

THE EXCLUDED WORKERS: THE NLRA, FARM LABORERS, AND A LINEAGE OF EXPLOITATION

Dustin J. Coffman[†]

I. Introduction.....	85
II. The Social Security Act of 1935 and Agricultural Workers.....	87
III. The Fair Labor Standards Act of 1938 and Agricultural Workers.....	89
IV. The National Labor Relations Act and Its Protections.....	91
V. The History of the Agricultural Exception in the National Labor Relation Act	94
VI. The South’s History of Agricultural Exploitation.....	98
VII. Today’s Agricultural Laborers.....	101
VIII. The Need For an Amendment.....	105
IX. Unprotected Organizing.....	107
X. What Can be Done?.....	108
XI. Conclusion.....	110

I. INTRODUCTION

On July 5th, 1935, President Franklin D. Roosevelt signed the National Labor Relations Act (NLRA).¹ With this stroke of a pen, the history of the United States’ labor movement was radically transformed.² The general goal of the NLRA was to guarantee employees the “right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid and protection.”³ This goal was—and to this day

[†] J.D., Drake University Law School, 2022; B.A., Political Science and Philosophy with a Minor in Sociology, Loras College, 2019. The Author would like to thank the Editorial Staff of the Drake Journal of Agricultural Law for their work in editing this note, and his family and partner for their love and support before, during, and after the writing process. The Author would also like to extend his sincerest thanks and support to those who toil in the fields so that everyone can have food on the table.

1. *1935 Passage of the Wagner Act*, NLRB (Oct. 26, 2021, 10:13 AM), <https://www.nlr.gov/about-nlr/who-we-are/our-history/1935-passage-of-the-wagner-act> [https://perma.cc/S8L3-J8TK].

2. See *id.*

3. *National Labor Relations Act (1935)*, OURDOCUMENTS (Oct. 26, 2021, 10:14 AM), <https://www.ourdocuments.gov/doc.php?flash=false&doc=67> [https://perma.cc/652V-F28X].

remains—a noble one, for collective bargaining has been instrumental in many historic leaps in workers’ rights and benefits.⁴ While the history of private sector employment in the United States is filled with examples of rampant exploitation and disturbing working conditions, many, but not all, sectors have been able to achieve some semblance of dignity in the workplace. Such achievements include higher pay, improved working conditions, anti-child labor policies, and are—at least in part—due to the ability to collectively organize one’s workplace.⁵ Dauntingly, however, the benefits and protections provided within the NLRA do not extend to all individuals who sell their labor for an income.⁶

Despite acknowledging the importance of such federal labor protections, Congress explicitly excluded all agricultural laborers from the NLRA’s definition of “employee.”⁷ Because agricultural laborers are excluded from the definition of employee, they are excluded from the protections afforded to nearly every other working person falling under the NLRA’s jurisdiction.⁸ Agricultural work, like many job sectors, has a dark history of horrendous working conditions, pay, and treatment of laborers.⁹ Unlike many of the jobs covered under the NLRA, however, many of these same issues are still faced by the contemporary agricultural laborer.¹⁰ This was not on accident, or without intention. Instead, and as this Note will demonstrate, agricultural workers were excluded from the protections conferred in the NLRA because farm owners and investors—primarily in the South—sought to perpetuate the exploitation of Black and poor laborers.¹¹

4. See Matthew Walters & Lawrence Mishel, *How Unions Help all Workers* 1-2 (Aug. 26, 2003), https://www.epi.org/publication/briefingpapers_bp143/ [<https://perma.cc/R8KA-N4Y7>].

5. See *id.*; DONALD M. FISK, U.S. BUREAU OF LAB. STAT., *AMERICAN LABOR IN THE 20TH CENTURY* 1 (2003), <https://www.bls.gov/opub/mlr/cwc/american-labor-in-the-20th-century.pdf> [<https://perma.cc/7SDF-XVJP>].

6. 29 U.S.C. § 152(3).

7. See NLRB, U.S. GOV’T PRINTING OFF., *LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1935*, at 15 (photo. reprinted 1949) (1934), https://heinonline-org.cowles-proxy.drake.edu/HOL/Page?collection=leghis&handle=hein.leghis/natltra0001&id=199&men_tab=srchresults# [<https://perma.cc/ZJ2E-YFQ5>] [hereinafter “NLRB”]; see also 29 U.S.C. § 152(3).

8. See 29 U.S.C. § 152(3).

9. See *Timeline of Agricultural Labor in the U.S.*, NAT’L FARM WORKER MINISTRY (Oct. 26, 2021, 10:15 AM), <http://nfwm.org/farm-workers/farm-worker-issues/slider-test/> [<https://perma.cc/85S6-WLJS>]; see generally PHILIP S. FONER, *ORGANIZED LABOR & THE BLACK WORKER 1619-1981* 146-147, 188 (Haymarket Books, 3d ed. 2017) (1974).

10. See Juan F. Perea, *The Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L.J. 95, 97 (2011).

11. See generally *id.* at 104.

While the demographics of farm laborers have shifted as time has progressed, the exploitation has persisted.¹² If the exploitation of agricultural laborers is to be eradicated, the NLRA must be amended to remove the agricultural laborer exception within the definition of employee. While this will not alone liberate such workers, with the federally protected right to collectively bargain they will be able to properly organize and campaign for fair pay, healthy working and living conditions, and other benefits commonly enjoyed by the average worker. As legendary farm labor leader Cesar Chavez said, “[i]t’s ironic that those who till the soil, cultivate and harvest the fruits, vegetables, and other foods that fill your tables with abundance have nothing left for themselves.”¹³

In order to fully understand why agricultural workers were excluded from the NLRA in 1935, it is necessary to grapple with the other federal worker statutes from which they were also excluded. The two that will be discussed are the Social Security Act of 1935 (SSA) and the Fair Labor Standards Act of 1938 (FLSA). This Note will begin by analyzing these two statutes and their subsequent amendments. It will then discuss the motive behind the NLRA’s proposal and some of the specific protections contained within it. Following this, the Note will evaluate the legislative history of the NLRA’s agricultural worker exclusion in order to discern the intent behind it. As will become evident, however, understanding this intent will require a broader analysis. As a result, this Note will turn to the history of agricultural exploitation—which preceded and existed synchronously with the bill’s passage—to argue that such exploitation gave rise to the exclusionary language. From there, the discussion will shift to the plight of modern-day farm laborers and how such difficulties are inextricably linked to their exclusion from the NLRA. Then, in light of the many present-day issues, a concluding argument will be advanced in favor of amending the NLRA to remove the farm worker exception.

II. THE SOCIAL SECURITY ACT OF 1935 AND AGRICULTURAL WORKERS

Along with the passage of the NLRA, the average United States citizen also benefited from the passage of the SSA the very same year.¹⁴ “In addition to several provisions for general welfare, the SSA created a social insurance program designed to pay retired workers age 65 or older a continuing income after

12. See generally *id.* at 137.

13. *Education of the Heart: Cesar Chavez in His Own Words*, UNITED FARM WORKERS (Oct. 26, 2021, 10:16 AM), <https://ufw.org/research/history/education-heart-cesar-chavez-words/> [https://perma.cc/932B-TAYF].

14. Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, 70 SOC. SEC. BULL. 49, 51 (2010).

retirement.”¹⁵ At its inception the SSA only covered approximately 60% of the United States workforce.¹⁶ It initially only provided coverage for workers who were employed in industry and commerce within the United States, which was just over a majority of employed citizens.¹⁷ President Roosevelt, nevertheless, eloquently described social security as a means of providing “some measure of protection to the average citizen and to his family against the loss of a job and against poverty-ridden old age” as he signed the bill into law.¹⁸ This law meant that the 60% of the United States workforce employed in industry and commerce would be entitled to benefits based on the payroll tax contributions they made during their working life.¹⁹ Thus, upon nearing retirement, those people could feel some semblance of comfort knowing they would be taken care of for the remainder of their days.

