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Employees: Some Necessary Changes**

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COLLECTIVE BARGAINING LAWS AND AGRICULTURAL EMPLOYEES: SOME NECESSARY CHANGES

Robert B. Moberly*

Until recently, most of this country's social legislation has excluded agricultural workers. In part, this has been due to the nature of the agricultural industry and its work force.¹ But whatever the reason, these exclusions have contributed to the existence of substantial poverty and inadequate living conditions for many agricultural and migrant workers.² Agricultural workers have not received the full benefit of

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1. ERENBERG, *Migratory Labor: A Review of Labor Market Problems*, in INDUSTRIAL RELATIONS RESEARCH ASSOC. 23RD ANNUAL PROCEEDINGS 12 (1970) (the increasing size of farms and agribusiness in America has contributed to the low income of farm workers). The estimated annual average number of farm workers in 1974 was 4,391,700. However, 3,075,500 were family workers (farm operators and unpaid family), and only 1,316,200 were hired workers. The number of hired farm workers, as well as the number of all farm workers, has been steadily decreasing over the years, although it has stabilized in the last 3 years. The annual average number of hired workers for 1974 was 92% of what it was in 1967, and only 35% of what it was in 1910-14. U.S.D.A. STAT. REPORTING SERV. 3 (Aug. 25, 1975). The annual average hourly pay for all hired farm workers in 1974 was \$2.29, but this figure includes higher paid workers such as supervisors, machine operators, maintenance and bookkeeping workers, and packinghouse workers. The average hourly pay for field and livestock workers in 1974, estimated for the first time in this report, was \$2.11. *Id.* See also AGRICULTURAL STATISTICS, 1974 at 433-36; EMPLOYMENT IN AGRICULTURAL AND BUSINESS OCCUPATIONS (1974) (published by the Economic Research Service of the U.S. Department of Agriculture, in cooperation with various other federal agencies); THE HIRED FARM WORKING FORCE OF 1974 (a statistical report issued by the Economic Research Service of the U.S. Department of Agriculture); Bull, *Application of Christian Principles for the Promotion of the Rights of Migrant Workers and Refugees in the Field of Labor Rights in the U.S.A.*, 20 CATHOLIC LAWYER 233 (1974).

The percentage of unionized employees in the agricultural industry historically has been small, a fact that has been attributed to factors such as the lack of laws protecting union organization, thus allowing employers to fire and otherwise discriminate against or interfere with employees who attempt to organize; a general oversupply of labor in agriculture; the existence of many seasonal and transient employees who have no permanent employment interest with an individual employer; increased mechanization in the industry, which contributes to the oversupply of labor; job competition from foreign "commuters" and illegal aliens, as well as the use of such employees for strike-breaking purposes; and interference by farm labor contractors. See generally Note, *Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems*, 48 N.Y.U.L. REV. 439, 453-55 (1973); Note, *Migrant Farm Labor in Upstate New York*, 4 COLUM. J. OF LAW & SOC. PROBS. 1, 21 (1968).

2. See, e.g., E. GALARZA, *MERCHANTS OF LABOR, THE MEXICAN BRACERO STORY—AN ACCOUNT OF THE MANAGED MIGRATION OF MEXICAN FARM WORKERS IN CALIFORNIA*,

labor legislation establishing minimum standards and regulating health and safety for workers, such as the Fair Labor Standards Act,³ the Occupational Safety and Health Act,⁴ workmen's compensation,⁵ unem-

1942-1960 (1964); C. McWILLIAMS, *Factories in the Field* (1939); E. NELSON, HUELGA (1961); Chase, *The Migrant Farm Worker in Colorado—The Life and the Law*, 40 *COLO. L. REV.* 45 (1967); Note, *Migrant Farm Labor in Upstate New York*, 4 *COLUM. J. OF LAW & SOC. PROBS.* 1 (1968). The condition of agricultural workers has also been dealt with extensively in Congressional hearings and reports. E.g., *Hearing on H.R. 881 (Title I), H.R. 4007, H.R. 4011, H.R. 4408, and H.R. 7513 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. (1973); SENATE COMM. ON LABOR AND PUBLIC WELFARE, *THE MIGRATORY FARM LABOR PROBLEM IN THE U.S.*, S. REP. No. 91-83, 91st Cong., 1st Sess. (1969).

3. Fair Labor Standards Act of 1938, 52 Stat. 1060 (1938), 29 U.S.C. §§ 201-19 (1964), as amended, (Supp. III 1973) [hereinafter cited as FLSA]. As originally enacted, this legislation establishing minimum wages and providing for overtime payments did not cover agricultural employees. Act of June 25, 1938, ch. 676, § 1, 52 Stat. 1060. In 1966, Congress extended minimum wage coverage, with some exceptions, to agricultural employees who worked for an employer who used more than 500 man-days of agricultural labor in any calendar quarter during the preceding calendar year. See 29 U.S.C. § 213(a)(6)(A) (1970). See ABA SECTION OF LABOR RELATIONS LAW, REPORT OF COMM. ON FEDERAL LABOR STANDARDS LEGIS. 144 (1970) (discussion of the 1966 amendments). However, Congress still had not extended coverage to all farmers in interstate commerce to the extent of its constitutional power and also had not included agricultural employees in the overtime provisions. In Champion, "Fair Labor Standards Coverage for Agricultural Employees," 41 *MISS. L.J.* 409, 421 (1970), the author made this observation concerning the impact of the 1966 amendments: "The most striking feature of the application of this act to agricultural laborers is the manner in which it appears to grant them benefits, but then it manages to withdraw these benefits from most of the workers."

Congress again amended the Act in 1974 to gradually phase in the overtime requirements for employers who use sufficient man-hours and to make the child labor provisions applicable in certain instances. Act to amend the Fair Labor Standards Act of 1938, Pub. L. No. 93-259, 88 Stat. 55. See ABA SECTION OF LABOR RELATIONS LAW (PART I), REPORT OF COMM. ON FEDERAL LABOR STANDARDS LEGIS. 131 (1975). A good critical commentary of the Fair Labor Standards Act as applied to agricultural workers, including the most recent amendments, is contained in Bull, *Application of Christian Principles for the Promotion of the Rights of Migrant Workers and Refugees in the Field of Labor Rights in the U.S.A.*, 20 *CATHOLIC LAWYER* 233, 245 (1974). See also Gardner, *Minimum Wages and the Farm Labor Market*, 54 *AMER. J. AGR. ECON.* #3, 473-76 (Aug., 1972). State enactment and enforcement of health, safety and minimum wage laws for agricultural workers has generally been inadequate. See, e.g., Chertkov, *Discussion*, 1970 *INDUSTRIAL RELATIONS RESEARCH ASS'N 23D ANNUAL PROCEEDINGS* 29; Ynostronza, *The Farm Worker—The Beginning of a New Awareness*, 20 *AMERICAN U.L. REV.* 39 (1970), for a description of the lack of enforcement of safety and health laws in California.

4. Agriculture is covered by the safety provisions of this Act. Occupational Safety and Health Act of 1970, 29 U.S.C. § 655 (1975). The Department of Labor has also issued extensive rules and regulations for temporary labor camps in agriculture, 29 C.F.R. § 1910.142 (1975).

In *Local 300 v. McCulloch*, 428 F.2d 396 (5th Cir. 1970), the court held that a three-judge court should be convened on the question whether the exclusion of agricultural laborers in the NLRA violated the fifth amendment's due process clause on equal protection grounds. In *Romero v. Hodgson*, 319 F. Supp. 1201 (N.D. Cal. 1970), *aff'd*, 403 U.S. 901 (1971), a three-judge district court dismissed a complaint which challenged the exclusion of agricultural labor from unemployment insurance coverage under the Federal Unemployment Tax Act of 1935. The court concluded that the exclusion was not an unreasonable legislative classification, and the Supreme Court summarily af-

ployment compensation,⁶ and Social Security.⁷ Moreover, the exclusion of agricultural employees from the national labor relations laws, enacted to protect employee self-organization and collective bargaining and to govern related labor-management activities,⁸ has frustrated the efforts of agricultural employees to improve their own standards. This article is addressed to this last exclusion, the exclusion from the national labor relations laws.

The issue today does not concern the need for labor relations legislation in agriculture, for apparently the critics⁹ and even the contesting parties¹⁰ agree that some form of legislation is desirable. Rather, the issue concerns the appropriate form and substance of such legislation. Important policy questions pervade the right to self-organization, collective bargaining, strikes and impasse resolution, secondary activity, union security, and the organizational structure to administer a new law. The primary purpose of this article is to consider and, where appropri-

firmed. In 1973, a federal court dismissed without a hearing, on the authority of *Romero v. Hodgson*, a challenge to the entire legislative scheme of generally excluding farm labor under social welfare statutes. See *Doe v. Hodgson*, 344 F. Supp. 964 (S.D.N.Y. 1972), *aff'd*, 478 F.2d 537 (2d Cir. 1973).

5. See Bull, *Application of Christian Principles for the Promotion of the Rights of Migrant Workers and Refugees in the Field of Labor Rights in the U.S.A.*, 20 CATHOLIC LAWYER 233, 251 (1974), for a description of the almost uniform exclusion of agricultural employees from most state workmen's compensation laws. See also *Gallegos v. Glaser Crandell Co.*, 388 Mich. 654, 202 N.W.2d 786 (1972) (the exclusion of seasonal farm workers from the state's Workmen's Compensation Act was without a rational basis and therefore a denial of equal protection under the Michigan constitution.) But see Note, *Constitutional Law—Equal Protection—Less Favorable Treatment of Farm Workers Under Michigan's Workmen's Compensation Act Violates State Constitution*, 20 WAYNE L. REV. 179 (1973) (criticizing *Gallegos* as being "superficial and exclusionary").

6. Almost all states exclude agricultural workers from coverage under their unemployment compensation laws. See Note, *The Farmworker: His Need for Legislation*, 22 MAINE L. REV. 213, 234 (1970).

7. *Id.* at 229.

8. The basic exclusion is found in section 2(3) of National Labor Relations Act (NLRA), ch. 372, § 2(3), 49 Stat. 450 (1935), as amended, 29 U.S.C. § 152(3) (1970), which provides as follows:

The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer

The major litigation over the exclusion has concerned the meaning and scope of the term "agricultural employee." See discussion and cases cited in C. MORRIS, *THE DEVELOPING LABOR LAW* 205 (1971); Rummel, *Current Developments in Farm Labor Law*, 19 LAB. L.J. 230 (1968).

9. E.g., Fuller, *Farm-Labor Relations*, 8 IDAHO L. REV. 66 (1971); Morris, *Agricultural Labor and National Labor Legislation*, 54 CALIF. L. REV. 1939 (1966).

10. See, e.g., statements of Clifford McIntire, Legislative Director of the American Farm Bureau, and Matt Triggs, Assistant Legislative Director, supporting a congressional proposal to protect "the right to farm workers to form and join unions." *Hearings on H.R. 881 (Title I), H.R. 4007, H.R. 4011, H.R. 4408, and H.R. 7513 Before the Subcomm. on Agricultural Labor of the House Comm. on Educ. and Labor*, 93d Cong., 1st Sess. 147, 163 (1973). See also Twigg, *A Rebuttal to Murphy*, 25 LAB. L.J. 241 (1974).

ate, suggest solutions for these important questions of public policy concerning labor relations in agriculture. This discussion will include an analysis and evaluation of the existing state laws and the various federal proposals. Part II provides an international comparison.

I. EXISTING LAWS AND CURRENT ISSUES

The exclusion of agricultural employees from the National Labor Relations Act (NLRA) means that the states are free to regulate collective bargaining in agriculture. However, only a few states have enacted collective bargaining laws that apply to agricultural employees.¹¹ Hawaii¹² and Wisconsin¹³ include agricultural employees along with other employees in the general labor relations laws. Bargaining has taken place for years in these jurisdictions,¹⁴ thus arguably demonstrating that collective bargaining would have no greater impact in the agricultural industry than in any other industry. However, several states have passed separate legislation covering only agricultural employment, apparently on the premise that agricultural employment is sufficiently different to require a different statutory scheme.¹⁵ California has recently enacted an agricultural labor law¹⁶ with the support of the major employers and unions affected by the act.¹⁷ It follows the NLRA in many but not all of its provisions. The only other comprehensive laws, in Arizona, Idaho, and Kansas, to some extent follow the NLRA, but

11. Four states have labor relations laws expressly designed for the agricultural industry. The newest is the California law, effective on August 29, 1975. CAL. LABOR CODE § 1140-66.3 (West Supp. 1975). Arizona, Idaho, and Kansas adopted laws in 1972. See ARIZ. REV. STAT. ANN. § 23-1381 to 95 (Supp. 1975); IDAHO CODE § 22-4101 to 13 (Supp. 1975); KANSAS STAT. ANN. § 44-818 to 30 (1973). Two states, Hawaii and Wisconsin, include agriculture in their general labor relations laws applicable to the public sector merely by failure to exclude agricultural employees from definitions of employees covered by the Acts. See HAWAII REV. STAT. § 377-1(3) (1968); WIS. STAT. § 111.02(3) (1975).

12. HAWAII REV. STAT. § 377-1(3) (1968).

13. WIS. STAT. § 111.02(3) (1975). The Wisconsin Employment Relations Commission has confirmed that agricultural employees are covered by the Wisconsin Act. See Libby, McNeill and Libby, WERC Dec. No. 8163 (1967) (migrant harvest hands are employees within the meaning of the Act); Mt. Nebo Fur Farm, WERC Dec. No. 6898 (1964) (even though laborers employed on a fur farm are agricultural employees, neither the employer nor the employees are exempt from the application of the Act).

