Community Supported Agriculture and Community Labor: Constructing a New Model to Unite Volunteers and Employers

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Community Supported Agriculture and Community Labor: Constructing a New Model to Unite Volunteers and Employers

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Abstract:

Community Supported Agriculture (CSA) is a farm philosophy and marketing strategy that creates a union between consumers and farmers. Extending beyond the traditional buyer-seller relationship, CSA farmers invite customers to participate in food production in a variety of scenarios the authors refer to as “community labor.” But community labor entails a serious paradox. Traditional employment law doctrine envisions autonomous competition between laborer and employer, and makes little room for these novel, community-based relationships. More importantly, rigid application of employment law structures undermines many of the values embedded in the CSA movement and may limit its continued viability and growth. Constructed as an oppositional force to the status quo—particularly the highly industrialized food system—the CSA model provides a unique opportunity to reject the current competition-based employment rules in favor of a more democratic farm labor system characterized by mutual gain and shared values. Accordingly, employment law should take a page from critical legal theory and develop a more nuanced view of worker relationships in the CSA context that support rather than undermine the game-changing potential of community labor in local food systems.

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I. Introduction

Community Supported Agriculture (CSA) is a farm philosophy and marketing strategy with surging popularity across the United States. Eager to join forces, the union between consumers and farmers reaches beyond the traditional buyer-seller relationship, with CSA farmers inviting customers to participate in food production by working on the farm in a variety of positions the authors refer to as “community labor.” But community labor entails a serious paradox. Traditional employment law doctrine envisions autonomous competition between laborer and employer, and makes little room for these novel relationships. More importantly, rigid application of employment law structures undermines many of the values embedded in the CSA movement and may limit its continued viability and growth. Constructed as an oppositional force to the status quo—particularly the highly industrialized food system—the CSA model provides a unique opportunity for pareto improvement of an employment environment that rejects the current competition-based rules in favor of mutual gain and shared values. Accordingly, employment law should take a page from critical legal theory and develop a more nuanced view of relationships in the CSA context that support rather than undermine the game-changing potential of community labor in local food systems.

II. CSA Origins, Growth, and the Phenomenon of Community Labor
Before discussing the paradox of CSA community labor, this paper explores CSA as a concept and as a practice. Generally speaking, CSA is an approach to growing and marketing agricultural products directly to consumers in a cooperative manner.\textsuperscript{1} CSA programs vary widely across the country, but perhaps the defining attribute of a CSA is the advance purchase by the customer of a regular “share” of the farm’s production over an entire season.\textsuperscript{2} By buying into the farm’s overall production, CSA customers are considered “members” or “shareholders” of the farm.\textsuperscript{3} In return, members receive a portion of the farm’s harvest on a regular basis, which contains a diversity of seasonal products. Members generally cannot choose precisely which products they wish to receive or quantities. Instead, members commit to accepting the constraints presented by the weather, climate, and the farmer’s skills.\textsuperscript{4} By making an advance purchase and allowing for unpredictability, the member is said to share in the risk and reward of farming along with


\textsuperscript{2} Marne Coit, Jumping on the Next Bandwagon: An Overview of the Policy and Legal Aspects of the Local Food Movement, 4 J. FOOD L. & POL’Y 45, 59 (2008).

\textsuperscript{3} Id., at 59.

\textsuperscript{4} Id., at 59.
the farmer.\(^5\) If the season is good, members share in the bounty. If the season is challenging, the member bears the burden of low production or poor quality together with the farmer.

The concept has international roots in Switzerland and Japan\(^6\), but the phrase Community Supported Agriculture, and its unwieldy acronym, as representative of a marketing program are uniquely American.\(^7\) Popular history indicates that Indian Line Farm, in South Egremont, Massachusetts crafted the phrase and the first American CSA model after a local farmer, Robyn Van En, pondered ways to increase local investment in her farm operation.\(^8\) Van En and a group of local citizens gathered weekly to craft a system where farm members pay a share of the farm’s production costs up front, with the expectation that they will later reap the harvest together with the farmer.\(^9\) Eleven years after the experiment in CSA began, the farmer concluded, “Equally empowering to both the community and the farmers, CSA offers solutions to common problems facing farmers and communities worldwide. Ultimately, the concept is

\(^5\) Laura B. DeLind, Considerably more than vegetables, a lot less than community: The dilemma of community supported agriculture, in Fighting for the Farm: Rural America Transformed, 179-200 (Jane Adams, ed. 2003).


\(^7\) Henderson, supra note #, at xv, 267; Bibliography, supra note #.

\(^8\) Henderson, supra note #, at xiii.

\(^9\) Henderson, supra note #, at xiv.
capable of engaging and empowering people to a capacity that has been all but lost in this modern world."\textsuperscript{10}

The CSA concept clearly resonates with American consumers as well. From the humble beginning of a single CSA at Indian Line Farm in 1985, the market has expanded tremendously. Ten years later, a study by a CSA advocate put the number of CSA farms at 600, nationwide.\textsuperscript{11} By 2007, CSA had garnered the attention of the USDA such that the agency included the marketing arrangement in its 10-year census of agriculture. 12,549 respondents indicated that they had sold product through a CSA structure.\textsuperscript{12} However, even the USDA’s numbers from 2007 likely reveal only the tip of the iceberg that is CSA in 2013. A study conducted in Kentucky between 2007 and 2009 showed an average sales increase of 50% within that time frame, a growth rate confirmed anecdotally in the broader Midwest region.\textsuperscript{13} Another study tracked California households purchasing a CSA share from 7,410 in 2005 to 32,938 in 201— an increase of 444%.\textsuperscript{14} By one estimate, at least 380,000 American households participated in a CSA marketing arrangement in its 10-year census of agriculture. 12,549 respondents indicated that they had sold product through a CSA structure.\textsuperscript{12} However, even the USDA’s numbers from 2007 likely reveal only the tip of the iceberg that is CSA in 2013. A study conducted in Kentucky between 2007 and 2009 showed an average sales increase of 50% within that time frame, a growth rate confirmed anecdotally in the broader Midwest region.\textsuperscript{13} Another study tracked California households purchasing a CSA share from 7,410 in 2005 to 32,938 in 201— an increase of 444%.\textsuperscript{14} By one estimate, at least 380,000 American households participated in a CSA marketing arrangement in its 10-year census of agriculture. 12,549 respondents indicated that they had sold product through a CSA structure.\textsuperscript{12} However, even the USDA’s numbers from 2007 likely reveal only the tip of the iceberg that is CSA in 2013. A study conducted in Kentucky between 2007 and 2009 showed an average sales increase of 50% within that time frame, a growth rate confirmed anecdotally in the broader Midwest region.\textsuperscript{13} Another study tracked California households purchasing a CSA share from 7,410 in 2005 to 32,938 in 201— an increase of 444%.\textsuperscript{14} By one estimate, at least 380,000 American households participated in a CSA marketing arrangement in its 10-year census of agriculture. 12,549 respondents indicated that they had sold product through a CSA structure.\textsuperscript{12} However, even the USDA’s numbers from 2007 likely reveal only the tip of the iceberg that is CSA in 2013. A study conducted in Kentucky between 2007 and 2009 showed an average sales increase of 50% within that time frame, a growth rate confirmed anecdotally in the broader Midwest region.\textsuperscript{13} Another study tracked California households purchasing a CSA share from 7,410 in 2005 to 32,938 in 201— an increase of 444%.\textsuperscript{14} By one estimate, at least 380,000 American households participated in a CSA

\textsuperscript{10} Id., at xvi.