As was the case with the NLRA, the SSA was pivotal in establishing a larger social safety net following the Great Depression. Further mirroring the NLRA, it too originally excluded agricultural and domestic workers.²⁰ As excluded persons they had no access to the social insurance program that is colloquially referred to as social security.²¹ If one was an agricultural laborer, they could work just as hard as a fellow citizen employed in an industrial or commercial position, and yet they would not be privy to such later-life protections.²² Even from a surface level analysis, this disparity of protection is a red flag. Such suspicion is further confounded given that a large number—if not a majority—of agricultural workers in 1935 were African American.²³ Under such a metaphorical microscope, the disparate impact based upon race caused by excluding agricultural workers from the SSA is palpable. Unlike the NLRA, however, the SSA has since been amended to extend coverage to agricultural workers.²⁴ Now, a general farm worker is covered by the SSA if their employer pays them at least \$150 in cash wages annually, or if they are paid less than \$150 in cash wages annually but their

15. See *Historical Background and Development of Social Security*, SOC. SEC. (Oct. 26, 2021, 10:16 AM), <https://www.ssa.gov/history/briefhistory3.html> [<https://perma.cc/8AKN-W3MF>].

16. William J. Nelson, Jr., *Employment Covered Under the Social Security Program, 1935-84*, 48 SOC. SEC. BULL. 33, 33 (1985).

17. *Id.*

18. See *Historical Background and Development of Social Security*, *supra* note 15.

19. See *id.*

20. DeWitt, *supra* note 14, at 49.

21. *Id.*

22. See *Historical Background and Development of Social Security*, *supra* note 15.

23. FONER, *supra* note 9, at 120; see also DeWitt, *supra* note 14, at 52.

24. Nelson, *supra* note 16, at 34.

employer reports at least \$2,500 in total expenses for agricultural labor to the IRS each year.²⁵ Seasonal farm workers are only covered if they are paid at least \$150 in cash, and if they commute to work daily from their home, are paid on a piece-rate basis, and are employed less than 13 weeks during the prior year.²⁶ It is estimated that approximately 60% of farm workers are seasonal.²⁷

III. THE FAIR LABOR STANDARDS ACT OF 1938 AND AGRICULTURAL WORKERS

Turning now to another landmark labor legislation which arose in the 1930s, the FLSA sought to directly improve the well-being of the average United States worker by increasing wages and limiting the number of hours worked.²⁸ President Roosevelt addressed the necessity of legislation pertaining to working wages and working hours in his 1938 State of the Union speech.²⁹ In this speech he said, “We are seeking, of course, only legislation to end starvation wages and intolerable hours; more desirable wages are and continue to be the product of collective bargaining.”³⁰ While the issues requiring consideration were abundantly clear, how to best address them was not.³¹ As a result, the language and provisions of the FLSA experienced significant discussion and incited substantial congressional debate for more than a year.³² Following great discourse and its eventual passage, President Roosevelt signed the FLSA into law on June 14, 1938.³³ In its original form, the FLSA applied to all industries engaged in interstate commerce directly or engaged in the production of goods and services for interstate commerce,³⁴ and “established a minimum wage of 25 cents per hour for the first year, to be increased

25. *Social Security Coverage for Farm Work*, SOC. SEC. (Oct. 26, 2021, 10:17 AM), <https://www.ssa.gov/benefits/retirement/planner/farmwork.html> [https://perma.cc/RJL6-G3HP].

26. *Id.*

27. NAT’L CTR. FOR FARMWORKER HEALTH, INC., FARMWORKER HEALTH FACTSHEET (2012), http://www.ncfh.org/uploads/3/8/6/8/38685499/fs-migrant_demographics.pdf [https://perma.cc/XS4K-BXUV].

28. *See Fair Labor Standards Act*, BRITANNICA (Oct. 26, 2021, 10:19 AM), <https://www.britannica.com/event/Fair-Labor-Standards-Act> [https://perma.cc/4SAJ-Q34Z].

29. Howard D. Samuel, *Troubled Passage: The Labor Movement and the Fair Labor Standards Act*, MONTHLY LAB. REV., Dec. 2000, at 32, 36.

30. *Id.*

31. *See id.*

32. Jonathan Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP’T OF LAB. (Oct. 26, 2021, 10:57 AM), <https://www.dol.gov/general/aboutdol/history/flsa1938> [https://perma.cc/XCE6-QUFQ].

33. *Fair Labor Standards Act*, *supra* note 28.

34. *Labor – An Overview*, NAT’L AGRIC. L. CTR. (Oct. 26, 2021, 10:21 AM), <https://nationalaglawcenter.org/overview/labor/> [https://perma.cc/8X6J-VLBY].

to 40 cents within seven years[, and no] worker was obliged to work, without [overtime] compensation . . . more than 44 hours a week during the first year, 42 the second year, and 40 thereafter.”³⁵ This meant the workers covered would have a guaranteed wage above the starvation threshold. It also provided the opportunity for the workers to provide for themselves *and* their family.³⁶ In addition, the quasi-cap on weekly hours guaranteed workers would either have sufficient time off or would receive just-compensation for hours worked beyond the weekly maximum.³⁷ The FLSA also restricted child labor and mandated additional record-keeping by employers.³⁸

As was the case with the SSA and the NLRA, the FLSA originally excluded farm workers from its protections.³⁹ However, it was amended in 1966 to include such workers.⁴⁰ As a result, the “FLSA now applies the minimum wage and recordkeeping provisions to most agricultural workers and employers.”⁴¹ While bringing farm workers into the minimum wage protection of the FLSA was certainly a step in the right direction, there are still lingering coverage and institutional issues.⁴²

For instance, undocumented farm workers have the right to receive back pay for minimum wage violations under the FLSA, but they may not have the resources and opportunity to file such a claim.⁴³ Additionally, an employer who does not use more than 500 man-days of agricultural labor during any calendar quarter of the preceding year is not required to pay minimum wage or meet the overtime requirements for the then present year.⁴⁴ A man-day is defined as “any day during

35. *Fair Labor Standards Act*, *supra* note 28.

36. *See* Samuel, *supra* note 29, at 36.

37. *See id.* at 34.

38. *Labor – An Overview*, *supra* note 34.

39. *Id.*; *US Labor Law for Farmworkers*, FARMWORKER JUST. (Oct. 26, 2021, 10:22 AM), https://www.farmworkerjustice.org/advocacy_program/us-labor-law-for-farmworkers/ [<https://perma.cc/L485-VGPT>].

40. *US Labor Law for Farmworkers*, *supra* note 39.

41. *Id.*

42. *See Labor – An Overview*, *supra* note 34.

43. *See* U.S. DEP’T OF LAB., FACT SHEET #48: APPLICATION OF U.S. LABOR LAWS TO IMMIGRANT WORKERS: EFFECT OF HOFFMAN PLASTICS DECISION ON LAWS ENFORCED BY THE WAGE AND HOUR DIVISION (2008), <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/whdfs48.pdf> [<https://perma.cc/3527-KGF4>].

44. 29 U.S.C. § 203(u); *see also* *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T OF LAB. (Jan. 2020), <https://www.dol.gov/agencies/whd/fact-sheets/12-flsa-agriculture> [<https://perma.cc/UG2Q-RXY5>].

which an employee performs any agricultural labor for not less than one hour.”⁴⁵ Often compromising compliance with minimum wage and man-day requirements is the lack of proper record keeping.⁴⁶ If a farm owner or manager “fails” in this regard, then it becomes difficult to ensure that they are actually paying their workers minimum wage.

Farm workers are also exempted from the FLSA’s overtime pay provisions.⁴⁷ Unlike covered employees, farm workers do not have to be paid one and a half times their regular pay for hours worked beyond 40-per-week.⁴⁸ Agricultural employers are also “allowed to hire ... children fourteen and older[,] ... twelve and thirteen-year old children may be hired with parental permission, and children under twelve may be hired on their parents’ farm or with parental permission on a farm that falls below the 500 man-day employment requirement.”⁴⁹ Despite the expansion of the FLSA to incorporate farm workers into many of its protections, there is still the lingering question as to why these employees are treated differently in the eyes of federal labor protections.

