Overtime Pay*, WATERLOO-CEDAR FALLS COURIER, May 18, 2003 (quoting Sandra Sanchez, immigrant rights project director of the American Friends Service Committee in Iowa).

224. S. REP. NO. 884, at 1-3 (1937); *Brennan v. Western Union Tel. Co.*, 561 F.2d 477, 481 (C.A. N.J. 1977).

ties, farmers commonly made their own tools, prepared their own fertilizer, and processed their own commodities into a marketable product.²²⁵ As our society has grown increasingly industrialized, the tool manufacturer supplies the farmer, factories produce the fertilizer, and commodities are processed at elevators and mills.²²⁶ Today, these activities may be performed by a single entity – the vertically-integrated agricultural producer and to require all nonagricultural activities to be separated from agricultural activities is not always efficient, or even feasible.²²⁷ Nor does this Note suggest that the agricultural exemption be quantified on a large or small farm determination. The Court has held that the FLSA did not attempt “to draw a distinction between large and small farms or between mechanized and non-mechanized agriculture.”²²⁸

What this Note does suggest is that if changes are to be made affecting the future of the overtime compensation exemption of agricultural workers, it should not be undertaken in the FLSA’s definition of agriculture. The definitions are difficult to understand without a fleet of corporate staff and attorneys, which requires costly expenditures of time and financial resources. The transforming character of agriculture indicates that a potential change should be focused elsewhere.

A source for change could be an extension of the 1974 amendment to the FLSA regarding conglomerates.²²⁹ Agricultural conglomerates with ten million in gross annual sales do not coincide with the public’s or Congress’ image of the family farmer, which the original overtime compensation exemption was intended to protect. Requiring these conglomerates, already obligated to pay a minimum wage, to comply with maximum hours and overtime compensation provisions of the FLSA would be the most efficient way to benefit the thousands of agricultural workers currently left without the protections rightly due to them as an integral part of America’s agricultural workforce.

225. See SCHNIEDER & STINE, *supra* note 190, at ¶ 5.85.

226. See *id.*

227. See, e.g., *Adkins v. Mid-American Growers, Inc.*, 167 F.3d 355 (7th Cir. 1998) (noting the burden separation may place on efficient integration of closely related activities, especially in situations where nonexempt activity is too slight to warrant the expense of a separate non-agricultural workforce).

228. The Court has repeatedly held that where extraordinary methods are used, the particular function in question should be analyzed rather than developing a bright line rule differentiating between large and small farms. *Maneja*, 349 U.S. at 261.

229. See H.R. REP. NO. 93-913 § 18, *reprinted in* 1974 U.S.C.C.A.N. 2811, 2823.