\textsuperscript{11} Id., at xv.


\textsuperscript{13} TIMOTHY WOODS, ET AL., 2009 SURVEY OF COMMUNITY SUPPORTED AGRICULTURE PRODUCERS, AGRICULTURAL ECONOMICS EXTENSION SERIES 2009-11 5-6 (2009).

\textsuperscript{14} RYAN GALT, ET AL., COMMUNITY SUPPORTED AGRICULTURE (CSA) IN AND AROUND CALIFORNIA’S CENTRAL VALLEY 20 (2011), available at

\textsuperscript{10} Id., at xvi.

\textsuperscript{11} Id., at xv.


\textsuperscript{13} TIMOTHY WOODS, ET AL., 2009 SURVEY OF COMMUNITY SUPPORTED AGRICULTURE PRODUCERS, AGRICULTURAL ECONOMICS EXTENSION SERIES 2009-11 5-6 (2009).

\textsuperscript{14} RYAN GALT, ET AL., COMMUNITY SUPPORTED AGRICULTURE (CSA) IN AND AROUND CALIFORNIA’S CENTRAL VALLEY 20 (2011), available at

\textsuperscript{10} Id., at xvi.

\textsuperscript{11} Id., at xv.


\textsuperscript{13} TIMOTHY WOODS, ET AL., 2009 SURVEY OF COMMUNITY SUPPORTED AGRICULTURE PRODUCERS, AGRICULTURAL ECONOMICS EXTENSION SERIES 2009-11 5-6 (2009).

\textsuperscript{14} RYAN GALT, ET AL., COMMUNITY SUPPORTED AGRICULTURE (CSA) IN AND AROUND CALIFORNIA’S CENTRAL VALLEY 20 (2011), available at
program in 2010, and by some estimates, at least 30% of CSA farms maintain a waiting list for membership, suggesting that CSA will continue its growth trajectory.

The tremendous growth of CSA provides some insight into U.S. farming, from both a consumer and farmer perspective. Beginning with the consumer perspective, a CSA is attractive for reasons that are intuitive given a social awareness of environmental and health issues. Members choose to join CSAs primarily out of a desire to support local farmers, enjoy fresh foods, and eat locally grown agricultural goods. The majority of CSA members make a


16 WOODS, supra note 13, at 9.


conscious choice to reject the current food system in favor of a smaller, more personal agricultural scale.\textsuperscript{20} Moreover, CSA consumers are motivated by the environmental and social benefits locally grown foods claim to foster.\textsuperscript{21} Despite these sound bite-worthy motivations, research into the nature of demand for CSA is complex because of the unique, experiential quality of a CSA. By purchasing a CSA share, consumers forgo choosing their produce and drive to a perhaps-inconvenient pickup site, without necessarily paying less for the product. Modeling these decisions within an economic framework of rationality is especially complex.\textsuperscript{22} Considering the unpredictability and lack of choice, some may question the long-term viability of the model. Although it is true that CSA requires a household to alter eating habits, in fact those that do change are much more likely to join again, indicating that consumers welcome the changes CSA brings to their kitchen habits.\textsuperscript{23}


\textsuperscript{22} See John M. Polimeni, et al., The Demand for Community Supported Agriculture, 4 J. OF BUS. & ECON. RESEARCH 2, (2006).

\textsuperscript{23} JAN PEREZ, ET AL., COMMUNITY SUPPORTED AGRICULTURE ON THE CENTRAL COAST: THE CSA MEMBER EXPERIENCE, RESEARCH BRIEFS, CENTER FOR AGROECOLOGY AND SUSTAINABLE FOOD
As for the farmer’s perspective, CSA offers a viable business model for a small operation that otherwise would struggle in commodity-based food production. The CSA concept addresses an intractable problem for an agricultural business; the means of production need to be purchased from nine months to one year ahead of the product’s sale. CSA allows a farmer to source part of the season’s production costs directly from members rather than relying on an operating loan—an important benefit for smaller scale or beginning farm operations. Of farmers who participated in one 2004 study, the vast majority cited the economic aspect of CSA as the primary reason for choosing the model.\textsuperscript{24} As compared to other agricultural marketing systems, CSA farmers found improved ability meet both operating costs and farmer compensation targets.\textsuperscript{25} CSA is also a far more secure sales outlet than commodity sales that rely on small margins and large volumes, and are even more secure than weekly farmers’ markets.\textsuperscript{26} By the

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\textbf{SYSTEMS, UC SANTA CRUZ 4 (2003), available at http://escholarship.org/uc/item/5wh3z9jg}
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(finding that of those who made a change 84\% renewed membership as opposed to 60\% of those who did not).

\textsuperscript{24} \textit{OBERHOLTZER, supra} note 19, at 10-12.

\textsuperscript{25} \textit{LASS, supra} note 18, at 22.

numbers alone, CSA customers spend 43% more than those who shop at farmers markets.\textsuperscript{27} The connectedness to consumers and customer feedback make the lifestyle rewards of CSA farming attractive as a grower.\textsuperscript{28} Farm events and festivals build local networks\textsuperscript{29} and involving customers in the farm decision-making can increase overall efficiency.\textsuperscript{30} Lastly, farmers feel good about their contribution to environmental sustainability as the majority of CSA farmers feel CSA has allowed them to improve the quality of their farmland.\textsuperscript{31}

Hardly a happy coincidence, the benefits of CSA are precisely why the model emerged in the first place.\textsuperscript{32} The key characteristics of CSA- an advance payment for an unpredictable array of seasonal produce that varies with production levels- was imagined to address the isolation and

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\textsuperscript{27} Curtis, supra note 15 at 2.

\textsuperscript{28} Lass, supra note 18, at 22.

\textsuperscript{29} Oberholtzer, supra note 19, at 10.


\textsuperscript{31} Lass, supra note 18, at 22.

\textsuperscript{32} The CSA model has found unique adaptations in countries around the world, each of which address the individual needs of the food communities in those countries. See Henderson, supra note 6, at 258-271.
pressure to go big and go global that many farmers felt in the 1980’s. Customers join a CSA to address what they also view as “fundamental problems within the food system.” CSA has a complex and lofty genesis, as sociologist Laura DeLind describes, “Early promoters took great pains to explain that CSA was ‘not just about vegetables.’ This distinction is essential to CSA and highlights its dual or hybrid personality. On the one hand, CSA is a marketing arrangement or ‘technique’- a means for individual farmers and individual consumers to resist and disengage from the food system. ... On the other hand, CSA is something quite different- a means with farming at its center, for reestablishing the connections and responsibilities that extend beyond self-interest and define community and create commonwealth.”

33 DeLind, supra note 5, at 195-196. The pressure was hardly imagined as farmers were exhorted to “get big or get out” and plant “fencerow to fencerow” by Ezra Taft Benson and Earl Butz, USDA Secretaries from 1953-1961 and 1971-1976, respectively. See William S. Eubanks II, A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation’s Tax Dollars, 28 STAN. ENVTL. L.J. 213, 224 (2009) (discussing Secretary Butz’s policies); Pete Daniel, Not Predestination: The Rural South and Twentieth-Century Transformation, in THE AMERICAN SOUTH IN THE TWENTIETH CENTURY 91, 97 (Craig S. Pascoe et al. eds., 2005) (discussing Secretary Benson’s policies). Secretary Butz added further encouragement for the consolidation and industrialization of agricultural production with his slogan of “adapt or die.” See Jim Chen, Get Green or Get Out: Decoupling Environmental from Economic Objectives in Agricultural Regulation, 48 OKLA. L. REV. 333, 335 (1995).