14. See *Senate Comm. on Labor and Public Welfare, the Migratory Farm Labor Problem in the U.S.*, S. REP. NO. 91-83, 91st Cong., 1st Sess. 23 (1969) (Hawaii); Erenberg, *Oberos Unidos in Wisconsin*, 91 MONTHLY LABOR REV. No. 6, at 17, 20-23 (June, 1968) (Wisconsin).

15. ARIZ. REV. STAT. ANN. § 23-1381 to 95 (Supp. 1975); CAL. LABOR CODE § 1140-66.3 (West Supp. 1975); IDAHO CODE § 22-4101 to 13 (Supp. 1975); KANSAS STAT. ANN. § 44-818 to 30 (1973).

16. CAL. LABOR CODE §§ 1140-66.3 (West Supp. 1976).

17. The California law was a consensus bill, passed with the approval of the major interests involved, including the Teamsters Union, Cesar Chavez and the United Farmworkers (UFO), major grower interests and political leaders. Bureau of National Affairs News and Background Information, June 16, 1975, 89 L.R.R.M. 135.

are generally more restrictive of union activity and were "met with strong union opposition"¹⁸ at the time of passage.

In addition to the existing state laws, several proposals are currently pending in Congress which would, in various ways, bring collective bargaining in agriculture under federal jurisdiction.¹⁹ Foreign countries have also worked to find solutions to labor relations in agriculture. The existing state legislation, the various federal proposals, and the foreign experience all demonstrate the wide variety of proposed solutions to the major policy issues that exist in agricultural employment.

A. *The Right to Self-Organization*

1. *Definition of Employer and Employee*

Collective bargaining legislation typically excludes agricultural employees by so stating in its definition of employees covered by the law. This method is used, for example, to exclude agricultural workers from the benefits of the NLRA.²⁰ Similarly, several of the states which have adopted collective bargaining laws governing private employment specifically exclude agricultural employees from their coverage.²¹ In other states, however, the coverage of these workers is unclear.²² Most current proposals would bring agricultural employees under a collective

18. ABA SECTION OF LABOR RELATIONS LAWS, REPORT OF COMM. ON STATE LABOR LAW AND PUBLIC EMPLOYEE BARGAINING 310 (1973).

19. Several bills have been introduced in the first session of the 94th Congress. H.R. 4408 and H.R. 4179 both would amend the NLRA simply by striking out the agricultural laborer exclusion in § 2(3) of the Act. H.R. 4786 would amend the Act in the same way, but would also add a provision allowing agricultural employers to make an agreement covering agricultural laborers with a bona fide labor organization wherein:

(1) Such agreement requires as a condition of employment, membership in such labor organization after the seventh day following the beginning of such employment or the effective date of the agreement, whichever is later, or (2) such agreement provides for priority in opportunities for employment based upon length of service with such employer, in the industry or in the particular geographical area: *Provided*, That nothing in this subsection shall set aside the final proviso to section 8(a)(3) of this Act.

H.R. 5521, and H.R. 3256, also identical bills, take a different approach. They propose an Agricultural Labor Relations Act, which would establish an Agricultural Labor Relations Board to administer an act which in some respects is similar to, but in other respects is greatly different from, the NLRA.

20. See note 8 *supra*.

21. *E.g.*, CONN. GEN. STAT. ANN. § 31-101(6) (1958); MICH. COMP. LAWS ANN. § 423.2(e) (1967); MICH. STAT. ANN. § 179.01(4) (1966); N.D. CENT. CODE § 34-12-01(3) (1972); PA. STAT. tit. 43, § 211.3(d) (1964); R.I. GEN. LAWS ANN. § 28-7-3(3) (1969); UTAH CODE ANN. § 34-20-2(3) (1974); VT. STAT. ANN. tit. 21, § 1502(6)(A) (Supp. 1975); W. VA. CODE ANN. § 21-1A-2(3) (1973).

22. In Minnesota, for example, the definition of employee specifically excludes any individual employed in agricultural labor. See MINN. STAT. ANN. § 179.01(4) (1966). In an amendment to its labor laws, the Minnesota legislature prohibited secondary boycotts of agricultural goods, but at the same time acknowledged the right of agricultural employees to organize and strike. See *id.* § 179.11(9). It has been reported that this law "may well be utilized by Minnesota farm workers to gain a measure of statutory protection in the future." ABA SECTION OF LABOR RELATIONS LAW, REPORT OF COMM. ON STATE LABOR LAW AND PUBLIC EMPLOYEE BARGAINING 288 (1975).

bargaining law either by removing the current agricultural worker exemption from the NLRA²³ or by establishing a new law covering only agricultural employees.²⁴

Over four-fifths of the states have failed to adopt any collective bargaining legislation for agricultural employees. A few have established commissions to develop programs to improve conditions for agricultural labor.²⁵ Finally, some states not only fail to protect union activity but actively discourage it.²⁶ In those states without collective bargaining legislation, labor relations in agriculture operates in a sphere of private, unregulated action. The California Supreme Court accurately described the situation in a decision involving agricultural workers which preceded the new California law. The court noted "the bitter hardships that regularly accompany the non-regulated status of labor-management relations," and stated that "instead of comprehensive state regulation, California's policy in the labor field has been one of laissez-faire, a posture which has generally left the resolution of labor disputes to 'the free interaction of economic forces.'"²⁷

Some of the state laws applicable to agriculture contain a broad definition of agricultural employee, such as "any individual employed to perform agricultural work."²⁸ On the other hand, the right of employee self-organization often is denied as a result of a very narrow definition of "agricultural employers" covered by the act. Under one congressional proposal, the law would cover only those employers engaged in agriculture who employed more than 500 man-days of agricultural labor during any calendar quarter of the preceding calendar year.²⁹ This is the same definition of agricultural employers subject to the Fair Labor Standards Act,³⁰ a definition that does not include all employers which the federal government constitutionally can reach.³¹ This definition would bring only those farmers who employ the equivalent of six or seven full-time employees within the purview of the Act.³² The defini-

23. H.R. 4786, 94th Cong., 1st Sess. (1975); H.R. 4408, 94th Cong., 1st Sess. (1975); H.R. 4179, 94th Cong., 1st Sess. (1975).

24. H.R. 5521, 94th Cong., 1st Sess. (1975); H.R. 3256, 94th Cong. 1st Sess. (1975).

25. *E.g.*, FLA. STAT. ANN. § 450.201 (Supp. 1975), establishing a migrant labor commission to consult, supervise, coordinate, cooperate and develop plans with regard to migrant programs, for the stated purpose of improving conditions for migrant labor.

26. LA. REV. STAT. ANN. §§ 23: 882-85 (West 1964).

27. *Englund v. Chavez*, 8 Cal. 3d 572, 584, 504 P.2d 457, 465, 105 Cal. Rptr. 521, 529 (1972).

28. KAN. STAT. ANN. § 44-819(b) (1973).

29. H.R. 5521, 94th Cong., 1st Sess. (1975).

30. FLSA § 13(a)(6), 29 U.S.C. § 213(a)(6) (1970).

31. The law constitutionally could cover all private employers affecting interstate commerce, as do most other labor relations laws. *See, e.g.*, *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937); Labor-Management Reporting and Disclosure Act of 1959 (Landrum Griffin Act) § 3 (e), 73 Stat. 537, 29 U.S.C. §§ 401-531 (1970).

32. *Hearings on H.R. 881 (Title I)*, H.R. 4007, H.R. 4011, H.R. 4408, and H.R.

tion of employer is also severely limited under the Kansas act. It covers only those "who employ six or more employees for twenty or more days of any calendar month in the six months preceding the filing for recognition by such employees."³³ The Arizona act governs only those agricultural employers who employed "six or more agricultural employees for a period of 30 days during the preceding six-month period."³⁴

On the other hand, some statutes have a broad definition of agricultural employer, such as the one contained in the new California act, which states that

the term 'agricultural employer' shall be liberally construed to include any person acting directly or indirectly in the interest of an employer in relation to an agriculture employee, any individual grower, corporate grower, cooperative grower, harvesting association, hiring association, land management group, any association of persons or cooperative engaged in agriculture, and shall include any person who owns or leases or manages land used for agricultural purposes . . .³⁵

Similarly, Idaho defines an employer as "any person who regularly employs any person in agricultural work, and any person acting as an agent of an employer."³⁶ Such all-inclusive definitions are in sharp contrast to the restrictive definitions described earlier.

Including the small family farm within the ambit of regulatory acts seems hardly necessary. Abuses have not occurred within this sphere, and the resources of government available to regulate labor relations are limited. Among the various groups advocating collective bargaining legislation, none proposes that it apply to the small family-operated farm.

The primary thrust of proposed legislation is to provide collective bargaining in agribusiness and other large enterprises in which equality of bargaining power between employer and worker no longer exists. However, this is also true of employers covered under the NLRA, and the NLRA does not attempt to establish a minimum standard of jurisdiction.³⁷ Rather, its definition of employer is broad. The NLRB, however, has discretion to decline jurisdiction over labor disputes involving classes or categories of employers if the effect of such labor disputes on commerce is not sufficiently substantial to warrant the exercise of its

7513 *Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. at 47 (1973).

33. KAN. STAT. ANN. § 44-819(c) (1973).

34. ARIZ. REV. STAT. ANN. § 23-1382(2) (Supp. 1975).

35. CAL. LABOR CODE § 1140.4(c) (West Supp. 1975).

36. IDAHO CODE § 22-4102(2) (Supp. 1975).

37. NLRA §§ 2(2), 14(c)(1), 29 U.S.C. §§ 152(2), 164(c)(1), (1970). Under § 14(c)(1), however, the Board is prohibited from declining to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing upon August 1, 1959.

jurisdiction.³⁸ For example, the Board currently asserts jurisdiction over nonretail operations only if they have an annual outflow or inflow across state lines of at least \$50,000.³⁹ Moreover, an enterprise with only one employee need not bargain because the Board does not recognize bargaining units containing less than two persons.⁴⁰ A narrow agricultural labor law, such as that in Arizona,⁴¹ does not take into account the migratory and seasonal nature of much agricultural work. This type of definition would, in essence, deny bargaining rights to those employees who most need collective bargaining protection.

The available evidence is insufficient for a legislative determination of the precise point at which collective bargaining becomes impractical in agriculture. Rather than attempting to make this delicate determination, a legislature should allow the administrative agency, as Congress has done under the NLRA, to determine the most feasible and practical standard for bargaining purposes. In this way, administrative action rather than subsequent legislation could correct any error. The NLRB has performed this function with private non-profit schools,⁴² hospitals,⁴³ and nursing homes,⁴⁴ and there is no reason to believe that it could not perform this chore in agriculture as well.

2. *Bargaining Unit and Election Problems*

Some have contended that collective bargaining in agricultural employment is impossible because of the casual or seasonal nature of much of the work.⁴⁵ Admittedly, the definition of an appropriate bargaining unit is more difficult in agriculture than in most industries, precisely because of the shifting nature of much of the work force and the temporary, seasonal nature of the work. Many industries are seasonal, however, and the NLRB has developed procedures and criteria to insure representative balance and the representative nature of the union relationship.⁴⁶ This problem is not new, and a labor board could deal with it under the general power to define an "appropriate unit."

38. *Id.*

39. NATIONAL LABOR RELATIONS BOARD, JURISDICTIONAL GUIDE 4 (1973). *See also* Culligan Soft Water Service, 149 N.L.R.B. 2, 57 L.R.R.M. 1229 (1964); Siemons Mailing Service, 122 N.L.R.B. 81, 43 L.R.R.M. 1056 (1958).

40. Sonoma-Marin Publishing Co., 172 N.L.R.B. 625, 68 L.R.R.M. 1313 (1968); Imperial Textile Co., Inc., 164 N.L.R.B. 675, 65 L.R.R.M. 1166 (1967); Foreign Car Center, 129 N.L.R.B. 319, 46 L.R.R.M. 1538 (1960).

41. *See, e.g.*, ARIZ. REV. STAT. § 23-1382(2) (Supp. 1975).

42. Cornell University, 183 N.L.R.B. 329, 74 L.R.R.M. 1269 (1970); 29 C.F.R. § 103.1 (1975).

43. Butte Medical Properties, 168 N.L.R.B. 266, 66 L.R.R.M. 1259 (1967).

44. The Swanholm, 186 N.L.R.B. 45, 75 L.R.R.M. 137 (1970); University Nursing Home, Inc., 168 N.L.R.B. 263, 66 L.R.R.M. 1263 (1967).

45. Twiggs, *A Rebuttal to Murphy*, 25 LAB. L.J. 241 (1974).

46. *E.g.*, Hondo Drilling Co., 164 N.L.R.B. 416 (1967); Management Directors, Inc., 148 N.L.R.B. 1053, 57 L.R.R.M. 1119 (1964); Scoa, Inc., 140 N.L.R.B. 1379, 52 L.R.R.M. 1244 (1963).

Some states follow this procedure.⁴⁷ This approach is desirable because it permits the board to take evidence and to determine the most appropriate unit. A legislature would find this task more difficult because it could not consider each particular bargaining unit.