Some argue that expanding overtime protections and precluding child labor on farms would unreasonably drive up costs.⁵⁰ In actuality, even if farm owners were held to the same standards as other employers under the FLSA, consumer prices would only slightly increase.⁵¹ Thus, any proffered “concern” for the cost of produce on consumers is just a thinly veiled excuse to maintain a workforce that can work overtime every week and receive zero extra pay. This brazen desire for such a class of exploited workers is at the very heart of the FLSA and the NLRA.

IV. THE NATIONAL LABOR RELATIONS ACT AND ITS PROTECTIONS

Turning to the NLRA, the senator who introduced the Bill, Senator Wagner, stressed the need for counterbalancing the heightened bargaining power held by employers.⁵² Employers were permitted to join together and form associations,

45. *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, *supra* note 44.

46. *Id.*

47. *Id.*

48. *See id.*

49. *Labor – An Overview*, *supra* note 34.

50. *See* David Dyssegaard Kallick & Daniel Costa, *Farm workers in New York deserve overtime pay*, UNITED STEELWORKERS (June 12, 2019), <https://m.usw.org/blog/2019/farmworkers-in-new-york-deserve-overtime-pay> [<https://perma.cc/FPS2-NWU8>].

51. *See id.*

52. NLRB, *supra* note 7, at 15.

which increased their already heightened bargaining power as they could effectively dictate the working terms as employees would have a difficult time finding a non-associated employer to work for.⁵³ While some theoretical or abstract good may arise from employers partnering to such an end, the potential harm to employees and consumers was too concerning to persist unchecked.⁵⁴

For his own part, Senator Wagner's opinion was likely influenced by having served as chairman of the New York Assembly State Factory Investigation Committee.⁵⁵ In this position, he bore witness to many of the harms manifested by careless and greedy employers.⁵⁶ Additionally, the fact that he introduced the NLRA very shortly after the brunt of the Great Depression hit the United States was not a coincidence.⁵⁷

The Great Depression highlighted many of struggles faced by workers in the United States. It was a time characterized by “breadlines, apple sellers on street corners, shuttered factories, rural poverty, and . . . shelters cobbled together from salvaged wood, cardboard, and tin.”⁵⁸ While the causes of the Great Depression are contested and numerous, this context is vital to understanding the labor movement in the 1930s, and, subsequently, Senator Wagner's rationale in introducing the NLRA.⁵⁹ He believed it “necessary to insure a wise distribution of wealth between management and labor, to maintain a full flow of purchasing power, and to prevent recurrent depressions.”⁶⁰ The NLRA was a means to accomplish these goals.⁶¹

Recognizing the connection between employee-employer bargaining power and worker exploitation, Senator Wagner said, “[g]enuine collective bargaining is

53. *See id.*

54. *See id.*

55. *Robert Wagner: A Featured Biography*, U.S. SENATE (Oct. 26, 2021, 10:23 AM), https://www.senate.gov/senators/FeaturedBios/Featured_Bio_Wagner.htm [<https://perma.cc/DMX3-FFGF>] (“As chairman of the New York Assembly State Factory Investigation Committee from 1911 to 1915, he had investigated the tragic Triangle Shirtwaist Factory fire and other industrial hazards. These experiences sharpened his commitment to reform.”).

56. *See id.*

57. *See Great Depression*, BRITANNICA (Oct. 11, 2021), <https://www.britannica.com/event/Great-Depression> [<https://perma.cc/6H2Q-USYX>].

58. *Id.* (explaining further that the shelter areas were colloquially referred to as “Hooverilles,” which were named after President Herbert Hoover).

59. *See NLRB, supra* note 7, at 15-18.

60. NLRB, *supra* note 7, at 15.

61. *See id.* at 15-18.

the only way to attain equality of bargaining power.”⁶² With greater bargaining power, workers can come to the bargaining table not to beg for scraps but on equal footing. As women’s suffragist and trade unionist Mary Macarthur once said, “[a] trade union is like a bundle of sticks. A worker who is not in a union is like a single stick. She can easily be broken or bent to the will of her employer. An employer can do without one worker. He cannot do without all his workers.”⁶³ The purpose of the NLRA has been and still is to codify the right to form and join a union.⁶⁴ When workers choose to join unions under the NLRA, it obligates employers to recognize the legitimacy of and to bargain with that collective group.⁶⁵

The current version of the NLRA is very extensive and its sections—while all pertaining to collective bargaining in the workplace—range from the establishment of the National Labor Relations Board (NLRB) to procedures for union elections.⁶⁶ As it relates to unfair practices, the NLRA prohibits employers from interfering with, restraining, or coercing its employees who exercise their right to federally protected right to self-organize.⁶⁷ The NLRA also dictates how labor unions may recruit new members and how they may exert influence over employers.⁶⁸ While there are explicit limitations on an employee’s right to strike, the NLRA makes clear it should not be construed as impeding or diminishing that right.⁶⁹ Going on strike is not something to be taken lightly, but, when all other means of bargaining have been exhausted, it can be an extremely powerful tool in a union’s arsenal. For example, in 2018 public school teachers from several states walked off their jobs and demanded higher pay and better benefits.⁷⁰ By and large, their demands were met.⁷¹

62. *Id.* at 15.

63. LEN MCCLUSKEY, WHY YOU SHOULD BE A TRADE UNIONIST 31 (2020).

64. *1935 Passage of the Wagner Act*, *supra* note 1.

65. *See id.*

66. *See* 29 U.S.C. §§ 151-169.

67. *Id.* § 158(a)(1); *see also id.* § 157.

68. 29 U.S.C. § 158(b)(1)-(4).

69. *Id.* § 163.

70. Holly Yan, *Here’s what teachers accomplished with their protests this year*, CNN (May 29, 2018), <https://www.cnn.com/2018/05/29/us/what-teachers-won-and-lost/index.html> [<https://perma.cc/2H2C-XGK6>] (noting in some states teachers demanded raises and better benefits not only for themselves, but also for support staff such as janitors and cafeteria workers.).

71. *Id.* (explaining that teachers in West Virginia won a 5% raise; Oklahoma teachers won raises for themselves and support staff, and an increase in overall education funding; and teachers in Arizona won a 20% raise, and increased funding for books, technology, infrastructure, and support staff.).

Returning to NLRA protections, the Act “provided federal protections to private sector workers’ efforts to unionize, outline[d] anti-union practices employers could no longer utilize, and put in place the [NLRB] to oversee union representation elections, adjudicate complaints, and interpret the Act in subsequent cases.”⁷² If qualifying employees vote in favor of unionizing, then the union and the employer must meet and bargain in good faith.⁷³ The NLRB states that bargaining in good faith “is an obligation to participate actively in the deliberations so as to indicate a present intention to find a basis for agreement. This implies both an open mind and a sincere desire to reach an agreement as well as a sincere effort to reach a common ground.”⁷⁴ Most private sector employees are covered under the NLRA, and thus are afforded the protections therein.⁷⁵ While this does not mean every covered person is a member of a union, it nevertheless provides and protects the opportunity for them to become one.

V. THE HISTORY OF THE AGRICULTURAL EXCEPTION IN THE NATIONAL LABOR RELATION ACT

To be afforded the employee protections contained within the NLRA, an individual must be classified as an employee for the purposes of the Act.⁷⁶ The NLRA provides that “any employee” will qualify, but this “shall not include any individual employed as an agricultural worker.”⁷⁷ Agricultural laborers are excluded from the NLRA’s protections not because they fail to meet some set of objective criteria common to all employees, but because they are explicitly excluded by profession.⁷⁸

In his original proposal for the bill, Senator Wagner proposed a radically different and broader definition of employee.⁷⁹ In contrast to the Act’s present phrasing, there was no exemption for any particular profession.⁸⁰ Instead, every

72. ALEXIS N. WALKER, *DIVIDED UNIONS: THE WAGNER ACT, FEDERALISM, AND ORGANIZED LABOR* 17 (2020).

73. *Frequently Asked Questions*, NLRB (Oct. 26, 2021, 10:28 AM), <https://www.nlr.gov/resources/faq/nlr> [<https://perma.cc/TNY9-DX9Y>]; *see also Employer/Union Rights and Obligations*, NLRB (Oct. 26, 2021, 10:27 AM), <https://www.nlr.gov/about-nlr/rights-we-protect/your-rights/employer-union-rights-and-obligations> [<https://perma.cc/P7BA-NBQM>].