34 Ostrom, supra note 20, at 116.

35 DeLind, supra note 5, at 195.
A. Worker Shares

Capital financing and cash flow are not the only problems faced by small farm operations. Labor is the single largest cost on a vegetable farm, accounting for about half the variable production expenses. In addition, CSA farms commonly grow between thirty and fifty different fruit and vegetable items, further limiting an operation’s ability to gain efficiency through mechanized solutions. Adding to the labor needs, the majority of CSA farms use organic methods. Without chemical weed control, hand labor is often the only option. Hiring more employees may theoretically help resolve this issue, but sourcing labor is a problem for agriculture as a whole.

Just as community integration provided a ready-made solution to operating credit and sales predictability, CSAs have turned to the community to address labor issues. For the first CSA operation in the United States, working on the farm was a mandatory membership


37 EMILY GIVENS, COMMUNITY SUPPORTED AGRICULTURE, VIRGINIA COOPERATIVE EXTENSION 2906-1301 1 (2009).

38 GALT, supra note 14, at iii. OBERHOLTZER, supra note 19, at 10.

39 See generally, CALVIN supra note 36.
Involving members in the actual work of the farm has remained central to the CSA concept. The largest directory of CSA farms in the country lists whether or not work is required of each CSA’s members. Generally speaking, CSA farms involve members in a wide variety of tasks from writing newsletter articles, recruiting members, planting, weeding, and harvesting. Although efficiency concerns have driven some farmers away from direct member involvement, community labor nonetheless remains a central element of many CSA farms.

40 HENDERSON, supra note 6, at 99-108.

41 www.Localharvest.org

42 Ostrom, supra note 20, at 109-113.

43 Unpublished survey results from the authors’ work indicate that of 38 farms, zero required members to volunteer. Similarly, a Midwestern coalition of 49 farms had only one that required members to volunteer in 2013. FAIRSHARE CSA COALITION, FULL FARM LIST http://www.csacoalition.org/our-farms/full-list/. Member-obligated volunteering is on the decline, but still present in the CSA community. This may be because members still provide a small portion of the incredible amount of labor required to produce vegetables. See ERIN TEGTMEIER AND MICHAEL DUFFY, LEOPOLD CENTER FOR SUSTAINABLE AGRICULTURE, COMMUNITY SUPPORTED AGRICULTURE (CSA) IN THE MIDWEST UNITED STATES: A REGIONAL CHARACTERIZATION 13 (2005). Many farmers now offer a membership option that allows, rather than requires, a member to work for their share. Of a Midwestern coalition of 49 farms, 29 or almost 60% offered the opportunity to work for a share in 2013. FAIRSHARE CSA COALITION, FULL FARM LIST http://www.csacoalition.org/our-farms/full-list/. 
Worker shares are also a traditional and relatively common way to integrate the community into the labor arrangement on a CSA farm. Around 50% of CSA farms in the Midwest region offer these work opportunities to members. As described above, a worker share is a unique arrangement where a CSA member works rather than pays cash in exchange for a CSA membership. Worker shares generally commit in advance to a specific volunteer shift or number of hours. Farmers often allocate a specific number of worker shares each year and have an application process to fill what many view as coveted positions.

B. Interns and Training Opportunities

In addition to member-workers, CSAs are a common spot for training beginning farmers through internship programs. In turn, interns and apprentices comprise a significant component of CSA farm labor. In California’s Central Valley, almost 30% of farms with employees use interns. Other regional studies echo the California study and find that interns are a significant element of CSA farm. Farmers are not the only ones indicating that interns

44 TEGTMEIER, supra note 43, at 13, (finding 53% of Midwestern CSA farms offer worker share positions); FAIRSHARE CSA COALITION, supra note 43.

45 HENDERSON, supra note 6, at 99-108.

46 Id.

47 Id.

48 GALT, supra note 14, at 15.

49 See LASS, supra note 18, at 11; TEGTMEIER supra note 43, at 6.
are important. Among beginning farmers themselves, 74% ranked apprenticeships as the single most valuable tool available to beginning farmers.\textsuperscript{50} To fill this need for farmer training and farm labor, organizations around the country whether governmental,\textsuperscript{51} nonprofit,\textsuperscript{52} or industry groups,\textsuperscript{53} are devoted to arranging and placing beginning farmers in internship opportunities—often with CSAs.

Although the CSA community commonly refers to these workers beginning farmers as “interns,” their legal status is much more ambiguous. The agricultural community generally conflates interns, apprentices, and other educational positions that pay less than the minimum


\textsuperscript{52} See e.g., Rogue Farm Corps, http://roguefarmcorps.org (last visited July 17, 2013); Illinois Farm Beginnings, http://www.illinoisfarmbeginnings.org/ (last visited July 17, 2013);

wage in cash as “interns.” Based on a review of over 100 farm internships offered for 2013, they are generally seasonal positions that begin in February or March and extend through the October or November growing season.\(^\text{54}\) Farm interns often assist on a wide variety of tasks from planting, to weeding, harvesting, and marketing products.\(^\text{55}\) Many interns learn the basics of farm equipment maintenance or specialized production techniques.\(^\text{56}\) These positions often come with a stipend of $300-$1000 per month, which is supplemented with free or low-cost housing and farm products.\(^\text{57}\) Although positions are billed as full-time, interns frequently work 50-60 hours per week.\(^\text{58}\)

This article collectively refers to on-farm internships, worker shares, and CSA members who are obligated to volunteer on the farm as “community laborers” and the phenomenon of these unique work-for-food arrangements as “community labor.” The common denominator across these work positions is that the individuals are motivated by their desire to learn farming and


\(^{55}\) Id.

\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id.
understand food production. In order to gain that knowledge, they are willing to work for in-kind wages of food, often at a rate less than the minimum wage equivalent.

C. Risk Management

Working with community laborers may seem like a simple cost-reduction strategy. However, on closer examination, these arrangements illustrate a deeper complexity within the country’s food system. Community labor allows a CSA farmer to manage risk where traditional agricultural risk management options are not available. For example, CSA farmers may be

59 The annual results of one regional intern-matching service, indicate that 80-90% of farmers using interns cite “providing farm labor” as a primary motivation for using interns. NEW ENGLAND SMALL FARM INSTITUTE, ON-FARM WORKSTAYS PROJECT YEAR END REPORT 1 (2008), available at http://www.smallfarm.org/uploads/uploads/Files/On%20Farm%20Workstays%20Project.pdf

60 Surveying the anecdotal reasons why CSA members prefer to work on CSA farms reveals several interesting motivations. As one worker share wrote to a farmer, “I’ve been despairing a lot lately about our food system and the choices we are given- so it is reassuring and heartening to me to see that there are alternatives… albeit struggling ones. Besides the delicious lunch, the fine company, and the pleasures of working a little bit on the farm, you gave me some hope today.” HENDERSON, supra note 6, at 99-108.

61 CSA farms tend to operate on very small acreage, JOHN HENDRICKSON, GROWER TO GROWER: CREATING A LIVELIHOOD ON A FRESH MARKET VEGETABLE FARM 4 (2006), available at
more vulnerable to inevitable insect, weather, and other uncontrollable influences because of the limited use of chemical controls. 62 Although crop insurance is available for agricultural commodities, 63 a farm with a diverse vegetable production often cannot buy crop insurance;

http://www.cias.wisc.edu/wp-content/uploads/2008/07/grwr2grwr.pdf. Although CSA profitability is higher on a per-acre basis relative to more traditional commodity agriculture, it remains limited. “Based on data collected in this project, a hypothetical six-acre CSA farm could supply food for 150-200 member households, have gross sales of $80,000 and a net cash income of around $40,000.” Id. at 6. Most CSA farmers cannot finance risk management products such as crop insurance. CSA farmers do not generate enough revenue to set aside significant reserves to operate through difficult growing years. Id.