Some states, however, have attempted to establish specific standards to govern the creation of a statutory bargaining unit. California defines an appropriate bargaining unit as

all the agricultural employees of an employer. If the agricultural employees of the employer are employed in two or more noncontiguous geographical areas, the board shall determine the appropriate unit or units of agricultural employees in which a secret ballot election shall be conducted.⁴⁸

Under this provision, the board does not have authority to determine the appropriate unit if the employees are working in contiguous geographical areas. If the employees are working in contiguous geographical areas, the bargaining unit apparently must include all the agricultural employees. However, if workers are employed in noncontiguous geographical areas, the board apparently has administrative discretion to determine the appropriate unit based on the standards ordinarily used, such as community of interest.⁴⁹ Evidently, the California legislature could not envision occasions on which more than one bargaining unit in contiguous areas would be appropriate. But one can imagine a situation in which an employer has two contiguous areas but uses two distinct groups of employees to work on two distinct crops requiring differences in skills and abilities. Under these circumstances perhaps a better policy would have been to allow the board to take evidence and to determine the appropriate unit based on the particular circumstances involved.⁵⁰

Occasionally, a statute reflects a preference for inclusion of the largest number of eligible employees in one bargaining unit.⁵¹ The fear, of course, is that over-fragmentation will place too great a burden upon the employer in the negotiations and could affect the efficient operation of the business. This is not unlike the occasional desire

47. See, e.g., WIS. STAT. ANN. § 111.02(6) (1974).

48. CAL. LABOR CODE § 1156.2 (West Supp. 1976).

49. For a discussion of the general factors normally applied in unit determination, see C. MORRIS, *THE DEVELOPING LABOR LAW* 217-22 (1971).

50. This approach was followed in Idaho and Arizona. IDAHO CODE § 22-4109(1) (Supp. 1975); ARIZ. REV. STAT. ANN. § 23-1389(A)(B) (Supp. 1976).

51. In Kansas, the board is directed to "establish an appropriate unit to include the largest number of eligible employees" consistent with:

(1) [t]he principles of efficient administration of the business; (2) the existence of a community of interest among employees; (3) the history of employee organization; (4) geographical location; (5) the effects of overfragmentation and the splintering of a work organization; (6) the provisions of section 5 [44-822] of this act [pertaining to the rights of employers]; and (7) the recommendations of the parties involved.

KAN. STAT. ANN. § 44-823(e) (1973).

expressed in state public employee bargaining statutes for large, rather than fragmented, bargaining units.⁵² However, unlike the public sector,⁵³ no data exist in the agricultural industry to establish that overfragmentation is a significant problem which hampers collective bargaining or the operation of the industry. For this reason, the preferable approach is to provide discretion to the administrative agency in order to establish bargaining units based on the needs and interests of the parties as established in thorough administrative hearings. A legislature itself, given the present state of knowledge, is incapable of making the underlying factual determinations necessary to dictate bargaining units by statute or even to set the specific standards to govern this determination in agriculture.

The states have made a contribution, however, in setting standards to ensure that an election will not be conducted with an unrepresentative group of employees. An administrative agency could just as easily establish these standards, but the standards some state legislatures have established to date undoubtedly will help assure the representative nature of the vote. One statute requires that an election petition allege that the number of agricultural employees of the employer is "not less than 50% of his peak agricultural employment for the current calendar year."⁵⁴ Another mandates that "the board shall not conduct an election unless it finds that a representative number of employees in that unit is employed at the time of the election."⁵⁵ These provisions are perhaps useful in determining and assuring the representative nature of the vote. However, by establishing the standards statutorily the legislature loses a degree of flexibility if the standards prove impractical.

Some statutes require the state labor board to conduct a secret ballot vote before the employer may agree to bargain.⁵⁶ This policy is contrary to that of the NLRA, under which an employer may recognize a union without a secret ballot vote so long as the proponents establish that a majority supports it.⁵⁷ In addition, the state provisions apparent-

52. E.g., ALASKA STAT. § 23.40.090 (1972); PA. STAT. ANN. tit. 43, § 101.604 (Supp. 1974-75); WIS. STAT. ANN. § 111.81(3) (1974).

53. See, e.g., Rock, *The Appropriate Unit Question in the Public Service: The Problem of Proliferation*, 67 MICH. L. REV. 1001 (1969); Slavney, *Representation and Bargaining Unit Issues*, in *DISPUTE SETTLEMENT IN THE PUBLIC SECTOR* 35, 49 (T. Gilroy ed. 1972).

54. CAL. LABOR CODE § 1156.3(a)(1) (West Supp. 1976).

55. IDAHO CODE § 22-4109(6) (Supp. 1975).

56. E.g., ARIZ. REV. STAT. ANN. § 23-1389(A) and 23-1385(A)(5) (Supp. 1976); CAL. LABOR CODE § 1156 (West Supp. 1976); KAN. STAT. ANN. § 44-823(d) (1973). The California provision seems to be related to another provision, CAL. LABOR CODE § 1159 (West Supp. 1976), which states that "[i]n order to assure the full freedom of association, self-organization, and designation of representatives of the employees own choosing, only labor organizations certified pursuant to this part shall be parties to a legally valid collective bargaining agreement."

57. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). See also Christensen & Christensen, *Gissel Packing and "Good Faith Doubt": The Gestalt of Required Recog-*

ly prevent a union from obtaining, as it can under the NLRA, a bargaining order based on the employer's aggravated unfair labor practices that destroyed the union majority. This is a serious deficiency in many state laws. One congressional proposal expressly provides a statutory remedy similar to that available under the *Gissell* case, by empowering the Board to order an employer to bargain with a labor organization after the labor organization lost an election if: (1) prior to the election, a majority of employees had clearly and freely designated the labor organization as its representative; (2) the employer committed aggravated unfair labor practices that directly resulted in the defeat of the labor organization; and (3) such practices had a sufficiently serious effect that the Board could not possibly conduct a fair election within a reasonable period of time.⁵⁸ This provision is quite desirable in those states requiring a secret ballot victory. Without this provision the employer has an incentive to engage in aggravated unfair labor practices so that the Board could never conduct a fair election. In this manner, the employer could effectively preclude the union from ever winning a majority vote and gaining certification as the bargaining representative.

As a result of the casual and seasonal nature of some agricultural employment, California makes it an unfair labor practice for either an employer or a labor organization willfully to arrange for persons to become employees for the primary purpose of voting in elections.⁵⁹ One could hardly quarrel with this provision, which is designed to prevent job changes purely for voting purposes. Due to the transitory and seasonal nature of some agricultural employment, changing jobs would otherwise be a quite feasible technique for manipulating elections. Further reflections of the transitory nature of some agricultural employment are provisions that require labor boards to hold prompt elections. For example, California requires the board to hold an election "within a maximum of seven days following the petition," and the board must attempt to hold the election within 48 hours of the filing of a petition if a majority of employees are engaged in a strike.⁶⁰ This law certainly creates practical problems, some of which the California board has already encountered while conducting elections.⁶¹ One must speculate as to whether such stringent time requirements affect the quality of bargaining unit decisions and other important decisions in the conducting of elections. Additionally, this provision, which is part of an act to promote peace in the fields, might actually encourage strikes since the existence of a strike apparently will result in faster elections.

nition of Unions Under the NLRA, 37 U. CHI. L. REV. 411 (1970); Lesnick, *Establishment of Bargaining Rights Without an NLRB Election*, 65 MICH. L. REV. 851 (1967).

58. H.R. 5521, § 9(a)(1), 94th Cong., 1st Sess. (1975).

59. CAL. LABOR CODE § 1154.6 (West Supp. 1975).

60. *Id.* § 1156.3(a)(4).

61. See 90 LAB. REL. REP. 201, 204 (1975); Wall Street J., Sept. 9, 1975, at 48, col.

B. *Collective Bargaining*

All but one of the state laws and all of the proposed federal laws concerning labor relations in agriculture establish a full and complete duty to bargain collectively in good faith with respect to wages, hours, and conditions of employment. Apparently, the sole exception is the Kansas statute, which creates a "meet and confer" arrangement.⁶² Evidently this is a carry-over from certain public sector bargaining laws that also contain the less stringent meet and confer requirement.⁶³ Additionally, Kansas limits the scope of subjects on which employers must meet and confer. Rather than allowing administrative agencies to determine appropriate subjects of bargaining, it creates the duty only as to certain items.⁶⁴ Because collective bargaining is a method for resolving disputes, this limitation on the subjects of bargaining means that no peaceful methods exist to resolve disputes over subjects of vital concern to employees. For example, mechanization is replacing many farm workers.⁶⁵ Automatic pickers in certain industries have depleted employment significantly. Courts have held that the decision to mechanize is a management decision that the employer need not bargain about, but they have also held that the impact of mechanization on the affected employees is a mandatory subject of bargaining.⁶⁶

Some of the states have attempted to limit the scope of bargaining by inserting strong "employer rights" clauses not found in the NLRA.⁶⁷

62. KAN. STAT. ANN. § 44-819(h) (1973).

63. E.g., CAL. GOV'T CODE § 3530 (West. Supp. 1975). See generally Shaw, *The Development of State and Federal Laws*, in PUBLIC WORKERS AND PUBLIC UNIONS 20, 28 (S. Zagoria ed. 1972).

64. It limits the duty to meet and confer to "conditions of employment," which are specifically defined as "salaries, wages, hours of work, vacation allowances, sick and injury leave, number of holidays, retirement benefits, insurance benefits, wearing apparel, premium pay for overtime, shift differential pay, jury duty and grievance procedures." KAN. STAT. ANN. § 44-819(p) (1973).

65. Note, *Unionization of the Agricultural Labor Force; An Inquiry of Job Property Rights*, 44 S. CAL. L. REV. 181, 182 (1970).

66. *Libby, McNeil & Libby v. Wisconsin Employment Relations Comm'n*, 48 Wis. 2d 272, 179 N.W.2d 805 (1970).

67. Arizona, for example, attempts to set forth the areas reserved for management decisionmaking by providing as follows:

Rights of Employer

A. An Agricultural employer shall have the following management rights:

1. To manage, control and conduct his operations, including, but not limited to, the number of farms and their locations, methods of carrying on any operation or practices thereon, kinds of crops, time of work, size and make-up of crews, assignment of work, and places of work.

2. To hire, suspend, discharge or transfer employees in accordance with his judgment of their ability.

3. To determine the type of equipment or machinery to be used, the standards and quality of work, and the wages, hours and conditions of work. The terms of employment relating to wages, hours and conditions of sanitation, health and the establishment of grievance procedures directly relating to a job shall be subject to negotiation.

4. To work on his own farm in any capacity at any time.

5. To join or refuse to join any labor organization or employer organization.

ARIZ. REV. STAT. ANN. § 23-1384 (1972).

These broad provisions will possibly negate decisions such as the *Libby-McNeal* case,⁶⁸ in which the court held that the impact of mechanization is a subject of bargaining. Removing a subject of such great concern to employees from the scope of mandatory bargaining can only serve to aggravate relationships. A similar provision in the Idaho law⁶⁹ removes contracting from the realm of required negotiations, contrary to federal policy.⁷⁰ Again, this narrow approach to mandatory subjects of bargaining presents an analogy to public sector management rights clauses, which to date have served primarily to cause disruption and discord in public sector bargaining.⁷¹

C. *Strikes and Impasse Procedures*

Existing state laws deal with strikes in agricultural employment in various ways. Some states grant the same broad right to strike that other private employees have,⁷² apparently on the theory that the strike weapon in agriculture is no more dangerous to the public welfare than strikes in other industries. Congressional proposals that would remove the agricultural employee exemption from the NLRA similarly would provide the right to strike enjoyed by other private sector employees.⁷³ However, some laws proceed on the assumption that agricultural employees should have more limited rights to strike because of the perishable nature of agricultural commodities. The argument is that the food supply is too important to risk the possibility of work stoppages which would interrupt food production and distribution.⁷⁴ Arizona, for example, makes it an unfair labor practice to call a strike unless a majority of the employees within the bargaining unit have first approved the strike by secret ballot.⁷⁵ This provision is similar to one contained in the

68. *Libby, McNeil & Libby v. Wisconsin Employment Relations Comm'n*, 48 Wis. 2d 272, 179 N.W.2d 805 (1970).

69. IDAHO CODE § 22-4105 (Supp. 1975).

70. *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964).

71. See generally *State College Educ. Ass'n v. Pennsylvania Labor Rel. Bd.*, 9 Pa. Cmwlth. 229, 306 A.2d 404 (1973); Wollett, *The Bargaining Process in the Public Sector: What is Bargainable?*, 51 ORE. L. REV. 177 (1971).

72. CAL. LABOR CODE § 1152 (West Supp. 1975); WIS. STAT. ANN. § 111.04 (1974).

73. See note 23 *supra*.

74. This argument has recently been stated in the following manner by a representative of the American Farm Bureau:

Thus, farmers are concerned, just as consumers need to be, if a strike should take place during critical periods of planting, growing, and harvesting on farms. Agricultural crops are not like steel. They have to be harvested when they are ready. They cannot be held in abeyance while a strike is settled. If they aren't planted on time, cultivated and harvested on time, an entire year's effort and investment is lost, and the food is lost to consumers. If one or two labor unions should gain the power to shut down a major portion of the production of food in this country at the farm, they will have us all at their mercy.

Address of C. H. Fields, Assistant Director, Congressional Relations, American Farm Bureau Federation, in Falls Church, Va., Feb. 21, 1975.