74. *Employer/Unions Rights and Obligations*, *supra* note 73.

75. *Frequently Asked Questions*, *supra* note 73.

76. *See id.*

77. 29 U.S.C. § 152(3).

78. *See id.* § 152.

79. NLRB, *supra* note 7, at 2.

80. *Id.*

person who was under a written or oral, express or implied contract for hire by an employer would be an employee, and would fall within the protections of the NLRA.⁸¹ The only exemption in this definition was that an individual who had replaced an employee on strike would not be considered an employee.⁸² Therefore, under this original iteration, as long as an agricultural worker did not replace a striking worker, and their employer was not the United States, a state, or local government, they would be privy to the NLRA's protections.⁸³

The Senate's legislative history regarding the insertion of the agricultural worker exemption into the definition of employee is sparse to say the least.⁸⁴ Nevertheless, the minimal legislative history of the "exemption lies initially in the deliberations of the Senate Committee."⁸⁵ Even here, however, there is only passing mention of concern regarding the inclusion of farm workers in the NLRA.⁸⁶ Senator Walsh apparently said to a present witness that the bill as drafted would permit the employees who work on a farm to collectively organize and would "require the farmer to actually recognize their representatives, and deal with them in the matter of collective bargaining."⁸⁷

Beyond this passing comment, the only other apparent overt discussion regarding agricultural workers came from Fred Brenckman, the Washington representative of the National Grange.⁸⁸ He filed a brief—which is included in the hearings record—wherein he argued farm labor should be exempted.⁸⁹ Brenckman argued if farm workers were poorly paid, then it was not because they could not collectively bargain, but because the farm owners were also poor.⁹⁰

81. *Id.*

82. *Id.*

83. *Id.*

84. See WALKER, *supra* note 72, at 18.

85. JAMES R. WASON, LEGISLATIVE HISTORY OF THE EXCLUSION OF AGRICULTURAL EMPLOYEES FROM THE NATIONAL LABOR RELATIONS ACT, 1935, AND THE FAIR LABOR STANDARDS ACT OF 1938, at 2 (1966), https://heinonline-org.cowles-proxy.drake.edu/HOL/Page?collection=leghis&handle=hein.leghis/excagr0001&id=4&men_t ab=srchresults [<https://perma.cc/M7KD-N6K3>].

86. *Id.* at 3.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.* ("If farm labor is poorly paid in the United States today, then it can be said with emphasis that the farmer and his family are still more poorly paid. . . . the workability of the Wagner bill would be greatly improved if it were amended so as to exempt farm labor.").

Without providing substantive reason, the Senate Committee amended the bill so to include the agricultural worker exemption.⁹¹ Thus, the legislative history of the NLRA in the Senate is essentially without explanation for this significant change.⁹² Considering there were approximately 6.8 million farms in the United States in 1935, the decision to exclude agricultural workers from the NLRA effected the workplace power of millions.⁹³ The Senate then passed the bill, S. 1558, on May 16, 1935, and whatever debate was had on the floor contained no reference whatsoever to the exemption of agricultural workers.⁹⁴

The House of Representative's treatment of the NLRA was slightly different than that of the Senate.⁹⁵ First, Representative Connery introduced two bills, H.R. 7978 and H.R. 6288.⁹⁶ Both bills "contained the language exempting agricultural employees."⁹⁷ While the majority report did not discuss the exemption, the minority view did.⁹⁸ Representative Marcantonio explicitly argued farm workers should be included in the protections of the proposed bill.⁹⁹ He stated, "I also find myself unable to agree with the Committee in its exclusion of agricultural workers. It is a matter of plain fact that the worst conditions in the United States are the conditions among the agricultural workers. . ."¹⁰⁰

Despite Representative Marcantonio's objection to the exemption, the House Committee reported S. 1558 with the farm worker exemption contained therein.¹⁰¹ When the bill reached the House floor for debate, Representative Marcantonio again repeated his opposition to the exemption.¹⁰² This opposition sparked a brief debate in which Representative Connery discussed his rationale for the

91. *Id.* at 4 ("From this point on, this exemption was carried by every bill considered in either House.").

92. *Id.* at 5.

93. *Farming and Farm Income*, U.S. DEPT. OF AGRIC. (Oct. 26, 2021, 10:28 AM), <https://www.ers.usda.gov/data-products/ag-and-food-statistics-charting-the-essentials/farming-and-farm-income/> [<https://perma.cc/34DR-Q4GK>].

94. WASON, *supra* note 85, at 5.

95. *See id.* at 5-7.

96. *Id.* at 5.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 6 ("[T]here is not a single solitary reason why agricultural workers should not be included under the provisions of the bill. The same reasons urged for the adoption of this bill in behalf of the industrial workers are equally applicable in the case of the agricultural workers.").

101. *Id.*

102. *Id.*

exemption.¹⁰³ Representative Connery argued that the decision to exclude agricultural workers was to more expediently pass the bill.¹⁰⁴ He stressed that he personally would like to include farm workers, but that he “[believed] in biting off one mouthful at a time,” and if they could pass the bill with the exemption then “there will be opportunity later...to take care of the agricultural workers.”¹⁰⁵ With agricultural workers included in the NLRA, “it was believed that sufficient votes might not be obtained to pass the bill, at least not in the form desired.”¹⁰⁶

The limited legislative history makes it difficult to ascertain an explicit reason for the exclusion of agricultural workers beyond their inclusion posing a significant obstacle to the passage of the bill. There is, however, circumstantial evidence that the cause for excluding agricultural workers was rooted in exploitation and racism.¹⁰⁷ The “evidence is strong, and pervasive throughout the period, that Southern Democrats would not support any New Deal legislation without [the agricultural laborer exclusion], a race-neutral proxy for the exclusion of most black employees.”¹⁰⁸ In threatening to withhold their support, these Southern Democrats forced provisions in economic bills that ultimately resulted in de facto minority exclusion.¹⁰⁹ As it relates to the NLRA, it “effectively excluded two-thirds of the black workforce by denying statutory protection to agricultural and domestic workers.”¹¹⁰ Thus, while there does not appear to have been an overt discriminatory intent, the substantial impact had on Black workers lends itself to a covert, underlying discriminatory purpose. There is little chance that the Senators and Representatives simply forgot or failed to consider how this decision would impact millions of farm workers who were disproportionately black.

Underlying this was a history of exploitation and enslavement, particularly in the agricultural sector. This history was not far removed; it existed concurrently with the passage of the NLRA and other New Deal legislation. Recognizing this historical context—and intellectually joining it with the discriminatory impact discussed above—makes it clear that Southern Democrats from the previously antebellum south sought to perpetuate this lineage of exploitation.

103. *Id.*

104. *Id.* at 7.

105. *Id.*

106. *Id.* (hinting at the need to pander to Southern Democrats in order to pass the Act).

107. See PAUL FRYMER, *BLACK AND BLUE: AFRICAN AMERICANS, THE LABOR MOVEMENT, AND THE DECLINE OF THE DEMOCRATIC PARTY* 28 (2008).

108. Perea, *supra* note 10, at 129; see also WASON, *supra* note 85, at 7.

109. FRYMER, *supra* note 107, at 27-28.

110. *Id.* at 28; see WALKER, *supra* note 72, at 18.