62 Organic production often leads to more variable yields as the skill of the farmer and the vagaries of environment fluctuate. Caution is urged in concluding that variable production results in less profitability however, as studies show the price premium and reduced input costs make up for variations. See e.g., James C. Hanson, et al., Organic versus conventional grain production in the mid-Atlantic: An economic and farming system overview, 12 AM. J. OF ALTERNATIVE AGRICULTURE 2 (1997).

63 Crop insurance is available on a per-crop basis for many agricultural crops. However, insurance is available only in selected areas where the crop is grown commercially on a large scale. For example, insurance for a pumpkin crop is available only in 10 counties located in northwest Illinois, where the commercial crop for the pumpkin canner, Libby’s, is located. USDA RISK MANAGEMENT AGENCY, 2012 COUNTY CROP PROGRAMS, http://www.rma.usda.gov/data/cropprograms.html; USDA RISK MANAGEMENT AGENCY,
and where it is available, the price is unreasonable for almost all growers. Moreover, even if available crop insurance products make financial sense, it often is not available to beginning farmers as it requires several years of established revenue generation to determine the coverage. As for other federally provided risk management programs such as direct and counter-cyclical payments, neither are available to a farmer who grows fresh vegetables.

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66 The status of these programs uncertain as of this writing, as ongoing farm bill negotiations may cancel these programs in favor of crop insurance only.
under a CSA system. With few other options, farmers look to community-based resources such as labor to reduce cash expenses, while also incorporating a flexibility to support the farm’s survival. If a serious drought threatens the crop, farmers who rely on community labor have the flexibility to let labor go, which conveniently also alleviates their obligation to provide product to the worker shares.

D. Education

Community labor on CSA farms also provides a solution to the anonymous, opaque system of food production that concerns many consumers and motivates young people to a career as a farmer. The public is increasingly interested in learning where their food comes from and the nuances of its production. These community labor arrangements may reflect a new consumer understanding of the food system, and worker share programs are very popular. Anecdotally, many farms with worker share programs have no problem selling out of shares reserved for the program. At the same time farming is resurging as a career choice among educated young

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67 LASS, supra note 18, at 23.


69 A survey of the members of the FairShare CSA Coalition in mid-summer 2013 revealed all 29 farms with worker share options had sold out. FAIRSHARE CSA COALITION, FULL FARM LIST http://www.csacoalition.org/our-farms/full-list/.
people, and they are choosing sustainable practices by large measure. However, beginning farmers have very few choices when considering how to learn about food production or the particular skills needed to execute a successful CSA program. These farmers are seeking internship and apprentice programs not available through traditional post-secondary education sources. Left with few options, many are willing to forgo financial compensation to gain the essential practical experience.

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70 See, Dinesh Ramde, More Young People See Opportunity in Farming, ASSOCIATED PRESS, December 21, 2011.

71 In 2013, legislation was introduced into the House and Senate as part of the Beginning Farmer and Rancher Opportunity Act of 2013 to address this problem. HR 1727, 113TH CONG. (2013); S 837, 113TH CONG. (2013). See also, advocacy by organizations such as the National Young Farmers’ Coalition and the National Campaign for Sustainable Agriculture. NATIONAL YOUNG FARMERS’ COALITION, NEWS ROOM, FARM BILL, BEGINNING FARMER AND RANCHER OPPORTUNITY ACT, http://www.youngfarmers.org/beginning-farmer-and-rancher-opportunity-act-of-2013/; NATIONAL SUSTAINABLE AGRICULTURE COALITION, BEGINNING FARMER AND RANCHER OPPORTUNITY ACT, http://sustainableagriculture.net/our-work/beginning-farmer-bill/

72 In response to alarm by constituents after realizing that current less-than-minimum wage internships were not authorized under federal minimum wage law, farm residents of Washington State agitated for and secured the passage of bill establishing a pilot program for unpaid internships on farms. 2010 Wash. Sess. Laws 1084 (codified at WASH. REV. CODE §§ 49.12.465, 50.04.237, 51.16.235) (expired Dec. 31, 2011). See also, LUSHER SHUTE, supra note 50, at 19, 36.
Having established that community labor is both an integral part of the CSA business model and a relevant social construct in light of the local food movement, the following section analyzes community labor within an employment law context. In particular, this article will explore how community labor fails to align neatly with employment law due, in large part, to the unique economic relationship employer and employee. The arc of this argument is perhaps best traced through a sports analogy. Employment law can be described as a set of rules by which two opposing teams—the employee and the employer—engage each other. Community labor on CSA farms, by contrast, switches up those teams. Instead of employee and employer on opposite sides, employee and employer unite against a new opponent—the conventional food system as a whole. CSA farmers and community labor participants are not so much trying to rewrite the rules as they are playing a different game than conventional business. Employment law has limited accommodations for such creativity. As the next section discusses, visionary community labor arrangements may expose many CSA farmers to substantial legal liability.

III. Community Labor in a Minimum Wage Law Context

A predominant study of CSA farm economics surveyed growers about the number of workers on the farm.\textsuperscript{73} The study specifically conflated interns and apprentices within “workers,” and

\textsuperscript{73} LASS, supra note 18.
asked how many non-family workers were used on the farm. 68 percent of responding farms had between one and 4 workers. Farmers were then asked how many of the workers were paid a wage: less than half of all CSA farm workers were paid a wage. But, the survey then allowed farmers to indicate that “educational experience” was provided as compensation, a misunderstanding echoed in the authors’ anecdotal experience, as farmers routinely ask how to deduct educational value from the worker’s wages.

At a baseline level, the CSA farmer needs to know if community laborers, “volunteer” or otherwise, must be paid the minimum wage. This determination, of course, hinges on the definition of an employee versus a volunteer, and, due to the agricultural nature of the business, the number of employees. For example, the federal minimum wage contains an exemption for agricultural employment on farms that employ approximately 6 full-time

\footnote{LASS, supra note 18, at 11.}

\footnote{Id.}

\footnote{LASS, supra note 18, at ii, 11.}

\footnote{Id.}
employees or fewer. Many states adopt this same exemption. Thus, the threshold analysis becomes who is or is not an employee, such that the farm business can determine the relevant threshold.