75. ARIZ. REV. STAT. ANN. § 23-1385(B)(13) (Supp. 1975).

national emergency provisions of the Labor-Management Relations Act,⁷⁶ which has been unsuccessful because "employees invariably vote to back up their union's position, and it actually constitutes an obstacle to genuine bargaining near the end of the period."⁷⁷

Some of the proposals that restrict or delay the right to strike also provide alternative impasse resolution procedures. In Kansas, for example, it is an unfair labor practice for an employer to engage in a lock-out⁷⁸ or for a union to engage in a strike.⁷⁹ On the other hand, the Kansas law provides an innovation in agricultural labor relations by providing for a binding determination of the dispute by a neutral third party. After mediation has failed, a dispute is subject to a fact-finding board, whose recommendation is merely advisory. If this does not resolve the dispute, the law provides for an arbitration procedure under which the agricultural labor relations board will make findings and orders that bind both sides, provided the findings are supported by substantial evidence in the record, considered as a whole.⁸⁰ The same law, however, allows parties to negotiate their own impasse procedures in place of the statutory one, without specifying any minimum standards for the agreed upon procedures.⁸¹ Accordingly, a party with great bargaining power may force the other side to agree to impasse procedures that do not result in final and binding arbitration, but instead allow each party to use its economic strength. A law allowing economic strength to prevail might be acceptable if applied equally in all cases, but if applied only when one party or the other has superior economic strength, the impropriety is evident. The law should at least contain minimum standards for negotiated impasse procedures if it is to serve as a substitute for statutory impasse procedures.

An innovation in impasse resolution procedures has been proposed each year in Congress since 1972.⁸² Under the proposal, no lock-out, strike, picketing, or similar activity is permissible unless the opposing party receives 20 days written notice of one's intention to engage in such activity. The party receiving this notice of intent may then invoke a 40-day period of mediation by the Federal Mediation and Conciliation Service (FMCS). If after 20 days from the start of the 40-day period the parties have not yet resolved the dispute, the FMCS would provide five names from which the parties would choose a special referee. The special referee must then reach a decision not later than 5 days before

76. Labor-Management Relations Act (Taft-Hartley Act), § 209(b), 29 U.S.C. § 179(b) (1970).

77. R. SMITH, L. MERRIFIELD AND T. ST. ANTOINE, *LABOR RELATIONS LAW* 483 (1974).

78. KAN. STAT. ANN. § 44-828(b)(8) (1973).

79. *Id.* § 44-828(c)(7) (1973).

80. *Id.* § 44-826(c) & (d) (1973).

81. *Id.* § 44-826(a) (1973).

82. The most current proposal is H.R. 5521, 94th Cong., 1st Sess. (1975), originally introduced as H.R. 4011, 93d Cong., 1st Sess. (1973).

the end of the 40-day period. The proposal would prohibit strikes and lockouts during the 20-day notice of intention period and the 40-day impasse resolution period, but would allow them after the 60 days.

In many respects, this procedure is similar to the impasse procedures adopted in 1974 for the health care industry under the Labor-Management Relations Act.⁸³ Under the proposed legislation, the government would compensate the special referees, as it does the members of the board of inquiry established in the health care industry⁸⁴ and in national emergencies.⁸⁵ A special referee would have to issue the report within a very limited time period.

Some significant differences do exist between the functions performed by Boards of Inquiry in the health care industry and the special referees proposed in the agricultural field. Some differences are perhaps based upon the fact that the agricultural impasse procedure was first proposed in 1972, and the health care amendments were adopted in 1974 following certain compromises. One significant difference is that under the proposed agricultural procedures, the parties would select the special referee from a given list, whereas under the health care procedures the Federal Mediation and Conciliation Service appoints the board of inquiry independent of the parties' preferences. Another difference is that the recommendations of the health care board are merely advisory, whereas the agricultural impasse procedure proposal would bind the invoking party if the other party accepted it before the 40-day period expired. Under this procedure, however, the employer is the party that would usually have the choice of whether or not to accept the recommendations, since the labor organization invokes impasse procedures in the vast majority of cases. This means that if an employer finds the recommendations favorable, he could accept them and the recommendations would bind the petitioning union. On the other hand, a strong employer could ignore the recommendations altogether if he felt that the petitioner union did not have the economic strength to obtain the recommended benefits. To be consistent, referee recommendations should either bind both parties or neither party. Another possibility is to give either party the option of making the recommendations binding. This solution is more appropriate in the agricultural context, because it takes into account the short harvesting period. If the harvest period ends before completion of the impasse procedure, the union has less strength.

A more fundamental issue, however, is the wisdom of establishing a final and binding impasse resolution procedure in agriculture. Bind-

83. Labor-Management Relations Act (Taft-Hartley Act) § 213, 29 U.S.C.A. § 183 (Supp. 1975).

84. *Id.*

85. Labor-Management Relations Act (Taft-Hartley Act) § 207(b), 29 U.S.C. § 177(b) (1970).

ing arbitration of initial contract terms has been mandated in other private employment only when all other efforts at collective bargaining and impasse procedures have failed and a true national emergency exists. Given the tremendous fragmentation of the agricultural industry and the normal utilization of collective bargaining as a means of resolving disputes, lost agricultural production due to strikes is unlikely to create a national emergency. Agricultural employers and unions are not monolithic bodies, and consequently, labor disputes would not arise at the same time and place. One can predict that the number of bargaining units in the industry would number in the thousands; moreover, there currently exists national emergency legislation that could resolve disputes of a national nature.⁸⁶ Congress has always retained the ability to act as a final arbitrator in case of national emergency disputes, and if necessary, as in the 1963 and 1967 railroad disputes, it has enacted special legislation to resolve disputes having a national impact.⁸⁷ One might also note that collective bargaining has been carried on successfully in the food processing industry for many years under the NLRA. Foods that processors deal with are as perishable as those growers deal with, and collective bargaining has not caused anything approaching a national emergency in the food processing industry. Moreover, collective bargaining without final and binding arbitration and with a full right to strike has been carried on successfully without emergencies in those states which provide collective bargaining rights for agricultural employees.⁸⁸

Finally, even the limited advisory proceedings used in the health care industry have doubtful utility in the agricultural industry at this stage of development. Labor disputes in the health care industry affect the immediate health and safety of persons being treated in health care institutions, and this arguably justifies elaborate impasse procedures in that industry. In contrast, labor disputes in the agricultural industry affect less significant interests. Admittedly, some crops would be lost, just as strikes occasionally reduce production of steel and other products. Even in the food processing industry, some food undoubtedly is lost as a result of labor disputes. However, all of our collective bargaining laws proceed on the assumption that an occasional economic loss is acceptable in order to make the entire collective bargaining process work.⁸⁹ In the absence of danger to human safety or health, and in the

86. Labor-Management Relations Act (Taft-Hartley Act) §§ 206-10, 29 U.S.C. §§ 176-80 (1970).

87. Pub. L. No. 90-54, 81 Stat. 122 (1967); Pub. L. No. 88-108, 77 Stat. 132 (1963).

88. HAWAII REV. LAWS § 377-1 (1955); WIS. STAT. ANN. § 111.01 (1975).

89. The United States Supreme Court has stated this concept in this way:

The system has not reached the ideal of the philosophic notion that perfect understanding among people would lead to perfect agreement among them on values. The presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized. . . . [T]he truth of the matter is that at the present statutory stage of our national labor relations policy, the two factors—necessity for

absence of a national emergency, special impasse procedures are no more necessary in the agricultural industry than in any other private sector industry. At the very least, legislatures should not impose impasse procedures prior to experiencing free collective bargaining and determining whether special impasse procedures are necessary. Experience has demonstrated that it is easier to enact impasse procedures than it is to rescind or change them when they are no longer necessary or effective.⁹⁰

D. Secondary Activity

The United Farm Workers of America (UFW) has dramatized the use of secondary activity by the boycotts it organized against California food products grown by employers who did not have a contract with the union.⁹¹ This practice would clearly be unlawful under the secondary activity provisions of the NLRA⁹² as well as most state acts.⁹³ The restriction on secondary activity in the NLRA is a primary reason why the UFW has opposed the inclusion of agricultural workers under the national Act, and why it has also opposed other national or state legislative proposals containing restrictions on secondary activity.⁹⁴ The new California Act differs from the NLRA in that it allows a certified union to promote consumer boycotts even if the goal is to have the public cease patronizing the secondary employer altogether.⁹⁵

good-faith bargaining between parties, and the availability of economic pressure devices to each to make the other party incline to agree on one's terms—exist side by side.

NLRB v. Insurance Agents' Int'l Union, 361 U.S. 477, 488 (1960). See also H. K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

90. Current laws governing emergency railway and airline disputes, for example, have often been severely criticized, and various presidential, congressional and other proposals have been made to improve the situation. None, however, have come close to enactment. See, e.g., Aaron, *National Emergency Disputes: Some Current Proposals*, 22 LAB. L.J. 461 (1971); Curtin, *Transportation Strikes and the Public Interest: The Recommendations of the ABA's Special Committee*, 58 GEO. L.J. 243 (1969); Fleming, *Emergency Strikes & National Policy*, 11 LAB. L.J. 267 (1960); Lewis, *Proposals for Change in the Taft-Hartley Emergency Procedures: A Critical Appraisal*, 40 TENN. L. REV. 689 (1973); Silberman, *National Emergency Disputes—The Considerations Behind a Legislative Proposal*, 4 GA. L. REV. 673 (1970).

91. See, e.g., J. DUNNE, DELANO, *THE STORY OF THE CALIFORNIA GRAPE STRIKE* (1967).

92. NLRA § 8(b)(4), 29 U.S.C. § 158(b)(4) (1970).

93. Kansas, for example, contains a typical definition of secondary boycott under which this activity would be prohibited:

"Secondary boycott" means to encourage, coerce, contract or conspire with any person where the object of such action is to force or persuade any person, not a party to the labor dispute, to refuse to use, sell, handle or transport any agricultural commodity, or where the object of such action is to require any agriculture employer to recognize, bargain with or resolve any dispute with a labor organization.

KAN. STAT. ANN. § 44-819(n) (1973). See also ARIZ. REV. STAT. ANN. § 23-1385(B)(6) (Supp. 1975); IDAHO CODE § 22-4107(6)-(8) (Supp. 1975).

94. E.g., *Hearings on Migrant and Seasonal Farmworker Powerlessness Before the Subcommittee on Migratory Labor of the Senate Committee on Labor and Public Welfare*, 91st Cong., 1st Sess., pt. 3-A, at 840 (1969).

95. CAL. LABOR CODE § 1154(d)(4) (West Supp. 1975).

It is too early to determine whether secondary boycotts are necessary economic weapons, whether they are useful, and whether they have a significant impact on bargaining relationships. These issues are worthy of separate study. If the California law were preempted by inclusion of agricultural workers under the NLRA, it would deprive California workers of the consumer boycott weapon directed at all products of secondary employers; the workers could, however, promote boycotts of the products of the primary employer sold by the secondary employer.⁹⁶

Moreover, the impact of a federal law containing existing restrictions on secondary activity would not be entirely negative. Such a law would have the positive effect of eliminating many state laws that restrict secondary and other concerted activity more severely. For example, in some states an individual as well as a labor board may seek injunctive relief in case of an alleged violation of the secondary boycott provisions.⁹⁷ This provision recalls the era when individual employers could seek and receive temporary injunctive relief from sympathetic judges and thereby destroy effective concerted activity regardless of the eventual outcome of the case.⁹⁸ To avoid such results, Congress in 1932 restricted the ability of federal courts to issue injunctions in most labor disputes.⁹⁹ In 1947 Congress allowed only the General Counsel of the NLRB to seek injunctions in secondary activity cases.¹⁰⁰ As a result, the only relief available to individuals is a suit for money damages,¹⁰¹ except in certain limited situations.¹⁰² Congress, by placing the power to seek injunctions in a governmental agency, sought to assure that the power to seek injunctions was not abused. State laws that allow individuals to seek injunctive relief run contrary to national labor policy and should be preempted by a federal law.¹⁰³

Some states also attempt to prohibit consumer publicity that the NLRA permits. For example, an Arizona state court, construing the Arizona Agricultural Employment Relations Act, prohibited UFW hand-billing and oral persuasion of a store's customers not to buy teamster or

96. *NLRB v. Fruit & Vegetable Packers & Warehousemen Local 760*, 377 U.S. 58 (1964).

97. IDAHO CODE § 22-4112(1) (Supp. 1975); KAN. STAT. ANN. § 44-829(b) (1973).

98. The classic description of this era is contained in N. GREEN & F. FRANKFURTER, *THE LABOR INJUNCTION* (1930).

99. The Norris-LaGuardia Act, 29 U.S.C. §§ 101-15 (1970). The legislative purpose of this Act is described in A. COX, *LAW AND THE NATIONAL LABOR POLICY* 5-8 (1960).

100. NLRA § 10(1), 29 U.S.C. § 160(1) (1970).

101. Labor Management Relations Act § 303, 29 U.S.C. § 187 (1970).

102. *E.g.*, *NAPA Pittsburgh, Inc. v. Automotive Chauffeurs, Local 926*, 502 F.2d 321 (4th Cir. 1974).