VI. THE SOUTH'S HISTORY OF AGRICULTURAL EXPLOITATION

A full history of slavery within the United States far exceeds the expertise exerted within this Note. Nevertheless, it feels morally necessary to make clear this country was built on the enslavement of millions of Black persons. Its infant economy boomed because it had a class of persons who could be whipped, mutilated, or killed for not working hard enough. As the nation's economy grew, so did the number of those enslaved.

The enslavement system was one of the principal engines of the new nation's financial independence, and it grew steadily until it was abolished by war. In 1790 there were fewer than 700,000 enslaved people in the United States; in 1830 there were more than 2 million; and on the eve of the Civil War there were nearly 4 million enslaved persons.¹¹¹ To further demonstrate the nation's—especially the South's—economic reliance on slavery, one need to simply look at the monetary value of the enslaved population. In 1860, “the total value of all slave property across the South...was at least \$3 billion.”¹¹² For comparison this was “seven times the amount invested in banks...[and] equal to about seven times the total value of all [United States] currency in circulation.”¹¹³

While the North began to diversify its economy between 1815 and 1861, the South's economy remained based on plantations, which produced cash crops and relied on enslaved persons as the main labor force.¹¹⁴ In the South, a majority of enslaved persons were forced to harvest cotton, rice, corn, sugar, and tobacco.¹¹⁵ With an economy so heavily reliant on agricultural production, the massive investment in the ownership of people was done to maintain free agricultural labor.¹¹⁶ This labor, in turn, ensured massive profits for the slave owners who received all of the economic value derived from the enslaved labor.¹¹⁷

111. *Africans in America: Life in a Slave Society*, LIBRARY OF CONGRESS (Oct. 26, 2021, 10:29 AM), <https://www.loc.gov/classroom-materials/immigration/african/africans-in-america/> [<https://perma.cc/PDZ5-AGQK>].

112. STEVEN DEYLE, *CARRY ME BACK: THE DOMESTIC SLAVE TRADE IN AMERICAN LIFE* 59 (2005).

113. *Id.*

114. Warren W. Hassler & Jennifer L. Weber, *American Civil War*, BRITANNICA (Oct. 26, 2021, 10:30 A.M.), <https://www.britannica.com/event/American-Civil-War> [<https://perma.cc/9TY7-B7AT>].

115. *Conditions of antebellum slavery: 1830-1860*, PBS (Oct. 26, 2021, 10:30 AM), <https://www.pbs.org/wgbh/aia/part4/4p2956.html> [<https://perma.cc/HA2C-8KYV>].

116. *See generally id.*

117. *See generally id.*

With the South's predominant capital investment—enslaved persons—challenged by the North leading up to the Civil War, it is obvious why those in power, the slave owners or those who they funded, chose to secede.¹¹⁸ The South's secession further demonstrates how fundamentally reliant it was on the institution of slavery, for at the time “it was impossible to conceive of a southern society without it.”¹¹⁹ On January 31, 1865, Congress passed the Thirteenth Amendment, and ratified it on December 6, 1865, just months after the South surrendered.¹²⁰ Because slavery's abolishment was completed through a Constitutional Amendment, there was hope for socioeconomic liberation and growth for the newly freed Black laborers. This hope was quickly dashed by Southern elites who still sought to maintain an exploited class of persons even if they could no longer keep them enslaved.

Despite their newly free status, Black Americans found themselves economically vulnerable following the passage of the Thirteenth Amendment.¹²¹ “Southern landowners developed many ways to keep black farm laborers under their control through economic duress and violence. The primary technique was the tenancy system, which involved, typically, blacks living and farming on land owned by a white farmer and paying the owner rent.”¹²² This new tenancy system, sometimes referred to as sharecropping, obfuscated many of the moral concerns associated with chattel slavery while maintaining a class of exploited, disproportionately Black farm laborers.¹²³ Having little to no capital of their own (because reparations had not occurred), Black sharecroppers often had to purchase their goods and lease equipment from plantation stores in return for their forthcoming harvests.¹²⁴ This reliance on leasing fostered a cycle of perpetual indebtedness to the White-owning class.¹²⁵ “High interest rates, unpredictable harvests, and unscrupulous landlords and merchants often kept tenant farm families severely indebted, requiring the debt to be carried over until the next year

118. DEYLE, *supra* note 112, at 60.

119. *Id.*

120. See *13th Amendment to the U.S. Constitution: Abolition of Slavery*, NAT'L ARCHIVES (Oct. 26, 2021, 10:31 AM), <https://www.archives.gov/historical-docs/13th-amendment> [<https://perma.cc/SD9P-JV3U>].

121. Perea, *supra* note 10, at 100.

122. *Id.* at 101.

123. See *Slavery by Another Name: Sharecropping*, PBS (Oct. 26, 2021, 10:31 AM), <https://www.pbs.org/tpt/slavery-by-another-name/themes/sharecropping/> [<https://perma.cc/3DFN-3KPS>].

124. FONER, *supra* note 9, at 188.

125. *Id.*

or the next.”¹²⁶ Black-agricultural laborers who opposed these nefarious practices “were kicked quietly outdoors and, in some cases, lynched.”¹²⁷

Census data from this time period demonstrates the disproportional effect of the tenancy system. In 1920 there were approximately 922,914 Nonwhite farmers in the southern United States.¹²⁸ Of said Nonwhite farmers, about 703,555 (76%) were tenants.¹²⁹ For comparison, at this same time and in the same region there were 2,283,750 White farmers, of which 887,566 (39%) were tenants.¹³⁰ In 1930, 79% of all Nonwhite farmers were tenants.¹³¹ That same year 47% of White farmers were tenants.¹³² These numbers make clear the sheer number of Black and White tenant farmers in the years preceding the NLRA’s enactment in 1935. Therefore, while it is important to recognize the disproportionate demographics of tenant farmers during this time, it is also important to take note of the prevalence of tenant indebtedness amongst poor White and Nonwhite farmers.

The South’s lineage of exploiting agricultural laborers—which often persisted by the literal barrel of a gun—is the historical context for southern Democrats necessitating the exclusion of agricultural workers from the NLRA’s protections.¹³³ If farm workers, sharecroppers, or wage laborers had been able to collectively organize, then they would have been in better position to bargain. The historical use of violence by farm owners to suppress the organizing of farm workers demonstrates how powerful of a tool collective organizing of tenant farmers and workers could have been. One example of the usage of anti-organizing violence was in Elaine, Arkansas in 1919. There “black sharecroppers dared to form a union, employ a lawyer, and demand an accounting from landlords, [and] one hundred of them were killed, and the courts sentenced twelve of the victims’ fellow sharecroppers to death and seventy-seven to long prison terms.”¹³⁴ These

126. *Slavery by Another Name: Sharecropping*, *supra* note 123.

127. FONER, *supra* note 9, at 188.

128. U.S. DEP’T OF COM., BUREAU OF THE CENSUS, HISTORICAL STATISTICS OF THE UNITED STATES: COLONIAL TIMES TO 1957, at 278 ser. K 8–52 (1960), https://www2.census.gov/library/publications/1960/compendia/hist_stats_colonial-1957/hist_stats_colonial-1957-chK.pdf [<https://perma.cc/XB7U-9ZRS>].

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. See FONER, *supra* note 9, at 146–47.

134. *Id.*; see also Christina Maxouris, *A new monument will honor the victims of a century-old racist massacre. Some say it’s not where it should be*, CNN (May 19, 2021), <https://www.cnn.com/2019/09/28/us/elaine-massacre-100-years-memorial-helena/index.html> [<https://perma.cc/PF4K-785A>].

farm workers met this resistance because they challenged the balance of power, which so heavily tipped towards the wealthy farm owners.¹³⁵ There are numerous other examples of White anti-unionists violently attacking Black and White farmers who attempted to form sharecroppers' unions in the South. These attempts were frequently met with violent resistance and murder.¹³⁶

Despite their attempts at organizing, these agricultural laborers were often overcome by the supremacy of White capital. The NLRA, which extended unionization protections to every other worker, did not come to their rescue. Because of the agricultural laborer exemption, "farm workers . . . have no federally protected right to organize and bargain collectively. In the absence of protective state legislation, farm workers [still to this day] can be fired for seeking to unionize or acting for their mutual aid and protection."¹³⁷ The southern Democrats who necessitated the agricultural exception in nearly every piece of New Deal legislation got their wish of a continued class of exploited agricultural laborers.¹³⁸ While the demographics of farm workers and the exploitative tactics may have changed from the 1930s, that same nefarious profiteering nevertheless persists today.