Based on evidence gathered by the authors from workshops, surveys, and personal conversations, many CSA farmers believe their community laborers are not employees but rather volunteers. If pressed further, such farmers often explain that the laborer has agreed to work under the established arrangement and thus, employment laws do not apply to the situation. However, from a legal perspective, volunteer exemptions from minimum wage law

78 Under the FLSA, agricultural labor performed on a small farm is exempt from the minimum wage. Small farms are those with fewer than 500 man days of labor in each quarter of the previous year. A man day is equivalent to one day in which one individual performs at least one hour of work. Farms that do not fall within the 500 man day exception must pay their workers the federal minimum wage. 29 U.S.C. § 213(a)(6) (West); 29 C.F.R. § 780.305.

are complex and based on scant statutory and case law that are unlikely to apply in the CSA context.\textsuperscript{80}

The FLSA defines “employ” as, “to suffer or permit to work,” which would appear to gather volunteers under its broad umbrella.\textsuperscript{81} The first test of this statutory definition of the FLSA arose in 1947. In \textit{Portland Terminal},\textsuperscript{82} men training to operate railcar bakes brought suit to receive the minimum wage under the FLSA. The brakemen in this case, who had not been hired and did not expect to be hired, followed experienced brakemen around as they performed their duties on the rail yard for three days, eventually testing the operation of the brakes for themselves.\textsuperscript{83} In deciding that the trainee brakemen did not fall under the FLSA, the Supreme Court created the legal distinction between “trainees” and employees for the purposes of the minimum wage.\textsuperscript{84}

Since then, \textit{Portland Terminal} has served as the basis for both an intern and volunteer exception to the minimum wage requirements of the FLSA.\textsuperscript{85} However, the general theory that

\begin{footnotesize}
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    \item \textsuperscript{80} Todaro v. The Twp. of Union, 27 F.Supp. 2d 517, 536-7 (D.N.J. 1998).
    \item \textsuperscript{81} 29 U.S.C. § 203(g), (2006).
    \item \textsuperscript{82} Walling v. Portland Terminal Co., 330 U.S. 148 (1947).
    \item \textsuperscript{83} \textit{Portland Terminal}, 330 U.S. at 149.
    \item \textsuperscript{84} \textit{Portland Terminal}, 330 U.S. at 157.
    \item \textsuperscript{85} See U.S. DEP’T OF LABOR, \textsc{Fact Sheet #71: Internship Programs Under The Fair Labor Standards Act} (2010), (intern exception); \textit{Alamo}, 471 U.S. at 301-303 (volunteer exception).
\end{itemize}
\end{footnotesize}
interns and volunteers should have an exception is the only clear element of the matter. The manner in which courts and federal agencies have applied *Portland Terminal* to a range of volunteer and internship experiences varies widely. Three general factors can be distilled from court rulings and U.S. Department of Labor, Wage and Hour Division (“WHD”) opinion letters; these factors are discussed below. Although source materials are limited to interpretation of federal minimum wage law, the reasoning is persuasive in those states adopting corollary acts and the agricultural exemption have been adopted.

A. Competitive Advantage Gained by Employer Through Displacement of Employees

86 *See infra* Part II.

87 *Id.*

In enacting the FLSA, Congress sought to place all businesses on the same playing field regarding worker wages.\textsuperscript{89} In furtherance of this general intent, courts have held that volunteers must be paid the minimum wage in situations where use of the volunteer provides the employer a competitive advantage,\textsuperscript{90} thereby removing employer incentives to pressure workers to assume volunteer service.\textsuperscript{91}

Although courts and WHD have used a variety of methods to determine if a business is gaining a competitive advantage, each inquiry centers on whether the volunteer has displaced a paid employee. If the volunteer fills a role that is part of the regular, necessary complement of workers, then a paid employee has been displaced.\textsuperscript{92} Displacement may also take the form of a reduction in hours for current employees.\textsuperscript{93} Employee displacement may also be implied. For example, if volunteers perform the same work as otherwise regularly employed persons, the court may presume an employee has been displaced.\textsuperscript{94}


\textsuperscript{90} \textit{See infra} Part II.

\textsuperscript{91} Alamo, 471 U.S. at 302.


\textsuperscript{93} U.S. Dep’t of Labor, Wage and Hour Division, Opinion Letter, FLSA2009-2.

\textsuperscript{94} \textit{Id.}; Donovan, 686 F.2d at 272; Reich v. Parker Fire Prot. District, 992 F.2d 1023, 1029 (10t Cir. 1993).
The supervisory structure for volunteers is important. Where employees supervise volunteers, the court may assume that no employee has been displaced. This is because the additional supervisory labor negates any additional work the volunteer may accomplish. However, if a volunteer supervises fellow volunteers, then an employee has likely been displaced. Another indirect indication of employee displacement is whether the business could continue to provide the same level of service or production without the volunteers. If not, then employees have been displaced.

Despite the restrictive interpretations, courts have identified two circumstances where a volunteer has not conferred a competitive advantage. In the first situation, the employer created a new position especially for the volunteer who, as a conscientious objector, was required to donate a year of service. In the second case, employees chose to work in a highly...

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95 Solis v. Laurelbrook Sanitarium and School, Inc., 642 F.3d 518, 530-531 (6th Cir. 2011).

96 Laurelbrook, 642 F.3d at 530-531.

97 Id.


99 Penn Community Services, Inc. v Isaacson, 450 F.2d 1306, 1310 (4th Cir. 1971). (finding that because “Plaintiff… cannot be said to have displaced a bona fide applicant who desired to sell his services at prevailing rates,” combined with the plaintiff’s voluntary acceptance of the position, indicated he was not an employee.)
non-traditional employment setting out of religious and educational motives.\textsuperscript{100} The court determined that the facility was not in competition with other businesses for labor and thus the displacement of such unique employees did not confer a competitive advantage.

Each of the courts’ analyses may be excellent for routing out when an employer is using volunteers as a means to gain a competitive advantage. In so doing, the courts have also enshrined a vision of autonomous competition. Thus, as discussed below, the historical vision of autonomous competition between employer and employee creates an environment potentially hostile to the CSA model.

Courts are likely to classify community labor arrangements as an employee/employer relationship. To the casual observer, community laborers perform the same work as regular farm employees, comprising the necessary, normal compliment of farm labor. As noted earlier, many CSAs could not maintain the same level of production without community laborers. If interns or worker shares fail to show up for a shift, the work is likely done by the farmer or by other paid employees. From the farmers’ purely economic perspective, training mechanisms are secondary to meeting the labor needs of the farm.

\textsuperscript{100} See Laurelbrook, 642 F.3d at 530-531, FN 4.
A more nuanced approach to community labor in the CSA context, however, could reframe the displacement and competitive advantage analysis. As with the conscientious objector\textsuperscript{101} and religiously-motivated volunteers,\textsuperscript{102} the positions created for community laborers may not exist otherwise. Most commercial farms do not hire part-time workers and the diversified smaller-scale farm operations hosting community laborers tend to exist on the margins of agricultural production.\textsuperscript{103} Moreover, working with the community serves what many see as the CSA model’s mission of education and transformation of the food supply system.

In some respects, engagement of community labor may not create a competitive advantage, but rather increase competition. Unlike training positions in non-farming industries,\textsuperscript{104} a farm intern is not seeking resume building experiences for a future employment opportunity.

\textsuperscript{101} Isaacson, 450 F.2d at 1310.

\textsuperscript{102} Laurelbrook, 642 F.3d at 530-531.

\textsuperscript{103} As of 2007, 12,549 out of the 2,204,792 total farms surveyed, or .05% of farms use CSA as a marketing strategy. (U.S. Department of Agriculture, National Agricultural Statistics Service (USDA NASS), 2007 USDA Census of Agriculture, Table 1: Historical Highlights (2007); Hendrickson, supra note 61, at 6; A. Bryan Endres and Rachel Armstrong, Diverging Values: Community Supported Agriculture, Volunteers, and the Hegemonic Legal System Food Studies (forthcoming Fall 2013).