103. Undoubtedly, the federal government can preempt state laws governing secondary boycotts in agriculture. The Supreme Court has held that under the theory of federal preemption, Congressional regulation of secondary boycotts in industries affecting commerce serves to divest states of jurisdiction in the area. *See Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468 (1955).

nonunion grapes or lettuce.¹⁰⁴ Such forms of consumer appeal would be lawful under the consumer publicity provisions of the NLRA.¹⁰⁵ Similarly, South Dakota attempted to prohibit all picketing of agricultural premises¹⁰⁶ and boycotts of any farm product merely because nonunion labor produced it.¹⁰⁷ However, a South Dakota state court held both provisions unconstitutional because the provisions violated the employees' freedom of speech.¹⁰⁸ Oregon now excludes agricultural employees from its labor-management relations act,¹⁰⁹ thereby denying them organizational and bargaining protection. Yet Oregon also prohibits nonemployees from picketing growers¹¹⁰ and prohibits persons from engaging in secondary boycotts or refusing to handle cargo.¹¹¹ This presents the worst of all possible worlds because the employees do not receive the benefits of legal protection in organizing and bargaining, yet they must operate within a framework of restrictions usually imposed only on employees who receive such legal protection.

Thus, a federal bargaining law applying national labor policies to agriculture, even one which contains restrictions on secondary activity, would remove many organizational impediments contained in some state laws and would clearly legalize some concerted activity now expressly prohibited by such laws.

E. Union Security

The principal union security devices that are at issue in agricultural labor relations include the legality of union shop agreements, the use of hiring halls, and the use of prehire agreements. Some states expressly prohibit union shop agreements in agriculture. The Louisiana statute, for example, provides that "the right to work of an agricultural laborer shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization."¹¹² The recent California law, on the other hand, allows agreements requiring union membership on or after the fifth day of employment.¹¹³ The NLRA allows agreements that require membership on or after 30 days,¹¹⁴ or

104. *Safeway Stores, Inc. v. United Farm Workers Union*, 72 CCH Lab. Cas. ¶ 53 (Ariz. Super. Ct. 1973).

105. NLRA § 8(b)(4)(D), 29 U.S.C. § 158(b)(4) (1970); *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58 (1964).

106. S.D. COMPILED LAWS ANN. § 60-10-4 (1967).

107. *Id.* § 60-10-5.

108. *AFL v. Mickelson*, 14 L.R.R.M. 846 (1944); *AFL v. Mickeson*, 15 L.R.R.M. 751 (1944).

109. ORE. REV. STAT. § 663.005(3) (1971).

110. *Id.* § 662.815 (1973).

111. *Id.* § 663.140 (1971).

112. LA. REV. STAT. ch. 23, § 882 (West 1964).

113. CAL. LABOR CODE § 1153(c) (West Supp. 1975).

114. NLRA § 8(a)(3), 29 U.S.C. § 158(a)(3) (1970); *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963).

after the seventh day in the building construction industry.¹¹⁵ In a similar spirit, Idaho authorizes agreements requiring employees, after seven days of employment, to "make financial contributions toward the labor organization consisting of a sum not greater than the monthly dues of said labor organization," and it allows termination if employees fail to pay the dues.¹¹⁶ When Congress adopted section 8(f) of the NLRA in 1959, legislators thought that the seasonal and transient nature of construction work necessitated the seven-day membership provision.¹¹⁷ The same argument can persuasively be made in the agricultural industry, in which employment is often for short periods of time. To the extent that industry practice is known, union membership is generally required after a short period of employment. Teamster and UFW contracts mandate union membership after 10 days and 3 days of employment, respectively.¹¹⁸ The exact length of time is not as important as the recognition that a period substantially less than 30 days is necessary because of the transitory nature of agricultural employment. If union security agreements are effectively to serve their purpose and make the union secure, the most sensible alternative is to adopt the seven-day term by extending the provisions of section 8(f) to cover agricultural employees.¹¹⁹

The California Act imposes somewhat broader membership obligations. It allows a union to demand of an employee "the satisfaction of all reasonable terms and conditions uniformly applicable to other members in good standing."¹²⁰ The Act does, however, protect employees' due process, free speech, and related rights. This membership requirement could mean that an employee must do more than simply "tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership," as is required under section 8(a)(3) of the NLRA.¹²¹ Additional requirements might include attendance at meetings, the taking of membership oaths,¹²² and preclusion from union resignation.¹²³ An

115. NLRA § 8(f), 29 U.S.C. § 158(f) (1970).

116. IDAHO CODE § 22-4106(3) (Supp. 1975).

117. S. REP. NO. 187, 86th Cong., 1st Sess. 27 (1959).

118. *Hearings on H.R. 881 (Title I), H.R. 4007, H.R. 4011, H.R. 4408, and H.R. 7513 Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 62, 89 (1973).

119. H.R. 4786, 94th Cong., 1st Sess., § 2 (1975) and H.R. 5521, 94th Cong., 1st Sess., § 8(a)(3) (1975) both propose adopting the seven-day term.

120. CAL. LABOR CODE § 1153(c) (West Supp. 1975).

121. 29 U.S.C. § 158(a)(3) (1970).

122. *See In re Union Starch & Ref. Co.*, 87 N.L.R.B. 779 (1949), *enforced*, 186 F.2d 1008 (7th Cir. 1951), *cert. denied*, 342 U.S. 815 (1951), in which the Board held that employees who refused to comply with a union rule requiring attendance at meetings and the taking of a membership oath could not be discharged, so long as they tendered their initiation fees and dues. *See also* *Hershey Foods Corp.*, 207 N.L.R.B. 897, 85 L.R.R.M. 1004 (1973); *Foner, The Union Shop Under Taft-Hartley*, 5 LAB. L.J. 552 (1954); *Note*, 52 MICH. L. REV. 619 (1954).

123. *See* *Marlin Rockwell Corp.*, 114 N.L.R.B. 553 (1955) (a union may not

employee apparently may be dismissed from the union and thereby discharged from his job for failure to comply with such requirements, so long as the requirements are reasonable. Thus, the California labor board will be continually faced with the difficult task of determining whether union membership requirements are reasonable. Some requirements, such as attendance at meetings, do not raise difficult questions since they seem basic to the functioning of any organization. However, other requirements pose more serious problems.

The labor board charged with defining reasonable membership requirements may face questions such as the propriety of suspension for failure to pay a union fine, for failure to honor a picket line of a friendly union, for purchasing goods of a "blacklisted" employer, or for production exceeding union regulations. If the labor board sustains these types of rules, it will approve substantially more obligations than are required for other private sector employees. The NLRA does not go nearly this far. It merely requires employees represented by a union and receiving the benefits of representation to pay dues and fees. However, employees are not, under threat of discharge, forced to otherwise act in a manner contrary to their wishes nor must they actively participate in the affairs of an organization in which they have either no interest or, perhaps, even an active dislike. Agricultural employees in California are apparently the only group of employees in the country who may be compelled to actively participate in union affairs to an extent greater than paying union dues and fees.

A further shortcoming of the California statute is its vagueness with respect to the type of procedures available to union members accused of violating union regulations. The statute merely states that a union may deny or terminate membership only if the action is in compliance with a union constitution that "contains adequate procedures to insure due process to members and applicants for membership."¹²⁴ The meaning of due process in this context is unclear. Since ouster from the union may mean loss of a job, some might argue that members should receive the full panoply of due process rights required in a criminal trial. Must, for example, warnings be given by union investigators to suspected violators of union regulations? Must a trial be conducted by an impartial umpire rather than the union officers or agents who now frequently hear such matters? Must the hearings be formal, with a full right to confront and cross-examine witnesses, and a right to counsel? These questions, while provocative, could easily serve as the basis for a separate law review article. They are raised here only to point out the problems inherent in allowing a deviation from national

threaten a worker with discharge because of his termination of union membership and nonpayment of dues).

124. CAL. LABOR CODE § 1153(c) (West Supp. 1975).

labor policy concerning union shop requirements. If only unions serving agricultural employees are allowed these additional powers and benefits, questions of equity arise. At this stage, there is little evidence to suggest that unions representing agricultural workers need these additional powers more than unions representing workers in other private sectors.

The use of hiring halls has also been a source of disagreement in the agricultural industry. In spite of grower dissatisfaction, contracts between the UFW and growers call for a hiring hall.¹²⁵ Teamster contracts, on the other hand, allow the growers to rely on the farm labor contractor system for their work force.¹²⁶ A hiring hall system could benefit both growers and unions who wish to negotiate a nondiscriminatory hiring hall. Industries with seasonal, temporary, and transitory employment similar to the agricultural industry, such as the construction and maritime industries, have often benefited from the systematic arrangement for employment provided by hiring hall agreements.¹²⁷ As the Supreme Court noted in *International Brotherhood of Teamsters Local 352 v. NLRB*,¹²⁸

. . . [T]he hiring hall came into being "to eliminate wasteful, time-consuming, and repetitive scouting for jobs by individual workmen and haphazard uneconomical searches by employers." . . . Congress may have thought . . . that in fact it has served well both labor and management—particularly in the maritime field and in the building and construction industry. In the latter the contractor who frequently is a stranger to the area where the work is done requires a "central source" for his employment needs; and a man looking for a job finds in the hiring hall "at least a minimum guarantee of continued employment."

In addition to assisting the parties in filling work needs, hiring halls also have the beneficial effect of reducing reliance on the farm labor contractor system, which has been uniformly denounced for its exploitation and abuse of farm workers.¹²⁹ The "middleman" farm labor contractor contracts with employers to find workers for the fields. Recent legislation has been enacted to eliminate some of the abuses of the farm labor contractor system,¹³⁰ but difficulties of enforcement

125. *Hearings on H.R. 881 (Title 1), H.R. 4007, H.R. 4011, H.R. 4408 and H.R. 7513 Before the Subcomm. on Agricultural Labor of the House Comm. on Educ. and Labor*, 93d Cong., 1st Sess. 90 (1973).

126. *Id.* at 83.

127. *Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

128. *Id.* at 672-73.

129. *E.g.*, Note, *Legal Problems of Agricultural Labor*, 2 CALIF. DAVIS L. REV. 1, 39 (1970); Note, *The Farm Worker: His Need for Legislation*, 22 MAINE L. REV. 213, 226-29 (1970); Note, *Commuters, Illegals and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems*, 48 N.Y.U.L. REV. 439, 448-50 (1973).

130. See note 128 *supra*.

make it imperative that legislation allow private parties to agree to a hiring hall system.¹³¹ The only danger in these arrangements is that a union might discriminate against nonmembers or other persons by preferring union members in referrals. Such conduct, however, is already an unfair labor practice¹³² and can be curtailed through existing NLRB procedures. If further assurances are necessary, Congress could adopt a pending proposal that would allow the Board to make rules to "insure nonexclusive and nonpreferential use of the arrangement and which may provide for the maintenance of records and for reporting of the operation of such arrangement to the Board."¹³³

A prehire agreement is another union security device whereby a grower and a union can, but need not, agree to the terms of a contract before any employees are hired and before majority status of the union is actually determined. Such agreements are allowed in the building and construction trade under section 8(f) of the NLRA because "the employers in the building industry depend heavily on transient labor."¹³⁴ Because the agricultural industry is seasonal and employment periods are short and because employers depend heavily on transient labor as in the construction industry, an extension of the prehire agreement to agriculture is justified. Prehire agreements will contribute to stable labor relations in agriculture by providing established and known rates well in advance of the temporary employment. The employees would benefit from known rates that were negotiated collectively, and the employers would benefit from knowing in advance the labor costs of planting and harvesting. Moreover, permitting prehire agreements would not significantly infringe on employee free choice, since prehire agreements do not bar subsequent elections if the employees so choose.¹³⁵ Additionally, employees would be protected against employer domination because prehire agreements negotiated by a union the employer has established, maintained, or assisted would not be recognized.¹³⁶

131. *Hearings on H.R. 881 (Title I), H.R. 4007, H.R. 4011, H.R. 4408 and H.R. 7513 Before the Subcomm. on Agricultural Labor of the House Comm. on Educ. and Labor*, 93d Cong., 1st Sess. 35 (1973).

132. *See, e.g., Lummus Co. v. NLRB*, 339 F.2d 728 (D.C. Cir. 1964); *NLRB v. Southern Stevedoring & Contracting Co.*, 332 F.2d 1017 (5th Cir. 1964); *NLRB v. Houston Maritime Ass'n*, 337 F.2d 333 (5th Cir. 1964); *Longshoremen Local 13*, 192 N.L.R.B. 260 (1971).

133. H.R. 5521, 94th Cong., 1st Sess. § 8(f) (1975). The Board once attempted to regulate hiring hall agreements. *See Mountain Pac. Chapter*, 119 N.L.R.B. 883 (1957), *enforcement denied*, 270 F.2d 425 (9th Cir. 1959). The Supreme Court ultimately rejected the Board's unlawful per se rule. *See Teamsters Local 357 v. NLRB*, 365 U.S. 667 (1961).

134. 29 U.S.C. § 158(f) (1970); C. MORRIS, *THE DEVELOPING LABOR LAW* 47 (1971).

135. *See NLRA* § 8(f), 29 U.S.C. § 158(f) (1970); *Bear Creek Constr. Co.*, 135 N.L.R.B. 1285, 49 L.R.R.M. 1674 (1962).

136. NLRA § 8(f), 29 U.S.C. § 158(f) (1970).

F. Administration

The major question concerning administration is whether an agency that administers labor laws in the private sector generally or a totally new agency handling only agricultural labor relations matters should administer agricultural labor laws. Four states have created separate labor relations boards for agriculture,¹³⁷ but none of them have a law governing other private sector labor relations. In those states with laws governing labor relations both for agriculture and for other private sector industries, the general labor relations statute also governs the agricultural sector¹³⁸ without any apparent difficulty in administration.