VII. TODAY'S AGRICULTURAL LABORERS

In 2018, 57% of farm laborers, graders, and sorters were Hispanic and of Mexican origin, and 7% were Hispanic not of Mexican origin.¹³⁹ Around 32% were White, non-Hispanic.¹⁴⁰ The median annual income in 2019 of general agricultural workers (i.e., farm laborers, graders, and sorters) was approximately \$25,840.¹⁴¹

135. FONER, *supra* note 9, at 146-47.

136. *Sharecropping*, EQUAL JUST. INITIATIVE (Nov. 21, 2018), <https://ej.org/news/history-racial-injustice-sharecropping/> [<https://perma.cc/T7PF-VE6U>] ("Whites violently attacked and murdered Black people attempting to form sharecroppers' unions in communities throughout the South in the early 20th century, including in Elaine, Arkansas (1919); Camp Hill, Alabama (1931); and Lowndes County, Alabama (1935).").

137. Perea, *supra* note 10, at 127.

138. DeWitt, *supra* note 14, at 49.

139. *Farm Labor*, U.S. DEPT. OF AGRIC. (Oct. 26, 2021, 10:34 AM), <https://www.ers.usda.gov/topics/farm-economy/farm-labor/#demographic> [<https://perma.cc/X2E9-4P3B>] ("Farm laborers have lower levels of educational attainment, are more likely to be Hispanic of Mexican origin, and are less likely to be citizens than both workers in other occupations in agriculture and the U.S. wage and salary workforce as a whole.").

140. *Id.*

141. *See Occupational Outlook Handbook: Agricultural Workers*, U.S. BUREAU OF LAB. STAT. (Sept. 8, 2021), <https://www.bls.gov/ooh/farming-fishing-and-forestry/agricultural-workers.htm#tab-1> [<https://perma.cc/B87G-WV49>].

Of farm managers, inspectors, and supervisors only 27% were Hispanic and of Mexican origin (4% were Hispanic not of Mexican origin), but 64% were White, non-Hispanic workers.¹⁴² These supervisory positions had a median annual income in 2019 of \$71,160.¹⁴³ Thus, the farm “workers” in the higher paying and ranking positions are more likely to be White, while the lower paying positions are more likely to be occupied by Hispanic workers.¹⁴⁴

Much like the economic subjugation of disproportionately Black farmers in the early 20th century, the trends continue into the modern era. In addition to the income disparities, between 2015 to 2016 “[o]ne-third of farmworkers had family incomes below poverty (33%).”¹⁴⁵ If farm laborers, graders, and sorters are the lowest paid workers, and Hispanic persons make up the majority of these positions, then the 33% of farm workers living in poverty are likely disproportionately Hispanic. This statistic is not presently used to suggest gross appropriation of the surplus value produced by farm laborers would be morally permissible if they were White. Instead, this is meant to draw a parallel to the cycle of indebtedness thrust upon the disproportionately Black and poor tenant farmers and workers in the 20th century.

In addition to high levels of poverty, agricultural workers also endure “brutal working conditions, no health insurance or other employee benefits, horrifying living conditions, and environmental hazards.”¹⁴⁶ In one study 53% of agricultural workers stated that they did not have health insurance.¹⁴⁷ Farm workers are also at high risk for work injuries and death, work-related lung disease, hearing loss, and various cancers due to chemical use and sun exposure.¹⁴⁸ “While farmworkers face numerous threats to their health and safety, pesticides and heat stress conditions are among the most serious.”¹⁴⁹ Thus, not only do such workers have to endure

142. *Farm Labor*, *supra* note 139.

143. *See Occupational Outlook Handbook: Farmers, Ranchers, and Other Agricultural Managers*, *supra* note 141.

144. *See Farm Labor*, *supra* note 139.

145. TRISH HERNANDEZ & SUSAN GABBARD, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2015-2016: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS, DEP’T OF LAB. 36 (2018), <https://www.dol.gov/sites/dolgov/files/OASP/legacy/files/NAWS-Research-Report-13.pdf> [<https://perma.cc/B4Z5-N98A>].

146. Perea, *supra* note 10, at 97.

147. *See* HERNANDEZ & GABBARD, *supra* note 145, at 40.

148. *Agricultural Operations*, U.S. DEPT. OF LAB., OSHA (Oct. 26, 2021, 10:34 AM), <https://www.osha.gov/agricultural-operations> [<https://perma.cc/9UMY-JE8T>].

149. RAFTER FERGUSON ET AL., FARMWORKERS AT RISK: THE GROWING DANGERS OF PESTICIDES AND HEAT 3 (2019).

dangerous working conditions, but they must frequently do so without health insurance.

In addition to these issues female farm laborers also face frequent workplace sexual violence and harassment, and retaliation if they choose to report it.¹⁵⁰ “The few victims who do report the abuse face lengthy and difficult legal processes that are sometimes impossible to access for migratory, low-income workers with limited English proficiency.”¹⁵¹ In many instances—not limited to just harassment claims—farm workers who complain about work conditions are blacklisted.¹⁵² Blacklisted, of course, meaning that they will not be hired by the farm owner again, thereby losing their already precarious livelihood. The potential for retaliation without recourse is extremely daunting for farm laborers, and many opt to forego reporting altogether as a result.¹⁵³

Another example of hazardous working and living conditions is the danger posed by harvesting tobacco. Agricultural workers who handle tobacco leaves inadvertently absorb nicotine through their skin, with some estimating that one days’ worth of picking is equivalent to smoking dozens of cigarettes.¹⁵⁴ Such laborers are thus exposed to the dangers posed by nicotine, which “may cause nicotine poisoning . . . with symptoms including nausea and vomiting.”¹⁵⁵ This sickness is commonly referred to as the green tobacco sickness, but many workers call it the “green monster.”¹⁵⁶ Long-term, absorption of nicotine can “adversely affect[] the heart, reproductive system, lung[s], kidney[s] . . . [and has] demonstrated . . . carcinogenic potential.”¹⁵⁷

Occupational Safety and Health Administration (OSHA) states that employers should provide farm workers appropriate personal protective equipment

150. See *US: Sexual Violence, Harassment of Immigrant Farmworkers*, HUM. RTS. WATCH (May 15, 2012), <https://www.hrw.org/news/2012/05/15/us-sexual-violence-harassment-immigrant-farmworkers> [<https://perma.cc/U4QJ-PJGS>]; see also Ariel Ramchandani, *There’s a Sexual-Harassment Epidemic on America’s Farms*, THE ATL. (Jan. 29, 2018), <https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/> [<https://perma.cc/6KMN-J75F>].

151. *US: Sexual Violence, Harassment of Immigrant Farmworkers*, *supra* note 150.

152. See Interview with Baldemar Velasquez, President, Farm Lab. Org. Comm., AFL-CIO, Virtual (Oct. 28, 2020).

153. See *id.*

154. See *id.*

155. *Green Tobacco Sickness*, U.S. DEP’T OF LAB., OSHA (Oct. 26, 2021, 10:42 AM), <https://www.osha.gov/green-tobacco-sickness> [<https://perma.cc/9AYW-8P7X>].