\textsuperscript{104} See e.g., Donovan, 686 F.2d at 272.
Instead, the intern is training to start his or her own farm, often in direct competition with the intern provider.\textsuperscript{105}

This raises the issues of what is the market in which to measure competitive advantage. On one hand, CSA farmers have repeatedly stated that their competition is not other direct-to-consumer farmers, it is commodity agriculture as a whole.\textsuperscript{106} This argument may have some traction as the CSA farmer captures a miniscule amount of market share for agricultural


Considering the inherent infrastructure limitations of local food systems, the use of community laborers is unlikely to tip the competitive advantage towards CSA farms.\textsuperscript{108}

On the other hand, given the limited consumer segment disposed to CSA membership, might the relevant market be CSAs or other direct farm business models? Although there is substantial anecdotal evidence that community labor positions are unique and may not give a

\textsuperscript{107} In 2007, total cash receipts for all agricultural commodities were $288 billion. USDA ECONOMIC RESEARCH SERVICE FARM INCOME AND WEALTH STATISTICS, CASH RECEIPTS, BY COMMODITY GROUPS AND SELECTED COMMODITIES, 1924-2011 (2013), available at http://www.ers.usda.gov/data-products/farm-income-and-wealth-statistics.aspx#27415. By comparison, if we assume that the 12,549 CSA farms in 2007 sold a very generous 200 shares each at $600 per share, cash receipts from CSA amounted to $1.5 billion. By these generous numbers, CSA captures one half of one percent of all agricultural cash receipts. Interestingly, the same percentage of US farms engage in a CSA program.

\textsuperscript{108} STEVE MARTINEZ, ET AL., USDA ECONOMIC RESEARCH SERVICE, LOCAL FOOD SYSTEMS: CONCEPTS, IMPACTS, AND ISSUES 23-29 (2010) (finding capacity limitations in small farms, capacity limitations in lack of infrastructure, limited traceback mechanisms and resulting liability concerns, limited farmer expertise and training, and regulatory uncertainties limit the overall viability of local food systems.)
competitive advantage, statistically sound research establishing such a claim is scant in this emerging industry leaving CSAs exposed to legal challenges.\footnote{109} 

This notion of competition arises from the historical view that employer and employee are opposed.\footnote{110} However, the primary objective of running a CSA farm is to unite a community of growers and eaters against the prevailing commodity system of agriculture.\footnote{111} And thus CSA farmers are not only willing, but eager, to host interns who will soon compete with their former mentor/employer.\footnote{112} Likewise, worker shares, armed with this new knowledge about fruit and vegetable production, may decide to grow their own food at home, leaving one less customer for the CSA farmer. The first CSA farms required members to work because it was seen as intrinsic to the business mission that farmer and eater work together.\footnote{113} Today, many farmers 

\footnote{109} Although the USDA tracks extensive economic data on nearly all aspects of commodity production, including labor costs, CSA is a marketing strategy and the products distributed (fruits, vegetables, and value-added meats and dairy) are not tracked in the same manner as commercial production. 2007 was the first year the USDA asked farmers if they engaged in a CSA program at all. U.S. DEPARTMENT OF AGRICULTURE, NATIONAL AGRICULTURAL STATISTICS SERVICE (USDA NASS), 2007 USDA CENSUS OF AGRICULTURE, TABLE 44: SELECTED PRACTICES (2007).

\footnote{110} See infra Part II.

\footnote{111} See infra Part I.

\footnote{112} Supra note 105.

\footnote{113} See infra p 4-5, 8-9.
work with community laborers because it bolsters their ultimate mission - to grow a new food system.\textsuperscript{114} But, the possibility of employer/employee cooperation is never contemplated under the law. In effect, a force for positive change is made illegal.

B. Benefit Received by the Employer

Particularly in internships, but also in other volunteer positions, both worker and business claim that the worker is not entitled to minimum wage because he or she benefits from the position.\textsuperscript{115} The FLSA is silent regarding a minimum wage exception to educational or otherwise beneficial work experiences, as each would fall under the FLSA’s “to permit [a person] to work” definition of employment.\textsuperscript{116} However, courts have read in an exception for beneficial, particularly educational, experiences.\textsuperscript{117} This factor finds its way back to \textit{Portland Terminal}.\textsuperscript{118} Regarding the trainee brakemen in \textit{Portland Terminal}, the court found that the trainees

\begin{footnotesize}
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\item \textit{Id.}
\item \textit{Alamo}, 471 U.S. at 300-301.
\item \textit{Portland Terminal}, 330 U.S. at 152 (finding that “The definition of ‘suffer or permit to work’ was obviously not intended to stamp all persons as employees who, without any express or implied compensation agreement, might work for their own advantage…”).
\item \textit{Id.}
\end{enumerate}
\end{footnotesize}
benefitted from their educational experience while the railroad company did not, and the trainees, “actually impede and retard [the railroad’s work].”\textsuperscript{119}

However, whether \textit{Portland Terminal} actually requires a business to forego any benefit is where The United States Department of Labor (DOL) and some courts diverge. The DOL has interpreted \textit{Portland Terminal} to mean that the business may not benefit from volunteers’ efforts. The DOL has extended this to suggest that volunteers must actually impede the business. To distinguish trainees\textsuperscript{120} from employees,\textsuperscript{121} the DOL’s Fact Sheet 71 clarifies that no benefit may be incurred by the business. The DOL has reinforced the agency’s preferred interpretation through opinion letters.\textsuperscript{122} In one such example, volunteers bagged groceries for customers, and the volunteers then donated any tips they received to a community organization. The DOL found that the grocery store was a “commercial for-profit business

\textsuperscript{119} \textit{Portland Terminal}, 330 U.S. at 150.

\textsuperscript{120} Fact sheet 71 refers to “interns,” but the term intern is not a legal classification and is not used by the courts. For the most part, courts use the title, “trainees” because it is the term adopted in \textit{Portland Terminal}. Regardless of the terminology, the facts are the same: a work situation involving less than the minimum wage.

\textsuperscript{121} WHD FIELD OPERATIONS HANDBOOK (FOH) 10b19 (1993), available at http://www.dol.gov/whd/FOH/

enterprise that derived an economic benefit from [volunteers’] services,” and as such, the volunteers would be employees.¹²³

Some courts have explicitly rejected the DOL’s requirement that businesses not benefit from volunteers’ efforts. Rather, a business with volunteers may benefit from their service as long as the intern is the primary beneficiary. This “primary beneficiary test”¹²⁴ requires a hard look at the quality of the educational experience for interns.¹²⁵ If interns emerge fully qualified for employment, the court is more likely to find that the experience primarily benefitted the intern. For example, where an airline company required potential employees to attend unpaid training programs, the court found that the airline company benefitted because they could then access new employees from a fully trained pool of individuals.¹²⁶ But, the court found that the volunteers received the greater benefit because the training program qualified them for


¹²⁴ Court analysis of volunteer and trainee positions is highly variable and no standard test, title, or methodology exists. This article outlines one way of synthesizing this opaque area of law into a reasonable framework. See e.g., Laurelbrook, 642 F.3d at 521 (stating that, “There is no settled test for determining whether a student is an employee for the purposes of the FLSA.”)

¹²⁵ Infra this section.

¹²⁶ Donovan, 686 F.2d at 272.
employment. On the other hand, if the volunteer only learns tasks specific to an enterprise rather than an industry, the business benefits more than the employee.

This line of inquiry into the allocation of benefits between volunteer and employee is considered in terms of the employer’s business model for generating revenue as a whole. Where a business had three times as many volunteers as compared to regular employees and couldn’t possibly have satisfied its service contracts without volunteers, the court found the business as the primary beneficiary of volunteer service. If employees spend time training interns or volunteers when they might otherwise by doing productive work, the balance of the benefits tips towards the intern. Likewise, if the interns receive necessary training and only benefit the business in indirect ways, the court may find the volunteer primarily benefits.