An existing proposal would create a federal Agricultural Labor Relations Board, separate from the NLRB to administer agricultural labor relations. However, the addition of this agency would, in all likelihood, merely serve to further proliferate the enforcement and administration of the labor laws at a time when the existing proliferation is coming under increasing criticism.¹³⁹ Congress should avoid further proliferation unless absolutely necessary, and necessity has not yet been proven. The creation of an additional agency could lead to conflicting opinions concerning the meaning of the same language and detract from national labor policies. It could also lead to wasteful jurisdictional conflicts between the NLRB and the agricultural board. The NLRA can be adapted to the peculiarities of certain industries without losing sight of the overall thrust of the policies and purposes behind the Act. Congress has, for example, modified general labor policies to meet the peculiar needs of the construction industry,¹⁴⁰ the postal service,¹⁴¹ and,

137. Arizona has created a seven-member Agricultural Labor Relations Board. The governor appoints the members to five-year terms. Two members are appointed as representatives of agriculture employers; two are appointed as representatives of organized agricultural labor; and the remaining three members, one of whom serves as chairman, are appointed as representatives of the general public. ARIZ. REV. STAT. ANN. § 23-1386(A), (B) (Supp. 1975). California has a five-member Agricultural Labor Relations Board. The governor appoints the members to five-year staggered terms. CALIF. LABOR CODE §§ 1141, 1147 (1975 Supp.). Idaho's Agricultural Labor Board contains five members appointed by the Governor for four-year terms. The governor chooses two persons from a list submitted by labor organizations, and two from a list submitted by agricultural producer groups. One public representative, who also acts as chairman, is appointed from a "mutually agreed upon list of not less than three (3) persons submitted to the governor by the four (4) other members of the board." The Act does not specify a procedure for selection in the event that the parties cannot reach agreement upon a list. IDAHO CODE §§ 22-4103(1) and (4) (Supp. 1975).

138. HAWAII REV. STAT. § 377-1(3) (1968); WIS. STAT. § 111.02(3) (1975).

139. See, e.g., Morris, *The Case for Unitary Enforcement of Federal Labor Law*, 26 Sw. L.J. 471 (1972).

140. NLRA § 8(f), 29 U.S.C. § 158 (1970).

141. In 1970, postal employees acquired most of the rights granted under the Labor-Management Relations Act, but Congress made some significant variations to meet the peculiar needs of the postal industry. Most significantly, the postal law prohibits strikes or any form of union security other than voluntary check-off, and provides for mandatory fact-finding and binding arbitration of bargaining impasses. However, rather than create a separate agency, Congress empowered the NLRB to adjudicate unfair labor

most recently, the health care industry.¹⁴² Even assuming that the agricultural industry has peculiar needs, no apparent reason would prohibit Congress from enacting specific and narrow amendments applicable only to the agricultural industry.

Some have argued that the NLRB cannot handle the increased case load that would result from placing agriculture under its jurisdiction. However, the number of employees involved in the industry is not large in comparison with the number of employees currently covered by the NLRA. Moreover, the chairman of the NLRB has recently indicated that the Board could handle the increased case load which would result from the inclusion of state and local employees under the Act, the number of which is substantially larger than the number of agricultural employees. If the Board could handle the increased caseload resulting from the inclusion of the large number of public employees, it could certainly handle the increase resulting from the inclusion of agricultural workers under the Act.

II. A COMPARISON WITH INTERNATIONAL STANDARDS AND OTHER DEMOCRATIC SOCIETIES¹⁴³

In order to fully treat the subject of labor relations in agriculture, this article will consider international labor standards and the practice of other developed democratic countries. These standards and practices, particularly those which have been ratified or are in effect in many countries, provide norms and guidelines for establishing fair and just practices.¹⁴⁴ Because of weak or nonexistent enforcement machinery

practice and representation matters. Part II of the Postal Reorganization Act of 1970, 39 U.S.C. §§ 1001-11, 1201-09 (1970).

142. In 1974, Congress established separate impasse resolution procedures under the Labor-Management Relations Act for the health care industry, 88 Stat. 395-97, amending scattered sections of 29 U.S.C. § 151 (1970). See generally Fehleley, *Amendments to the National Labor Relations Act: Health Care Institutions*, 36 OHIO ST. L.J. 235 (1975). Additionally, the NLRB has established special timeliness rules for election petitions in health care institution cases, in order to meet the special circumstances of the health care industry. NLRB release No. 1393, June 10, 1975.

143. The research for this portion of this article was largely completed while the author was serving as a Visiting Professor of Law at the University of Louvain in Belgium, and thanks must be gratefully extended to the following institutions and individuals without whose assistance this article could not have been completed: Professor Roger Blanpain, Institute for Labor Relations of the University of Louvain; Mr. E. Cordova, Chief of the Labor Law & Labor Relations Branch, International Labor Organization; Alan Gladstone, Head of the Dynamics of Industrial Relations Systems Sector of the International Institute for Labor Studies; Mr. Hugo Goossens, Secretary, European Joint Commission for Social Problems in Agriculture; Mr. A. Herlitska, Secretary, and Mr. Vittorio Desantis, Comité des Organisations Professionnelles Agricoles de la C.E.E.; Miss J. Pandev, Secretary of the European Federal of Agricultural Workers' Unions in the Community (E.F.A.); Mr. V. Pestoff, Assistant to the General Secretary, International Federation of Plantation, Agricultural and Allied Workers. The responsibility for the opinions and the accuracy of the facts stated herein, of course, rest solely with the author.

144. Of course, the labor practices and policies of one country cannot automatically

one should not exaggerate the significance of international labor standards. On the other hand, one could err by ignoring altogether the existence of widely-accepted international norms which have some moral and occasional legal significance.¹⁴⁵ Additionally, these standards may, and often do, influence the course of legislative developments, and lawmakers often take them into account in drafting social legislation. In a discussion of the value of the international standards adopted by the International Labor Organization, for example, it has been stated that such standards "have now been one of the main formative influences on the development of social legislation in many countries for three decades."¹⁴⁶ Similarly,

[e]ven when a Convention is not ratified by a particular country, it may still exercise an influence in that country; some of its provisions may be applied in new legislation or in fresh collective agreements. Further, although recommendations are not subject to ratification, their influence on national law and practice may be substantial.¹⁴⁷

In fact, a major purpose of international labor standards, in addition to providing normative guidelines, is "to stimulate social progress and to promote the adoption of new measures, practical as well as legislative, for the improvement of working and living conditions in member states."¹⁴⁸

The relevant standards are those established by the International Labor Organization and the European Social Charter of the Council of Europe. The relevant practices are those of other democratic societies, including the members of the European Economic Community. The International Labor Organization (ILO),¹⁴⁹ since its establishment in

be transferred to other countries, and the circumstances and social history of each country must be carefully considered. See generally, Bok, *Reflections on the Distinctive Character of American Labor Laws*, 84 HARV. L. REV. 1394 (1971); Summers, *American and European Labor Law: The Use and Usefulness of Foreign Experience*, 16 BUFF. L. REV. 210 (1966).

145. B. HEPPLE & P. O'HIGGINS, *ENCYCLOPEDIA OF LABOUR RELATIONS LAW* 1187 (1972).

146. G. JOHNSTON, *THE INTERNATIONAL LABOUR ORGANISATION* 92 (1970), quoting from the Forward to INTERNATIONAL LABOUR ORGANISATION, *THE INTERNATIONAL LABOUR CODE*, 1951 VI (1952).

147. *Id.* at 104.

148. INTERNATIONAL LABOUR OFFICE, *REPORT OF THE DIRECTOR-GENERAL: THE RATIFICATION AND IMPLEMENTATION OF INTERNATIONAL LABOUR CONVENTIONS BY AMERICAN COUNTRIES* 4 (1974).

149. For a general discussion of the history and development of the ILO as well as its structure and functions, see G. JOHNSTON, *THE INTERNATIONAL LABOUR ORGANISATION* (1970). The author also discusses the role of the ILO in agriculture and rural development. *Id.* at 251-63. See also D. MORSE, *THE ORIGIN AND EVOLUTION OF THE ILO AND ITS ROLE IN THE WORLD COMMUNITY* (1969).

Some critics have charged that in recent years the ILO has been transformed from a useful technical body into a political battlefield. For a discussion of the various views on this question, see Windmuller, *U.S. Participation in the ILO: The Political Dimension*, in *PROCEEDINGS OF THE 27TH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS*

1919, has promulgated numerous conventions and recommendations setting forth standards for most aspects of the employment relationship.¹⁵⁰ Member states are not obligated to adopt the conventions, but "there is a gentle pressure put upon member states to give effect to such instruments."¹⁵¹ The ILO has long been concerned with labor relations problems in agriculture, and has adopted several Conventions and Recommendations pertaining to organizational and collective bargaining rights for agricultural workers. The ILO has two primary reasons for its concern. First, one-half of the world's population relies primarily and directly on agriculture for its income.¹⁵² Second, "in both developed and developing countries the income per head in agriculture is lower than that in the rest of the economy."¹⁵³

In order to eliminate or reduce the disparity of income and otherwise improve the living and working conditions of agricultural workers, the ILO, through its Conventions, Recommendations and various reports, has consistently supported the rights of agricultural workers to organize and to engage in collective bargaining. In one of its earliest actions, it adopted a convention in 1921 whereby ratifying countries agreed "to secure to all those engaged in agriculture the same right of association and combination as to industrial workers, and to repeal any statutory or other provisions restricting such rights in the case of those engaged in agriculture."¹⁵⁴ Between 1921 and 1975, it adopted a

RESEARCH ASSOCIATION 100-08 (1975). Because of the alleged politicization of the ILO, among other reasons, the United States issued a notice of its intention to withdraw from the organization to take effect under the ILO constitution in two years. The letter of notice, however, also stated that the United States "does not desire to leave the ILO" and "does not expect to do so," but rather would work to promote conditions that would, in its judgment, facilitate its continued participation. Letter from U.S. Secretary of State Henry Kissinger to the ILO Director-General, November 6, 1975, a copy of which is on file at the University of Tennessee Law School.

150. The ILO has adopted a total of 143 Conventions and 151 Recommendations from the first Session of its International Labour Conference in 1919 through its 60th session in 1975. INTERNATIONAL LABOUR ORGANIZATION, INTERNATIONAL LABOUR CONVENTIONS: CHART OF RATIFICATIONS (January 1, 1975); INTERNATIONAL LABOUR OFFICE, LVIII OFFICIAL BULLETIN 28-75 (Series A, No. 1 1975).

151. B. HEPPLE & P. O'HIGGINS, ENCYCLOPEDIA OF LABOUR RELATIONS LAW 1191-92 (1972). The effect of Conventions and the procedure for establishing them is further discussed in G. JOHNSTON, THE INTERNATIONAL LABOUR ORGANISATION 90 (1974).

152. INTERNATIONAL LABOUR OFFICE, INCOMES OF AGRICULTURAL WORKERS, WITH PARTICULAR REFERENCE TO DEVELOPING COUNTRIES 1 (1974) [hereinafter cited as INCOMES OF AGRICULTURAL WORKERS]. There are wide differences, however, in the importance of agriculture as a source of employment and income between the developing and developed regions. At one extreme, 69% of the population in Africa in 1970 depended on agriculture for its livelihood. Figures for other areas of the world, in descending order, are Asia (not including China), 64%; Central America, 47%; South America, 39%; USSR, 32%; Europe, 19%; and North America, 4%. *Id.* The percentage of workers employed in agriculture and related industries for each country of the world is listed in INTERNATIONAL LABOUR OFFICE, YEARBOOK OF LABOR STATISTICS 45 (1974).

153. INCOMES OF AGRICULTURAL WORKERS 4. This is also true in the United States. See note 1 *supra*.

154. Convention No. 11, The Right of Association (Agriculture) Convention, 1921,

number of other important Conventions¹⁵⁵ and Recommendations¹⁵⁶ designed to encourage the protection of organizational and collective bargaining rights of all employees, including agricultural employees.

In spite of ILO efforts, the income and participation of agricultural workers has continued to lag behind that of other workers, and the ILO has given increased attention to this problem in recent years. It has given particular attention to the role of organizations of rural workers in improving their own conditions. One study recognized the value of and encouraged the further use of collective bargaining.¹⁵⁷ The study noted that organizations of rural workers could gain far-reaching benefits ranging from wages to working conditions.¹⁵⁸ A second study reached the same conclusions:

To achieve these two goals—the improvement of the lot of rural workers and their integration into the national development effort—it is essential that there exist strong, independent and representative organizations of rural workers, together with the necessary machinery to associate effectively these organizations at all levels and at all stages of the development process.¹⁵⁹

In 1975, after lengthy study¹⁶⁰ and debate,¹⁶¹ the International Labor

in INTERNATIONAL LABOUR OFFICE, CONVENTIONS ADOPTED BY THE INTERNATIONAL LABOUR CONFERENCE, 1919-1966 52 (1966).

155. These include Convention No. 87: Freedom of Association and Protection of the Right to Organize Convention, 1948, *id.* at 663; Convention No. 98: Right to Organize and Collective Bargaining Convention, 1949, *id.* at 777; and Convention No. 110: Plantations Convention, 1958 (particularly Parts IX and X), *id.* at 941.

156. Recommendations No. 91: Collective Agreements Recommendations 1951, *id.* at 802; Recommendation No. 110: Plantations Recommendation, 1958, *id.* at 960.

157. INCOMES OF AGRICULTURAL WORKERS 23-24.

158. *Id.* at 86.