156. Virtual Interview with Baldemar Velasquez, *supra* note 152.

157. Aseem Mishra et al., *Harmful Effects of Nicotine*, 36 INDIAN J. MED. & PAEDIATRIC ONCOLOGY 24, 24 (2015).

(PPE), but the farm owners often do not.¹⁵⁸ Farm owners are also supposed to provide washing stations for the workers to shower and laundry stations for their clothes.¹⁵⁹ Such “amenities” are often nonexistent or grossly inadequate.¹⁶⁰ Without the protected right to collectively bargain, there is often little workers can do to better the situation. If they were represented by a union, then they could collectively bargain (or strike) for such amenities. Instead, they are at the behest of farm owners and major corporations for whom it is easier to simply replace dissident voices.

The cycle of impoverishment and degradation of farm laborers ensures that there will be a continued class of persons to toil in the fields barely earning enough to survive, while the farm owners and agricultural corporations reap the profits. Further complicating any attempt at alleviating intergenerational poverty is the fact that nearly 50% of hired farm laborers lack legal immigration status.¹⁶¹ United States citizens living in poverty can typically access means-tested programs such as the Supplemental Nutrition Assistance Program (SNAP), Medicaid, Supplemental Security Income (SSI), and Temporary Assistance for Needy Families (TANF).¹⁶²

Undocumented immigrants are ineligible for these programs, and “are ineligible for health care subsidies under the Affordable Care Act (ACA) and are prohibited from purchasing unsubsidized health coverage on ACA exchanges.”¹⁶³ Poor wages, ineligibility for federal assistance programs, and “bad working conditions ... for generations have maintained a slave labor system which insures that the migrant farmworker’s children will have to live the same way he did and will continue to be slaves to agriculture and business.”¹⁶⁴

158. See *Green Tobacco Sickness*, *supra* note 155.

159. See 29 C.F.R. § 1910.142(c)-(d) (2021).

160. See Virtual Interview with Baldemar Velasquez, *supra* note 152.

161. *Farm Labor*, *supra* note 139; see *Farm Labor*, *supra* note 139.

162. *Fact Sheet: Immigrants and Public Benefits*, NAT’L IMMIGR. F. (Aug. 21, 2018), <https://immigrationforum.org/article/fact-sheet-immigrants-and-public-benefits/> [<https://perma.cc/5LGG-ENFZ>].

163. *Id.*

164. “*The Cycle of Poverty*”: *Mexican-American Migrant Farmworkers Testify before Congress*, HIST. MATTERS (Oct. 26, 2021, 10:36 AM), <http://historymatters.gmu.edu/d/7024/> [<https://perma.cc/KP6P-Z5DU>].

VIII. THE NEED FOR AN AMENDMENT

In basic terms, unions enable workers to come together and collectively negotiate for higher wages, improved benefits, and safer workplace conditions.¹⁶⁵ For some, the connection between collective bargaining and wages, working conditions, and benefits may not be immediately apparent. This non-recognition is understandable considering the decline of union membership in the United States.¹⁶⁶ With a decline in union representation the connection between union membership and employee benefits has been clouded. In 1983, over 20% of all employees in the United States belonged to a union.¹⁶⁷ As of 2019, that percentage dropped to just 10.3%.¹⁶⁸ Additionally, the benefits of collective bargaining may be unknown to many—some may even have a negative view towards unions—in part because United States employers spend approximately “\$340 million annually on “union avoidance” consultants, who teach them how to exploit [weaknesses in federal labor law and] scare workers out of exercising their legal right to collective bargaining.”¹⁶⁹

With such anti-union propaganda, it is unsurprising that many Americans are unaware of the benefits of union members. For example, union workers “earn

165. *Unions Begin with You*, AFL-CIO (Oct. 26, 2021, 10:37 AM), <https://aflcio.org/what-unions-do> [<https://perma.cc/F3RA-LJ8Q>].

166. *See In 2020, the number of unionized workers dropped, while the share of union members increased*, USAFACTS (Jan. 29, 2021), <https://usafacts.org/articles/labor-union-membership> [<https://perma.cc/NWM2-BM3R>].

167. *Id.*

168. U.S. BUREAU OF LAB. STAT., UNION AFFILIATION OF EMPLOYED WAGE AND SALARY WORKERS BY SELECTED CHARACTERISTICS (Nov. 9, 2021, 9:04 AM), <https://www.bls.gov/news.release/union2.t01.htm> [<https://perma.cc/W6ZW-UU72>].

169. GORDON LAFER & LOLA LOUSTAUNAU, FEAR AT WORK I (2020), <https://files.epi.org/pdf/202305.pdf> [<https://perma.cc/YDH2-CCVV>]; *see* Esther Kaplan, *Liar Liar: The New Propaganda War Against Unions*, *New Labor Forum*, Winter 2007, at 107 (“Only about 100 union-busting consultants existed in the late 1960s, but some 2,000 such firms today constitute a \$1 billion-a-year industry. They draft anti-union literature, teach managers how to scare off union support, and run work-shops with titles like “How to Stay Union Free.”); David Streitfeld, *How Amazon Crushes Unions*, *N.Y. TIMES* (Oct. 21, 2021), <https://www.nytimes.com/2021/03/16/technology/amazon-unions-virginia.html> [<https://perma.cc/5CSC-5P7T>]; Annie Palmer, *How Amazon keeps a close eye on employee activism to head off unions*, *CNBC* (Oct. 24, 2020), <https://www.cnn.com/2020/10/24/how-amazon-prevents-unions-by-surveilling-employee-activism.html> [<https://perma.cc/922Q-8X9C>] (“Amazon posted a job listing for two intelligence analysts who could monitor “labor organizing threats” and other sensitive topics, and report their findings to “internal stakeholders, up to and including executive leadership.”).

about 20[%] more than nonunion workers in similar jobs.”¹⁷⁰ These benefits are not limited to just skilled laborers either. Recent research shows when unions expand—whether at the national level or the state level—they tend to draw in unskilled workers and raise their relative wages, which helps alleviate inequality.¹⁷¹ These are the very benefits that Senator Wagner referenced when he discussed the moral and economic need to “insure a wise distribution of wealth.”¹⁷²

The NLRA protects the right to unionize of nearly every worker in the United States. In doing so, it provides for workers, regardless of their respective positions, wages or benefits, to form unions if they so choose. For those that do vote to unionize, they will more than likely benefit as a result. Agricultural laborers do not even get the choice. If they did, they could rally around many of the issues they face such as low wages, workplace discrimination, and working and living conditions. Right now, if an agricultural worker even mentions unionization, they can be fired by their employer without any repercussion.¹⁷³ As a result, just 1.7% of workers in agriculture and related industries are members of a union.¹⁷⁴

The federal government has recognized the importance of this right by statute, only to preclude the hard working agricultural laborer. The absurdity of the exemption is perfectly summarized in the following excerpt: “[s]lavery does not exist in labor environments that offer adequate worker protections like collective bargaining and other federally protected rights. A huge disparity exists between the exploitation and vulnerability lived by agricultural and domestic workers and the more reasonable and humane labor conditions existing in most other occupations.”¹⁷⁵ If the right to organize is traditionally valued and provides such aforementioned benefits, then to deny this right to millions of people who are disproportionately Hispanic and poor is morally unjust.

170. Susan Dynarski, *Fresh Proof that Strong Unions Help Reduce Income Inequality*, N.Y. TIMES (July 6, 2018), <https://www.nytimes.com/2018/07/06/business/labor-unions-income-inequality.html> [<https://perma.cc/W22A-V2SH>].

171. See Henry S. Farber et al., *Unions and Inequality Over the Twentieth Century: New Evidence from Survey Data*, 136 Q.J. ECON. 1325, 1374 (2021).

172. NLRB, *supra* note 7, at 15.

173. See Perea, *supra* note 10, at 127.

174. U.S. DEP’T OF LAB. STAT., UNION MEMBERS – 2021, at 8 (2021), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/V7PQ-85X4>].