The CSA context presents a unique challenge to this primary beneficiary analysis. Community laborers in the form of worker shares increase output without substantial decreases in

127 Id.
128 McLaughlin, 877 F.2d at 1210 (finding that training to stock shelves was instruction in a employer-specific job rather than an industry as a whole). Reich, 992 F.2d at 1028 (finding that “a training program that emphasizes the prospective employer’s particular policies… teaches skills that are fungible within the industry”).
129 Archie, 997 F.Supp. at 535 (comparing the business’s twenty-two staff with the sixty-three volunteer workers and finding that although the volunteers benefitted, the business benefitted more).
efficiency and do not necessarily become qualified for employment. At the same time, this is exactly why many community laborers serve: They wish to increase the economic viability of the farm businesses that serve the community. Interns serving extended terms on the CSA operation in an educational context, however, present a more difficulty case.

What is clear, is that both the DOL’s prohibition on employer gain from volunteer labor and the court’s primary beneficiary balancing approach ossifies an economic duality between employer and employee. The courts use an exclusively economic framework- output, efficiency, or eligibility for wage-earning positions- in their analysis. Community laborers could argue that they are the primary beneficiaries because the rewards of work are multi-faceted in ways the law has yet to recognize. Work is the mechanism by which community laborers contribute to a new and different food system that, together with the farmer, they believe in building.

Economic factors are only one element. By restricting the definition of volunteer as opposed to employee to economic benefit, the legal system is rejecting the other forms of value that work can possess such as the personal and political expression that comes with where one chooses to spend one’s time. Farms, and those that care about farming, see their work as an expression of self and belief, which is excluded by the legal analysis of why an individual may volunteer. By failing to recognize these motivations, the court essentially eliminates them as

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possible motivations where cautious farmers shut down volunteer opportunities rather than pay minimum wages (and perhaps workers’ compensation—a topic for another article).

C. **Whether the volunteer works “in contemplation of compensation.”**

Despite the critical discussion thus far of the FLSA, it nonetheless serves an important function in society—reducing unfair competition between employers and protecting employees from being coerced into unfair labor arrangements.  

To that end, the FLSA protects all workers who receive any compensation, regardless of form. Cash wages and in-kind wages are treated the same. Congress and the courts have reiterated that “true” volunteers work without any expectation of compensation whatsoever. Thus, the courts have crafted a framework for determining who works in expectation of compensation, and thus must be paid the federal minimum wage.

At the threshold, the courts will consider if the employer provides any compensation (broadly interpreted) to the volunteer. Giving food and shelter to otherwise homeless individuals is

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131 *Alamo*, 471 U.S. at 302.

132 *Alamo*, 471 U.S. at 301.

133 *Id.*

134 The fact that a volunteer who receives any compensation at all is more likely to be viewed as an employee and deserving of minimum wage does create a perverse incentive not to compensate
However, if the homeless individual primarily seeks rehabilitation, and the food or shelter facilitates that end, it is not viewed as compensation.\textsuperscript{136}

\textsuperscript{135} Alamo, 471 U.S. at 301; Archie, 997 F.Supp. at 533.

\textsuperscript{136} Williams v. Strickland, 87 F.3d 1064, 1067 (9t Cir. 1996) (finding that the plaintiff signed an agreement stating he was not entitled to compensation and that the compensation plaintiff did receive were given so plaintiff could pursue rehabilitation rather than as in-kind compensation for work); \textit{But, see}, Williams v. Strickland, 87 F.3d 1064, 106 (9t Cir. 1996) (Poole, J., dissenting) (finding that a material dispute of fact existed because a rehabilitative motive did not preclude employment and the plaintiff’s work significantly improved the defendant’s product and resulted in substantial profits).
As part of the “expectation of compensation” analysis, the courts will consider how closely the arrangement resembles traditional employment. If the volunteer receives more compensation for better performance or the equivalent of commission, the court is more likely to find minimum wage is owed. The resemblance to traditional employment is also considered on a more technical basis. Where volunteers work a traditional 8-hour day, report in for their shifts, and use the same hour tracking system as regular employees, the court will find an employment relationship likely exists. Traditional employees are dependent on their employment to meet their financial needs. In the volunteer context, fear of losing a position or the associated compensation may trigger an employment relationship. On the other hand, short one-week training programs that resemble an educational environment are outside traditional employment and may not be deserving of the minimum wage. Similarly, volunteer reimbursement is not compensation because the arrangement merely enables volunteerism.

137 Alamo, 471 U.S. at 301.
139 Archie, 997 F.Supp. at 533.
140 Portland Terminal, 330 U.S. at 152 (drawing a comparison between the training position and a one-week course in railroading, and suggesting that school students could not reasonably expect compensation”).
141 Op.Wage-Hour Adm’r No FLSA 2006-18
To summarize, a volunteer may be compensated in so far as the benefit enables the volunteer to perform his or her service. But once compensation is offered in exchange for the labor itself, the relationship becomes one of employer/employee. Under this line of analysis, community laborers would be employees. Most CSA farms are organized as for-profit businesses and community laborers, by in large, work in expectation of some form of compensation. Most farm interns work in exchange for food, board, or a stipend. Worker share positions are defined by the fact that the individual works in exchange for a share of the harvest.

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142 Both the courts and the DOL are reticent to allow volunteerism at for-profit businesses as compared to nonprofits. The DOL emphasizes in opinion letters that for-profit commercial enterprises have an unfair advantage if they use volunteers (Op.Wage-Hour Adm'r No FLSA 2006-4) (quoting, “The Wage and Hour division has recognized that a person may volunteer time to religious, charitable, civic, humanitarian, or similar nonprofit organizations as a public service and not be covered by the FLSA); On the other hand, one court stated in dicta that a nonprofit could not unduly benefit from volunteers because the benefit to a nonprofit actually accrues to the public at large (Isaacson, 450 F.2d at 1309-10). The Supreme Court appears to disagree, at least where nonprofits engage in “ordinary commercial activities,” as it found volunteers who rely on the organization for their total support are employees. Alamo, 471 U.S. at 302-303, (citing the DOL’s recognition of individuals “who help to minister to the comfort of the sick, elderly, indigent, infirm, or handicapped and those who work with retarded or disadvantaged youth”).
However, if the situation is considered more deeply, it becomes evident that community laborers and CSA farmers are working within a fundamentally different context than the law envisions. By working with interns and offering worker share positions, CSA farmers are explicitly intending to increase the community’s stake in the farm. By bringing individuals out to the farm and giving tangible illustration of the vagaries of food production, CSA farmers are cultivating a physical and emotional investment in their farm. Critics could point out that cultivating investment is just good marketing, which it is. But, CSA is further distinguishable in that the customer’s investment is accompanied with actual risk. By working for a CSA share, individuals run the risk of crop failures, poor harvests, and other factors that reduce return. Under the DOL’s legal framework, the expectation of return alone would tend towards a finding that community laborers are employees. The legal analysis as it exists today envisions a reductionary economy where a unit of work is exchanged for a unit of pay. Once the expectation of an economic exchange is present, the relationship is oppositional. To be a true volunteer, one must be removed entirely from an economic framework. Thus the cooperative effort or mutual compensation characterizing community laborers on most CSA farms fails our current worker protection regime established by the FLSA.

IV. The Jurisprudential Context of Community Labor and Employment Law

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143 See infra Part II.