159. INTERNATIONAL LABOUR OFFICE, ORGANISATIONS OF RURAL WORKERS AND THEIR ROLE IN ECONOMIC AND SOCIAL DEVELOPMENT (REPORT VI (1)) 14-15 (1973) [hereinafter cited as ORGANIZATIONS OF RURAL WORKERS]. See also International Labour Office, *The Agricultural Workers' Right of Association in Developing Countries*, 1974 (unpublished paper on file at the University of Tennessee College of Law).

160. The process of studying and passing a Convention or Recommendation is lengthy, as is illustrated by this action. After the governing Board of the ILO determined in 1972 that the subject should be studied, the International Labor Office made an extensive worldwide study of the subject and sent it, along with a questionnaire, to member countries for their comments. ORGANISATIONS OF RURAL WORKERS (REPORT VI (1)). The International Labour Office then prepared a second report on the basis of the replies received, including a reproduction of the substance of the replies, commentary thereon, and proposed conclusions. *Id.* REPORT VI (2). This report was considered and, under a double-discussion procedure, first discussed in 1974 at the 59th session of the International Labour Conference. A third report containing proposed action was then sent to member governments, based on the conclusions adopted by the Conference at its 59th session. *Id.* Report IV (1). A fourth report was then issued, containing the essential points of governmental replies, commentary on the replies, and proposed action amended in light of the replies. Final discussion and action was then taken in 1975 at the 60th Session of the International Labor Conference.

161. See INTERNATIONAL LABOUR OFFICE, RECORD OF PROCEEDINGS OF THE FIFTY-NINTH SESSION OF THE INTERNATIONAL LABOUR CONFERENCE 1974, 447, 645 (1975); INTERNATIONAL LABOUR OFFICE, RECORD OF THE PROCEEDINGS OF THE SIXTIETH SESSION OF THE INTERNATIONAL LABOUR CONFERENCE, 1975, to be published in 1976.

Conference of the ILO adopted a comprehensive "CONVENTION CONCERNING ORGANIZATIONS OF RURALWORKERS AND THEIR ROLE IN ECONOMIC AND SOCIAL DEVELOPMENT,"¹⁶² as well as an even more comprehensive Recommendation¹⁶³ on the same subject. The precise language of the Convention, printed as an appendix to this article, is significant. The various Conventions and Recommendations, then, are designed to encourage the protection of organizational and collective bargaining rights of agricultural employees.¹⁶⁴ They have received broad acceptance among member nations of the ILO,¹⁶⁵ but the United States has not ratified any of them. However, one should not take this as a sign of the United States' disapproval. The United States commonly fails to ratify ILO Conventions because of its federal structure, and the ILO's Director General has recognized "the difficulties encountered by states with a federal structure . . . in the ratification of Conventions, especially where the powers to enact the laws and regulations necessary to give effect to them are divided between the federal authorities and those of the constituent units."¹⁶⁶ Largely for this reason, the United States has ratified only seven of the 143 ILO Conventions,¹⁶⁷ with the last being ratified 23 years ago.¹⁶⁸ This number of ratifications compares unfavorably to an average number of ratifications per country: 49 for the European countries; 41 for the Latin American countries; 35 for countries in the Americas, and 31 on a worldwide basis.¹⁶⁹ The real ques-

162. Reprinted in full in INTERNATIONAL LABOR ORGANISATION, OFFICIAL BULLETIN 28 (1975).

163. *Id.* at 43.

164. In a report of the proceedings covering Convention No. 141, it was stated that "the whole discussion was dominated by a single idea, namely that the same dignity and treatment should be accorded to rural workers as were accorded to workers in other sectors of the economy." ORGANISATIONS OF RURAL WORKERS (REPORT IV (1)) 7. Similarly, during the second discussion of the proposed Convention No. 141, it was stated that a major purpose of Convention No. 141 is "the specific extension to rural workers of the basic rights of association embodied in the Freedom of Association and Protection of the Right to Organize Convention, 1948 (no. 87)." Remarks of Mr. Foggon, United Kingdom Government advisor, reported in INTERNATIONAL LABOUR OFFICE, PROVISIONAL RECORD (No. 33) OF THE PROCEEDINGS OF THE SIXTIETH SESSION OF THE INTERNATIONAL LABOR CONFERENCE 12 (1975).

165. International instruments pertaining to organizational and collective bargaining rights have been among the most accepted by member nations of the ILO. Convention No. 11 has been ratified by 91 countries; No. 87 by 80 countries; and No. 98 by 95 countries. INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR CONVENTIONS: CHART OF RATIFICATIONS (1975).

166. INTERNATIONAL LABOUR OFFICE, REPORT OF THE DIRECTOR GENERAL: THE RATIFICATIONS AND IMPLEMENTATION OF INTERNATIONAL LABOUR CONVENTIONS BY AMERICAN COUNTRIES 6 (1974). On the obligations of federal states, see *id.*; G. JOHNSTON, THE INTERNATIONAL LABOR ORGANISATION 98 (1970).

167. INTERNATIONAL LABOUR OFFICE, INTERNATIONAL LABOUR CONVENTIONS: CHART OF RATIFICATION (1975).

168. In 1953 INTERNATIONAL LABOUR OFFICE, REPORT OF THE DIRECTOR-GENERAL: THE RATIFICATION AND IMPLEMENTATION OF INTERNATIONAL LABOUR CONVENTIONS BY AMERICAN COUNTRIES 5 (1974).

169. *Id.* at 4.

tions, then, pertain not to whether the United States has ratified these international standards, but whether it complies with them in practice, or, if not, whether it should.

Quite clearly, the United States is not now meeting the international standards pertaining to organizational and bargaining rights of agricultural workers. Federal laws and most state laws that protect such rights exclude agricultural employees. Consequently, those workers do not receive "social and economic protection and benefits corresponding to those made available to industrial workers."¹⁷⁰ The ILO maintains a committee of independent experts to report on the application of Conventions and Recommendations, and in 1973, in a special report on freedom of association and collective bargaining, the committee concluded that the United States fails to respect these standards in agriculture.¹⁷¹

Given the fact that the United States does not in practice comply with the ILO standards, the inquiry becomes whether the United States should accept the ILO norms and attempt to come into compliance. The United States government has taken an affirmative position on this question. Its delegates, along with an overwhelming number of other delegates, voted for the most recent international instruments—Convention 141 and Recommendation 149.¹⁷² In its answer to the ILO questionnaire which preceded the adoption of these instruments, the United States stated that it favored the adoption of an international instrument on organizations of rural workers,¹⁷³ and that "[e]ffective rural development would be served by a national policy to promote and protect the rights of farm workers to organize and bargain collectively in organizations of their own choosing."¹⁷⁴ It added that "[p]rocedures for

170. ILO Recommendation No. 149 (Part III (6)(c)), pertaining to "Organisations of Rural Workers and their Role in Economic and Social Development," reprinted in INTERNATIONAL LABOUR OFFICE, LXIII OFFICIAL BULLETIN 43 (1975).

171. The exclusion of agricultural workers from the national legislation which protects workers against acts of anti-union discrimination and promotes collective bargaining constitutes in actual practice an obstacle to the development of occupational organizations within this sector or to their effectiveness in industrial relations. INTERNATIONAL LABOUR OFFICE, FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING: GENERAL SURVEY BY THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATION (REPORT III, PART 4B) 17 (1973). The report subsequently stated that Convention 98, pertaining to collective bargaining, "requires that workers should be adequately protected against anti-union discrimination both at the time of taking up employment and in the course of their employment relationship." *Id.* at 63. Of course, as seen in earlier discussions, large numbers of agricultural workers in the U.S. have no such protection, and may be discharged for their union activity.

172. The vote on Convention No. 141 was 359 ayes, 0 nays and 10 abstentions. INTERNATIONAL LABOUR OFFICE, PROVISIONAL RECORD (No. 40) OF THE PROCEEDINGS OF THE SIXTIETH SESSION OF THE INTERNATIONAL LABOUR CONFERENCE 11-21 (1975). The vote on Recommendation No. 149 was 347 ayes, 0 nays and 4 abstentions. INTERNATIONAL LABOUR OFFICE, PROVISIONAL RECORD (No. 41) OF THE PROCEEDINGS OF THE SIXTIETH SESSION OF THE INTERNATIONAL LABOUR CONFERENCE 16-17 (1975).

173. ORGANISATIONS OF RURAL WORKERS (REPORT VI (2)) 8 (1974).

174. *Id.* at 17.

enforcing laws and regulations that govern rural workers' organizations should be comparable to (and, in any event, not weaker than) procedures applying to other categories of workers."¹⁷⁵ The United States also supported measures that would ensure effective consultation and dialogue between rural workers' organizations and employers on matters relating to conditions of work and life in rural areas.¹⁷⁶

Other employment standards adopted on a multinational basis include those established in the European Social Charter, agreed to by certain member states of the Council of Europe.¹⁷⁷ Although there is no direct enforcement machinery, these standards, like those of the ILO, reflect normative guidelines and, often, the actual practices of the countries involved. Like the ILO standards, an independent committee of experts periodically reviews the Charter standards and their implementation.¹⁷⁸ The Charter, in article six, "seeks to ensure that both employers and workers can exercise the right to bargain collectively."¹⁷⁹ These collective bargaining provisions apply to all sectors of the economy, including agriculture.¹⁸⁰ Most member countries of the Council of Europe,¹⁸¹ in practice, as well as in theory, have accepted them.

The United States is apparently the only developed¹⁸² industrial-

175. *Id.* at 38.

176. *Id.* at 45.

177. CONSEIL DE L'EUROPE, CHARTE SOCIALE EUROPEENNE. The Charter has been in effect since 1965. For a general discussion of the Charter and its origins, see B. HEPPLE & P. O. HIGGINS, ENCYCLOPEDIA OF LABOUR RELATIONS LAW 1188 (1972).

178. COUNCIL OF EUROPE, CONCLUSIONS OF INDEPENDENT EXPERTS ON THE EUROPEAN SOCIAL CHARTER I 34 (1970). See also Reports II (1971) and III (1973).

179. CONSEIL DE L'EUROPE, CHARTE SOCIALE EUROPEENNE 6. Article 6, entitled "The Right to Bargain Collectively," recommends the establishment of rights between employers and unions concerning consultation, negotiation and collective agreements, conciliation and arbitration, and strikes.

180. See, e.g., COUNCIL OF EUROPE, CONCLUSIONS OF INDEPENDENT EXPERTS ON THE EUROPEAN SOCIAL CHARTER III 33 (1973), in which the committee of experts criticized one country for failing to comply with Article 6 "particularly with regard to joint consultation at the regional and local level in the agricultural sector." The application of the strike provisions, however, may vary for certain public sector disputes. For a full explanation of the right to strike and its restrictions and exercise in the 17 European nations belonging to the Council of Europe, see O. KAHN-FREUND, THE RIGHT TO STRIKE—ITS SCOPE AND LIMITATIONS (1974). This is a complete report commissioned by the Council of Europe and intended "to give a comparative survey of the restrictions which the legal systems of the 17 member states of the Council of Europe impose on the 'right to strike' and its exercise." *Id.* at 1.

181. The collective bargaining provisions of Article 6 have been accepted by Austria, Cyprus, Denmark, Federal Republic of Germany, France, Ireland, Italy, Norway, Sweden, and the United Kingdom. See table in COUNCIL OF EUROPE, CONCLUSIONS OF INDEPENDENT EXPERTS ON THE EUROPEAN SOCIAL CHARTER III 237 (1973). Other states that had signed the charter at the time of the report, to be bound at a future date, included Belgium, Luxembourg, the Netherlands and Turkey. Only Ireland, Malta and Switzerland had not yet signed the Charter. *Id.* at ix.

182. This comparison primarily involves developed rather than developing countries. As noted in one study, "[i]n most developing countries the use of collective agreements to regulate wages is not a very widespread practice, and this is directly attributable to the weakness of the trade union organizations in agriculture." INCOMES OF AGRICULTURAL

ized democracy in which collective bargaining is not a principal method of establishing terms of employment for agricultural workers, and in which agricultural workers are denied the rights granted other workers to organize, to bargain collectively, and to engage in concerted activities. In the European countries with free economies,¹⁸³ collective bargaining is a generally accepted process in agriculture. An early study of several of these countries found that in all of the countries, except Luxembourg, collective bargaining established the terms of employment in agriculture.¹⁸⁴ The study also pointed out that even in those countries in which the proportion of employers and workers affiliated with the organizations is small, the impact often is great because the negotiated

WORKERS 31. For a good discussion of the laws in the developing countries pertaining to the right of agricultural workers to organize into unions, see INTERNATIONAL LABOUR ORGANIZATION, *LE DROIT D'ASSOCIATION DES TRAVAILLEURS AGRICOLES DANS LES PAYS EN VOIE DE DEVELOPPEMENT* (1974). In developing countries, plantation workers are better organized than other rural workers because of their proximity to one another, a common employer, a community of interest, and greater job security and tenure. Worker organizations for other rural workers, however, remain undeveloped if they exist at all. See, e.g., INTERNATIONAL LABOUR OFFICE, *HUMAN RESOURCES DEVELOPMENT IN RURAL AREAS IN ASIA AND ROLE OF RURAL INSTITUTIONS* 122, 123-34 (1975). On the other hand, another report found that negotiations over conditions of employment have occurred in developing countries, although not to the extent of negotiations in developed countries. ORGANISATIONS OF RURAL WORKERS (REPORT VI (1)) 28 (1973). It states that such negotiations take place in North African countries, Egypt, and Phillipines, Bolivia and Peru (*Id.* at 18); Argentina, Bolivia, Chili, Venezuela, Cameron, Malaysia, Nigeria, Somalia, Tunisia, Uganda, and Zambia. *Id.* at 28. The International Federation of Plantation, Agricultural and Allied Workers (IFPAAW) lists collective bargaining agreements negotiated by its affiliates in 52 countries. IFPAAW, *COLLECTIVE AGREEMENTS* (1975), on file at the University of Tennessee College of Law.

