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Ending the Sweatshops of the Soil: Eliminating the Agricultural Worker Exception from Federal Labor Laws

Tamara Lam-Plattes

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Thesis: This article argues that the agricultural worker exception to the National Labor Relations Act and Fair Labor Standards Act is unconstitutional and should be eliminated. The exclusion was motivated by racial discrimination and should be subject to strict scrutiny. Even under the looser rationality review, there is no justification for the exclusion. Previous Supreme Court cases upholding the exclusion should be overruled because they are inconsistent with our society’s deep commitment to the eradication of race discrimination.

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Introduction

Agricultural work consistently ranks as one of the most hazardous occupations in the nation, yet agricultural workers remain excluded from most of the legal protections and benefits enjoyed by other sectors of the United States economy. Narcizo Peralta, an agricultural laborer working in citrus orchards for nine years, says his employer does not provide him with water and does not pay him minimum wage. Erika Contreras recalls working all day without taking a break or going for water because she was afraid of getting fired, and Pedro Zapien says that sometimes full days go by and the employer does not bring bathrooms to the fields.

Agricultural workers should be treated with dignity and respect because we depend on them to feed our nation. Instead, federal laws such as the National Labor Relations Act (NLRA) and Fair Labor Standards Act (FLSA), designed to protect workers from exploitation, exclude agricultural workers from their protection. Agricultural exceptionalism, statutory exemptions which benefit and privilege the agricultural industry while depriving the agricultural worker of minimal guarantees available to employees in almost all other sectors, has created a highly vulnerable, deprived, and powerless group of workers.

The NLRA was enacted in 1935 as a critical component to President Franklin D. Roosevelt’s New Deal, which aimed to provide relief for the poor and unemployed. Given the

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3 Id.
inherent imbalance of power in the employer-employee relationship, the NLRA sought to equalize the power between employees and employers. The NLRA protects employees’ rights to self-organization, to form unions, and to engage in concerted activities for the purpose of collective bargaining. Agricultural workers, however, are completely excluded from this federally protected right to organize and bargain collectively over the terms and conditions of employment and have been since its enactment.\(^5\)

The FLSA, passed three years later, was designed to discourage and diminish both low wages and long hours and to maintain a minimum standard of living necessary for the health, efficiency and well being of workers.\(^6\) Again, agricultural workers were completely exempted from these provisions when the statute was enacted. Some of the exclusionary provisions have been modified today, but most agricultural workers are still not entitled to overtime pay and have no protection against being forced to work unreasonable numbers of hours.\(^7\)

This article argues that the agricultural worker exception to the NLRA and FLSA is unconstitutional and should be eliminated. The exclusion was motivated by racial discrimination and should be subject to strict scrutiny. Even under the looser rationality review, there is no justification for the exclusion. Previous Supreme Court cases upholding the exclusion should be overruled because they are inconsistent with our society’s deep commitment to the eradication of race discrimination.

Part I of this article provides the historical context surrounding the exclusion of agriculture from the NLRA and FLSA. Southern planters and farmers took advantage of the former slave class by exerting their political power during the New Deal Congresses in order to

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continue oppressing their emancipated slaves. Part II of this article examines the impact of agricultural exceptionalism on agricultural workers today. Current demographics, working conditions and the problem of farm worker powerlessness are analyzed. Also, the ways in which the termination of this exclusion could positively impact the farm worker population are examined.

Part III argues that the agricultural worker exception to the NLRA and FLSA protections is unconstitutional and should be eliminated by the judiciary. First, under a strict scrutiny analysis, disparate impact and discriminatory intent motivating the exclusion of agricultural workers in the NLRA and FLSA is proven. Additionally, if the courts applied rationality review, the exclusion would still not pass constitutional muster because the supposed considerations that prompted Congress to exclude agricultural workers initially are either irrational or no longer hold true today. Finally, prior case law upholding the exclusion should be overruled, because the underlying reasoning behind those decisions are inconsistent with contemporary values.

I. Historical Context of the Exclusion

Discrimination by race and discrimination against agricultural labor have been intertwined ever since white landowners in the New World began importing slave labor.\(^8\) Whites discriminated against Blacks because of racism and because racism was good for them financially.\(^9\) It is impossible to understand the current minimal legal protections we provide our agricultural workers without fully understanding our past laws and policies with regard to this labor force. This section focuses on two historical periods as a way of providing the necessary background to explain our current labor system, which promotes and produces an exploited and

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\(^9\) *Id.* at 1371.
disempowered class of agricultural laborers, defined by race. The first period addresses slavery and how America’s dependence on cheap labor, especially in the southern states, infiltrated our Constitution with racial discrimination. The second period is the New Deal Era of the 1930’s when agriculture was explicitly exempted from most of the provisions intended to protect workers from exploitation. The exclusion ensured that the racist and oppressive labor system created during slavery would be maintained.

**A. Slavery in our Constitution**

Nearly 240 years passed from the beginning of slavery in the United States to its eventual abolition in 1865. During this time the institution of slavery and its racist ideology became so ingrained in our social structure that even the supreme law of our land, the United States Constitution, protected it.

The original Constitution of 1787 contained four key provision that protected slavery: 1) the Fugitive Slave Clause, which guaranteed owners the right to reclaim escaped slaves; 2) the Three-Fifths Clause which increased the representation of southern states in Congress by adding three-fifths the number of slaves held as property to the number of free persons residing in each state; 3) Article I, section 9, which prohibited Congress from exerting their commerce clause power to limit the slave trade with Africa until 1808 and 4) Article V, which prohibited amending Article I, section 9, for twenty years.