144 Id.

145 Id.
In this article the authors attempt to illustrate how the three general (although variable and highly fact-specific) factors for distinguishing between volunteers and employees in the FLSA force a division between employer and employee, even though CSA farmers and community laborers explicitly work to break down these barriers. At this point, advocates may be inclined to offer a legislative solution. However, the situation does not lend itself to a simple fix. The law has evolved in a rational manner, in response to the inequitable economic position of employer and employee.146 Although the majority of CSA farms appear benevolent in their approach to community labor, that may not remain the case. As the business model gains popularity and the CSA concept evolves far beyond its original vision, logistically and ethically, it looks more like business as usual.147 An impulse to except CSA farms from employment laws could potentially hasten that progression by propping open the door to exploitation. Instead, the law should find a way to foster the best intentions of CSA farms and community laborers: encouraging cooperation that empowers the community to build a better food system. Inspiration, if not prescription, for such a direction can be found in an abbreviated review of the evolution of jurisprudence itself.

146 Scott D. Miller, Revitalizing the FLSA, 19 HOFSTRA LAB. & EMP. L.J. 1, 10 (2001) (characterizing the FLSA and its progression as a fight by workers for control over their working hours).

As the industrial revolution was gaining a foothold in the United States, classical legal theory held sway over the courts, with the marketplace viewed as the natural arbiter of legal truths.\footnote{See Morton J. Horowitz, The Transformation of American Law 160-198 (1977).}

Embodying the zeitgeist of the times, courts permitted the survival of the fittest in employment and contract concerns.\footnote{Id. See also, P.S. Atiyah, The Rise and Fall of Freedom of Contract 402-405 (1979).} In one prominent example, The Supreme Court drew on classical legal theory to strike down New York’s attempt to regulate working hours in its infamous \textit{Lochner v. New York} decision.\footnote{Lochner v. New York, 198 U.S. 45, 57 (1905). \textit{Lochner} was just one of approximately two hundred economic regulations struck down from 1905 to the mid 1930’s. Geoffrey R. Stone (Ed.), Mark Tushnet, Cass R. Sunstein, and Louis Michael Seidman, Constitutional Law, 6th ed., 735-754 (1996).} The court exhibited the perceived supremacy of contract when it stated, “There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labor, in the occupation of a baker.”\footnote{Lochner, 198 U.S. at 57.} Although \textit{Lochner} was decided over one hundred years ago, the thinking behind it remains influential. To argue that CSA farmers should be granted an exemption from employment law suggests a return to \textit{Lochner}esque contractual deference in the employment context despite the nearly universal view that the majority in the case was on the wrong side of history.\footnote{Cass R. Sunstein, \textit{Lochner’s Legacy}, 87 Colum. L. Rev. 873 (1987).}
Legal realism was the next jurisprudential theory to gain widespread acceptance. Realism, as the name implies, acknowledged the unrealistic premises of classical legal theory.\textsuperscript{153} The market cannot be a neutral arbiter of truth, because the market itself represents specific values and falsely presupposes autonomy and equal competition between market participants.\textsuperscript{154} Reversing the \textit{Lochner} decision, the Supreme Court cemented realism within employment jurisprudence in \textit{United States v. Darby}.\textsuperscript{155} The Court acknowledged that allowing a business to pay lower wages undercuts fair competition for everyone.\textsuperscript{156} The \textit{Darby} decision grew out of the groundbreaking legislation that still governs much of employment and labor law today. Although for labor advocates \textit{Darby} was a welcome change from classical legal thinking, the court may have enshrined unintentionally an oppositional status between employees and employer that limits opportunities for community building volunteerism.

In employment law jurisprudence, realism appears to be the stopping point; an unfortunate result as legal thinking has continued to evolve in other contexts that display a more nuanced interpretation of reality. Civil rights law is one model. Beginning with advocacy for the equal

\begin{thebibliography}{99}
\bibitem{154} \textit{Id.} Later writing his famous dissent in \textit{Lochner}, Oliver Wendell Holmes, Jr. spoke early about the erroneous path classical legal theory was heading along. Oliver Wendell Holmes, Jr., \textit{The Path of the Law}, 10 Harv. L. Rev. 457, 458-468 (1897).
\bibitem{155} United States v. Darby, 61 U.S. 451, 461 (1941).
\bibitem{156} \textit{Id.}
\end{thebibliography}
treatment of women, the first iteration of feminist legal theory called for equal treatment between men and women.\textsuperscript{157} But, advocates became disillusioned in that traits specific to women, such as pregnancy, went accommodated in a rush to treat women like men.\textsuperscript{158} As a result, a new legal theory, critical feminist theory, emerged (along with critical legal theory as a whole),\textsuperscript{159} shifted from an analysis of whether men and women were receiving different treatment to whether the substantive result of laws affecting women reinforced their subordinate status.\textsuperscript{160}

To draw a parallel with employment law, the analysis begins with the goal. When it comes to civil rights for women, the objective is equality. When it comes to employment law, the definition may not be as apparent. Fairness is an obvious goal, but what fairness is remains

\begin{footnotesize}
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\item \textsuperscript{158} \textit{See}, e.g., California Federal Savings and Loan Association, et al., v. Guerra, 479 U.S. 272 (1987).
\item \textsuperscript{159} UNGER, \textit{supra} note 157.
\end{enumerate}
\end{footnotesize}
debatable. A leading scholar has proposed that employment law should seek to democratize the workplace.\textsuperscript{161} Democracy is seen as an inherent good because it acknowledges autonomy only within a community context and because it enables the personal expression so important to society today.\textsuperscript{162} A democratic workplace encourages participation and investment in the business and thus, increases efficiency and individual satisfaction.\textsuperscript{163}

Democratization of employment law offers an alternative way beyond the stalled approach of legal realism. Critical legal theory enters again to illustrate how we may move towards this goal. Akin to the feminist legal theory analysis of equal treatment, employment law’s current superficial view merely asks if a volunteer is an employee. A nuanced and critical analysis seeks to understand if the volunteer is serving to democratize the workplace or erode it. As phrased by Professor Klare, “With respect to every workplace rule or practice, it is fair inquiry to ask whether it enhances or impedes employee self-determination, economic productivity and other basic social values. There is no reason to favor market autonomy in the abstract.”\textsuperscript{164}

\begin{flushleft}

\textsuperscript{162} \textit{Id.} at 8.

\textsuperscript{163} \textit{Id.} at 4.

\textsuperscript{164} \textit{Id.} at 23-24.
\end{flushleft}
Reframing the volunteer/employee issue based on a critical legal theory of workplace democratization would enable CSA farmers to continue to build a positive food system future, without the risks (and political battles) of a wholesale exemption from the FLSA. If the definition of a democratizing force is one that increases the power of citizens, then community labor may prove a powerful example. The CSA objective is to engage eaters in the process of food production, so that consumers are empowered with the knowledge and resources to contribute to the food system of their choosing. Accordingly, the law should be open to the consideration of whether community labor enables the shared interest in the economic viability of a new kind of farm over the long term, rather a narrow inquiry into short term employee displacement.

V. Concluding Thoughts

The phenomenon of community labor on CSA farms has materialized because citizens are hungry for a more intimate experience with their food and their communities. By using customers for more than just their dollar, the CSA farmer builds a stable base in the community and fulfills the farm’s social mission. But at the same time, community labor is vulnerable to legal action because these arrangements may be seen as employment deserving of the minimum wage. The current legal constructions of whether a worker is an employee or volunteer has evolved within a rather narrow vision of worker in competition with employer. Legal risk surrounding the evolution of these creative, willing labor arrangements, may stall the growth and economic viability of CSA farms that already lack the safety net available to large-
scale commodity producers. The cure may not be found in a one-size fits all legislative exemption, but rather a new legal paradigm focused on the democratization of the workforce—one that matches evolution of the food system with the passion of the community labor force.