175. See Perea, *supra* note 10, at 98.

IX. UNPROTECTED ORGANIZING

Despite lacking federal protection of their right to unionize, some agricultural unions have won significant improvements for their members. One of the more well-known unions is the United Farm Workers (UFW), which was led by Cesar Chavez, Dolores Huerta, and Gilbert Padilla.¹⁷⁶ Their work resulted in pay increases and the bettering of working conditions for farm laborers in the 1960s and 1970s.¹⁷⁷ They also “pav[ed] the way for landmark legislation in 1975 that codified and guaranteed agricultural workers’ right to unionize, bargain collectively with their employers and vote in secret-ballot elections in California.”¹⁷⁸ Their success in California, however, did not extend everywhere else nor did it persist with such vigor. “[Many] states did not follow, and many union gains in California have since been lost.”¹⁷⁹

Another such union is the Farm Labor Organizing Committee (FLOC), which is a member of the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO).¹⁸⁰ The FLOC was formed by Baldemar Velásquez in the 1960s in Ohio.¹⁸¹ Since its inception, the FLOC has successfully negotiated several contracts throughout the United States, many of which provided the means by which their members could voice concerns regarding working conditions and file grievances without fear of retaliation.¹⁸² The FLOC has also played a pivotal role in organizing guest workers who enter the United States as H-2A temporary agricultural workers.¹⁸³ As a result of their successful negotiations, the FLOC has provided the means for these workers to address issues such as wages, working

176. *Our Vision*, UNITED FARM WORKERS (Oct. 26, 2021, 10:38 AM), <https://ufw.org/about-us/our-vision/> [<https://perma.cc/6FFG-ZX5T>]; see also *United Farm Workers*, BRITANNICA (Sept. 24, 2021), <https://www.britannica.com/topic/United-Farm-Workers> [<https://perma.cc/G4DU-733Y>].

177. Maureen Pao, *Cesar Chavez: The Life Behind A Legacy of Farm Labor Rights*, NPR (Aug. 16, 2016), <https://www.npr.org/2016/08/02/488428577/cesar-chavez-the-life-behind-a-legacy-of-farm-labor-rights> [<https://perma.cc/YYG4-SVLW>].

178. *Id.*

179. “*The Cycle of Poverty*”: *Mexican-American Migrant Farmworkers Testify Before Congress*, *supra* note 164.

180. *About FLOC*, FARM LABOR ORGANIZING COMMITTEE, AFL-CIO (Oct. 26, 2021, 10:40 AM), <http://www.floc.com/wordpress/about-floc/> [<https://perma.cc/FEE6-3VDF>].

181. *Id.*

182. See *id.*; Virtual Interview with Baldemar Velasquez, *supra* note 152.

183. *About FLOC*, *supra* note 180; *H-2A Temporary Agricultural Workers*, U.S. CITIZENSHIP & IMMIGR. SERVS. (Oct. 26, 2021, 10:40 AM), <https://www.uscis.gov/working-in-the-united-states/temporary-workers/h-2a-temporary-agricultural-workers> [<https://perma.cc/RH9H-7MM9>].

conditions, and “transportation from their home areas in Mexico, health care, and immigration policies.”¹⁸⁴

Some people may interpret the successes of the UFW and the FLOC as evidence that there is no need for an amendment to the NLRA because they have amassed thousands of members without its protections. This interpretation, however, is an improper takeaway from the accomplishments of these unions. While they have been successful, they would likely have been all the more had they been able to organize farm workers with the privilege of not having to worry about retaliatory actions such as being fired or turned over to immigration services. Additionally, if farm laborers were included in the NLRA, then there may have been more examples of different labor unions and their successes. It is precisely because organizers realized the tremendous obstacle presented by attempting to organize such a workforce that they have repeatedly attempted to rescind the NLRA’s exemption of these types of temporary workers.¹⁸⁵ Unfortunately, these attempts have been unsuccessful.¹⁸⁶

X. WHAT CAN BE DONE?

If agricultural workers had the federally protected right to engage in union activity, they could more effectively coordinate campaigns for the issues they face. Such movements would help win better working and living conditions, better pay, health insurance, and would help address whatever other issues may arise.¹⁸⁷ The need for collective representation for agricultural workers is especially heightened because so many are already impoverished, have a only high school level education, or are in the United States undocumented.¹⁸⁸ These factors diminish the already lowered bargaining power held by agricultural workers, many of whom often cannot afford to look for other employment, are unfamiliar with the options available to them, and face the threat of deportation.

All that is minimally necessary in terms of amending the NLRA is to remove the agricultural worker exemption from the NLRA’s definition of employee. If this amendment to the definition is accomplished, then farm laborers—as covered under the definition of employee—would have their right to unionize protected under the Act. There is no overt answer as to why Congress has continuously rejected an amendment to the NLRA extending its protections to agricultural

184. *About FLOC*, *supra* note 180.

185. *See “The Cycle of Poverty”: Mexican-American Migrant Farmworkers Testify before Congress*, *supra* note 164.

186. *See id.*

187. *See Walters & Mishel*, *supra* note 4.

188. *See Farm Labor*, *supra* note 139.

workers. Nevertheless, and as this Note has argued, the covert reason has been to maintain an exploitable class of agricultural laborers. Workers who can be fired if they try to usurp the power imbalance.

At the time of the NLRA's passage, the southern Democrats were concerned with maintaining the wealth of the landowners. Today, based upon the exorbitant amount of money that agribusinesses spend on lobbying, with more than \$118 million spent in the 2016 presidential cycle alone, one may reasonably speculate to whom the politicians that oppose such an amendment may be beholden.¹⁸⁹

Recognizing the unlikelihood of such an amendment passing both chambers of Congress and being signed by the President, pragmatists may disavow any attempt altogether. Potential futility, however, should not completely discourage those who are concerned for farm workers' rights. Clearly, the overarching purpose of this Note is to argue for the removal of the exclusionary language. But the more fundamental purpose is to detail and espouse the need for change. People who not directly impacted should be, and hopefully after reading this Note are, aware of the issues faced by those who toil in the fields. The exploitation and oppression that farm workers face is an issue that should strike at the core of every United States citizen. Thus, while it is unlikely that such an amendment will pass any time soon, the paramount hope is that more people will stand in solidarity with the excluded workers.

Despite the need for removing exclusionary language, there are legitimate concerns with a simple amendment extending the NLRA's protections to farm workers. The structure and processes within the NLRA may not fit perfectly—without modification and flexibility—to every farm laborer's circumstances.¹⁹⁰ For example, there are certain crops in specific regions that are only harvested for a few weeks a year. This would be difficult to implement some of the NLRA's rigid representation procedures.¹⁹¹ However, such an approach presupposes that the right to unionize—and the steps required to form a union—would be respected by solitary farms. Instead, a farm labor union could—and arguably should—exist externally to any single farm, such that union elections, for example, are not held at or solely binding on isolated farms. There does not appear to be any obstacle which would prevent Congress from both amending the NLRA to remove the farm worker exception and tailor the remainder of the statute to fit the specific needs of agricultural work.

189. See *Agribusiness*, OPEN SECRETS (Oct. 26, 2021, 10:41 AM), <https://www.opensecrets.org/industries/indus.php?ind=A&cycle=2014> [<https://perma.cc/Q9V2-W8ZB>].

190. See Virtual Interview with Baldemar Velasquez, *supra* note 152.

191. See *id.*

XI. CONCLUSION

For Americans living in the contemporary era, the lineage of the exploitation of agricultural laborers has been inherited. The decision to exclude farm workers was not their own. Nevertheless, agricultural laborers continue to face extreme economic, social, and political hardship. As was the case in the 1930s, this hardship disproportionately impacts nonwhite and poor workers. For contemporary farm laborers, a federally protected right to unionize will assist in balancing the power between agricultural employer and employee. Striking this balance was the goal at the time of the NLRA's introduction and should be a goal today. Without it, the systemic exploitation will inevitably continue. Without change, this exploitation will no longer just be an inherited evil. Instead, today's inaction will be tomorrow's complicity. In the influential words of Cesar Chavez, "They have imposed hungers on us, and now we hunger for justice."¹⁹²

192. *Education of the Heart: Cesar Chavez in His Own Words*, *supra* note 13.