The comparison in this article excludes communist countries, which generally restrict employee rights of association. Some of these restrictions are described and criticized in INTERNATIONAL LABOUR OFFICE, *FREEDOM OF ASSOCIATION AND COLLECTIVE BARGAINING: GENERAL SURVEY BY THE COMMITTEE OF EXPERTS ON THE APPLICATION OF CONVENTIONS AND RECOMMENDATIONS* (REPORT III, PART 4B) 17 (1973).

183. In making comparisons with European countries, one must keep in mind several distinct features of European labor relations as compared to labor relations in the United States. First, bargaining generally tends to be governed much more by practice than by law, and it was therefore necessary for the author to conduct interviews as well as review the laws. Second, in many countries bargaining takes place at the industry, regional or national level rather than the enterprise level as in the United States. Third, negotiations in Europe often take place with several unions rather than one exclusive representative, as in the United States. Fourth, negotiations often establish only the minimum benefits, leaving the employee free to negotiate higher benefits. Fifth, agreements in Europe reached at the industry, regional or national level are often extended by law to all employers and employees in that industry, regardless of whether they were members of the organizations that negotiated the agreement. For a good discussion of these differences, see INTERNATIONAL LABOUR OFFICE, *COLLECTIVE BARGAINING IN INDUSTRIALIZED MARKET ECONOMIES* (1974).

184. The countries studied included Belgium, Denmark, England, France, Germany, Italy, and Luxembourg, ORGANISATION DE COOPERATION ET DE DEVELOPPEMENT ECONOMIQUES [ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT], *LA SITUATION DU TRAVAILLEUR AGRICOLE SALARIE* 106-07 (1962). See also Tables XIX (modes de determination des conditions de travail et des salaries) and XX (principales caracteristiques des formes des remunerations prevues par les conventions collectives). *Id.* at 108-11.

terms of employment are extended to all or most of the employers and workers either by law or by practice.¹⁸⁵

A more recent and larger survey of 12 European countries further indicates that collective agreements are the common mode of determining conditions of employment in European agriculture. This survey concluded that bargaining occurs on a regular basis in all of the surveyed countries; that national collective agreements in agriculture are extended by law to all agricultural employers and workers in one-half of the surveyed countries;¹⁸⁶ that those countries which negotiated at the local level had large numbers of local agreements (for example, Norway had 762 local agreements and one regional agreement); and that the patterns of negotiations in agriculture tended to follow patterns of negotiations existing in other industries.¹⁸⁷ Collective bargaining in agriculture is also commonplace in non-European industrialized democracies, such as Australia,¹⁸⁸ Japan,¹⁸⁹ and Israel.¹⁹⁰

These conclusions were reaffirmed in the author's interviews with employer, union and neutral representatives¹⁹¹ and in a recent study conducted by the International Labor Organization.¹⁹² No distinctions

185. *Id.* at 107. A good example of this "extension" device can be found in England's Agricultural Wages Act of 1948, which provides for the fixing of wages and other employment conditions by a tripartite agricultural wages board. Agricultural Wages Act 1948, 11 & 12 Geo. 6, c. 47. The decisions of the Board apply to all agricultural employers and employees in the affected area. For an example of the orders issued under this Act, see Agricultural Wages Board, 1973 A.W.B. No. 1. Decisions of the Board most frequently are determined through negotiations. Although strikes are legal, there has been only one strike in this century, an unsuccessful effort in 1923. Interview with Dennis Hodson of the International Labour Organisation, December 15, 1975. A good discussion of the "extension" device as used in Europe is contained in INTERNATIONAL LABOUR OFFICE, COLLECTIVE BARGAINING IN INDUSTRIALIZED MARKET ECONOMIES 147 (1974).

186. Extension occurs in Belgium, England, Finland, France, Holland, Italy, and Sweden.

187. INTERNATIONAL FEDERATION OF PLANTATION, AGRICULTURAL AND ALLIED WORKERS, 1975 ANNUAL SURVEY ON EUROPEAN CONDITIONS IN AGRICULTURE, HORTICULTURE AND FORESTRY, Table VI (Nov. 1975). The countries surveyed are Austria, Belgium, Denmark, England, France, Finland, Germany, Holland, Ireland, Italy, Norway and Sweden. Although this survey was conducted by an organization representing unions, the conclusions drawn from it are similar to those expressed by employer, neutral and other union representatives in interviews. In addition, a neutral committee also surveys working conditions in agriculture by comparing the actual collective bargaining agreements of the countries of the European Economic Community. *E.g.*, COMM'N OF THE EUROPEAN COMMUNITIES, JOINT COMMITTEE ON SOCIAL PROBLEMS AFFECTING AGRICULTURAL WORKERS, STANDING SURVEY OF THE NEGOTIATED PROVISIONS IN AGRICULTURE (WORKING DOCUMENT) (Oct. 10, 1974).

188. "The right of agricultural workers (in Australia) to organize is recognized and . . . there are broadly based organizations of rural employers and workers." ORGANIZATIONS OF RURAL WORKERS (REPORT VI(2)) 3 (1974).

189. "In Japan agricultural workers' unions have sprung up since 1950 and engage in collective bargaining on conditions of employment; in 1965, they combined to form the National Federation of Agricultural Workers' Unions." *Id.* Report VI (1) 18 (1973).

190. *Id.* at 28.

191. See acknowledgments in note 142 *supra*.

192. ORGANISATIONS OF RURAL WORKERS (REPORT VI (1)) (1973). This study

exist in these European countries between the rights of agricultural and other employees to organize, to engage in collective bargaining and to strike; yet no strikes have occurred that deprived a nation of its food supply. In fact, the strike rate has been less than that in other industries.¹⁹³ In part this is because agricultural workers are difficult to organize due to the transient and seasonal nature of the work, and they remain "relatively weak" compared to their industrial counterparts, both in the EEC and in the developed countries generally.¹⁹⁴ Nonetheless, agricultural wage earners' organizations have existed for many years, and a very large percentage of agricultural workers are organized into unions, without perceptible adverse impact within their countries.¹⁹⁵

Some efforts have even been made to engage in collective bargaining at the international level in order to establish minimum standards throughout all the countries of Europe. Under the auspices and encouragement of the Commission of the European Communities, representative employer and union organizations have negotiated two "ententes"—one in 1968 covering field workers and the second in 1971 covering workers who tend animals—which have incorporated suggested minimum terms of employment.¹⁹⁶

One union observer has stated, perhaps with as much hope as with foreknowledge, that "these were the first steps towards the eventual introduction of European collective agreements."¹⁹⁷ An academic observer has called these two agreements "the symbol of the first major success achieved by European collective bargaining."¹⁹⁸ Because these agreements may have resulted, in part, from the practice of fixing prices of agricultural products at the European level, the example may not

noted the existence of collective bargaining in the following European countries (a listing not intending to be inclusive): Germany, Italy, Denmark, Sweden, Belgium, France and the Netherlands (pp. 27-28).

193. Annual strike statistics are provided in the volumes of the YEARBOOK OF LABOR STATISTICS, published annually by the International Labor Office.

194. T. Bavin, *The Role of Trade Unions in the Developing Countries* (unpublished paper) (1972).

195. Some examples of the percentage of organized agricultural workers are as follows: Netherlands, 72%; Belgium, 60%; Italy, 60%; and France, 30%. ORGANISATIONS OF RURAL WORKERS (REPORT VI (1)) 17, 37 (1973).

196. Copies of the two ententes are on file at the University of Tennessee College of Law.

197. Pfeiffer, "The European Federation of Agricultural Workers' Unions (E.F.A.) and its Programme of Action," Address given at an E.F.A. Conference, The Hague, July 5-6, 1973. According to this address, no national or regional collective bargaining agreement embodies lower standards than those fixed under the 1968 agreement. The address also describes the development of the E.F.A. and its role in insisting that a joint commission be established for a collective bargaining function. The E.F.A. was established by, and has as its affiliates national unions representing agricultural workers in European countries. CONSTITUTION OF THE EUROPEAN FEDERATION OF AGRICULTURAL WORKERS' UNIONS IN THE COMMUNITY.

198. G. LYONE-CAEN, IN SEARCH OF THE EUROPEAN COLLECTIVE BARGAINING AGREEMENT 51 (1972).

carry over from agriculture to other activities.¹⁹⁹ Negotiations are currently taking place to reach an agreement upon a binding document containing more detailed provisions for European agricultural workers, but the future of such negotiations or possible agreements is far from clear. It is enough for our purposes, however, to note the existence of negotiations at the European level as another piece of evidence that collective bargaining in agriculture can work.

III. CONCLUSIONS

A thorough review of existing laws, conditions, and international experiences in the agricultural industry compels the conclusion that federal legislation is necessary to facilitate collective bargaining in agriculture. The states, with few exceptions, have failed to act in a comprehensive manner in the area, and national labor policies have not been implemented in the agricultural sector of our economy.²⁰⁰ Although a national policy for agriculture would have the necessary effect of negating the few good state laws on the subject, such negation of state laws also occurred without adverse effect in 1974 when Congress preempted many adequate state laws by bringing the health care industry under our national labor laws.

Although a national labor law for the agricultural industry is necessary, it need not be a separate labor relations act. The NLRA has proven its ability to accommodate diverse industries and yet maintain consistent policies for all. If an industry has demonstrably peculiar characteristics that require an alteration or exception to the Act, lawmakers have successfully adopted alterations or exceptions without destroying the basic thrust of the Act. This should also be true of the agricultural industry if the need for deviations from the Act are demonstrated. On the other hand, however, Congress ought not change basic labor policies lightly at the behest of particular industries. In most areas of the agricultural industry, no compelling reasons for distinction exist. Few persons or organizations seriously question the need to extend the basic rights of self-organization and collective bargaining to agricultural employees, and the NLRB has the capacity and experience to enforce these rights through established election and unfair labor

199. *Id.* at 52.

200. Although this article has emphasized the national labor policies pertaining to employee organization, collective bargaining and concerted activities, the inclusion of agricultural workers under the NLRA will also of necessity extend other national labor policies to the industry. Thus, unions composed exclusively of agricultural employees would be required to comply with rules pertaining to union democracy and financial disclosure. Labor Management Reporting and Disclosure Act, 29 U.S.C. §§ 401-531 (1970). Additionally, such unions could also be prosecuted for committing unfair labor practices under § 8(b) of the NLRA. Thus, the important case of *Digiorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (D.C. Cir.), *cert. denied*, 342 U.S. 869 (1951), which held that organizations composed exclusively of agricultural laborers could not be prosecuted for acts termed unfair labor practices by the Act, would effectively be overruled.

practice proceedings. Substantial litigation would be avoided simply because 40 years of litigation over the meaning of statutory language and the authority of the agency would not have to be relitigated. If certain distinctions are necessary for issues such as the applicable criteria for bargaining units and the eligibility of employees, the Board could make such distinctions based upon full evidentiary hearings, accommodating any unique features of agriculture.

Although sometimes advocated, no persuasive case has been made for amending the strike and impasse resolution provisions of the NLRA. Due to the fragmentation of the industry, and based on successful collective bargaining experience in the food processing industry and in states having comprehensive collective bargaining experience, it is extremely doubtful that anything approaching a national emergency would occur in the industry. Even if a national emergency did occur, existing legislation and the inherent ability of Congress to resolve the dispute should be sufficient to resolve any disputes. Unlike the health care industry there would be no safety endangered in the absence of a national emergency; the principal strike damage to employers and employees would be economic, as in every other collective bargaining dispute under the NLRA. The fact that economic damage might occur is no reason to adopt compulsory means of dispute settlement, at least without some experience which would demonstrate, without speculation, that the economic damage suffered is severely disproportionate to the damage suffered in other industries subject to the Act.

In the same vein, our history and tradition of restricting certain types of secondary activity ought not to be ignored or altered for one industry, in the absence of evidence that such restrictions make organization or collective bargaining substantially more difficult than in other industries. First, we ought to allow existing election and collective bargaining machinery to run its course; if history is any guide, this should be effective in resolving many current problems in agriculture. However, if this machinery is for some reason ineffective in agriculture, we can subsequently alter the NLRA to increase its effectiveness, including, of course, any necessary changes in the law governing secondary activity.

On the other hand, experience with the seasonal and temporary employees involved in construction work provides insight into the need for special union security measures for such employees. In order to stabilize employment relations in industries using seasonal and temporary employees, Congress has recognized the need to allow measures such as union shop agreements after seven days, nondiscriminatory hiring halls, and prehire agreements. The extension of section 8(f) to include agricultural employees is therefore a justifiable deviation from the NLRA, based on proven experiences involving seasonal and temporary employees.

To implement these conclusions, Congress must amend the NLRA to include agricultural employees, without significant deviation from that Act based on any alleged differences in the agricultural industry. It should also extend the union security provisions contained in section 8(f) of the Act to the agricultural industry.