In 1857, the Supreme Court relied on the text of the Constitution and our framers’ intent, which clearly suggested that slaves were meant to be property and not citizens, in the infamous

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10 Perea, *Destined for Servitude*, supra note 7, at 247 n.9.
12 Perea, *Destined for Servitude*, supra note 7, at 245-246.
Dred Scott v. Sandford decision.\textsuperscript{13} Scott was a slave living in Missouri, a slave state, but his previous owner had taken him to several free states. Scott argued he had obtained his freedom by residing in these free states for a long period of time. However, the United States Supreme Court held that Blacks were never intended to be included in the word “citizen” in the Constitution and therefore were not entitled to all the rights, privileges and immunities granted to citizens in the Constitution.\textsuperscript{14} In this case, Scott could not even invoke the federal courts diversity jurisdiction to bring suit because he was not considered a citizen of Missouri. Furthermore, it was found that by bringing Scott into a state which prohibited slavery, his owner could not possibly have lost ownership of Scott, for that would deprive his owner of his right to “property” without due process.\textsuperscript{15}

Even though most textbooks and scholars today condemn the Dred Scott decision, it is legally correct given the text of our Constitution and the premise of the time.\textsuperscript{16} The decision is understandable today only by recognizing that the framers’ Constitution actually supported this injustice. The Constitution was a pro-slavery document that explicitly sanctioned and supported a system of slave labor used mostly for southern agriculture.

Slavery was abolished by the thirteenth amendment in 1865. The fourteenth amendment, which requires equal protection under the laws, was enacted shortly thereafter, in 1868. Although these amendments radically transformed our national consensus regarding slavery, they were largely ignored after Reconstruction.\textsuperscript{17} Southerners were able to essentially re-enslave free Blacks through abusive sharecropping and tenant farm systems, black codes, and white mob

\textsuperscript{13} 60 U.S. 393 (1856).
\textsuperscript{14} Id.
\textsuperscript{15} Id.
\textsuperscript{16} Perea, Destined for Servitude, supra note 7, at 246.
\textsuperscript{17} Id. at 247.
violence which created an elaborate system of quasi-slavery. In other words, the South successfully imposed a system of white supremacy and second-class citizenship for non-whites that managed to carry over into the New Deal and consequently our current federal labor laws.

**B. Racial Discrimination Behind the Agricultural Exclusion in The New Deal**

The racially defined labor system preserved in our Constitution had a direct effect on the enactment of the New Deal legislation. In order to win the votes of southern democrats, which were needed to pass the legislation, President Roosevelt agreed to a series of measures and limitations that would exclude most black employees from the benefits these federal statutes offered. The NLRA and the FLSA are the two pieces of New Deal legislation that this article discusses, but the agricultural exception was part of virtually all of President Roosevelt’s New Deal reforms. These federal statutes privileged agricultural employers in the south by excluding the agricultural workers from their coverage. They effectively preserved the South’s political and economic system based on white supremacy.

1. Legislative History of the NRLA and FLSA

There is little legislative history that states the actual reasons behind the agricultural worker exception. In fact, the NLRA’s legislative history reveals that Congress excluded this group without much thought and without providing significant justification. When the FLSA was passed three years later the exception was a standard provision of New Deal legislation.

In 1934 when Senator Wagner first introduced the bill that would come to be the NLRA, agricultural workers were clearly employees within the scope of its coverage. Several months

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18 Id.
19 Id. at 248.
later the term employee was redefined to exclude persons engaged in agricultural work.\textsuperscript{21} The agricultural exclusion was not considered in either the hearings or debate in the Senate. The only explanation offered, stated only once, declared that the exclusion was deemed wise for “administrative reasons”.\textsuperscript{22}

The exclusion certainly cannot be attributed to lack of need on behalf of farm workers. Representative Marceantonio of New York called attention to the plight of agricultural labor and testified on the United States House of Representatives floor that farm workers endured the worst conditions in the nation.\textsuperscript{23} James Rorty, a newspaper correspondent also testified to the miserable working conditions of person’s engaged in farm labor and the violence that confronted those who tried to organize.\textsuperscript{24} The Senate Committee received a report from Pelham D. Glassford that urged the enactment of policies to provide workers with greater protection from exploitation.\textsuperscript{25} Although the report became part of the record, no one followed up on its findings or recommendations.\textsuperscript{26} The NLRA was passed with the agricultural worker exception and without farm owners or agriculturalists having to present any reasoned argument for their interest in this exclusion.

By the time the FLSA was drafted, the exclusion of agricultural workers from related legislation had become such a fixed component of New Deal politics that the drafters no longer

\begin{unnumbered}
\textsuperscript{21} Id.
\textsuperscript{22} Id. at 385.
\textsuperscript{24} Jourdane, \textit{supra} note 20, at 384.
\textsuperscript{26} Id.
\end{unnumbered}
consciously took the issue into consideration. Yet Congress knew the racial implications of the agriculture exclusion. John P. Davis, representing the National Negro Congress, testified before the House and the Senate committees considering the Bill. He reminded the congressmen that black workers were helpless to defend themselves against demands for longer hours and lower wages, especially from southern industry representatives, and that the FLSA provisions promised even greater discriminatory treatment of Blacks since agricultural workers represented the bulk of black labor.

The fact that the exclusion was automatic suggests it was part of a movement to deprive black farm workers of all the social welfare legislation of the New Deal. Congressional debates attest to this discriminatory intent as southern congressmen openly articulated the reasons for excluding Blacks. For example, Senator Ed Smith of South Carolina bemoaned the fact that the emancipation of slaves had injected former slaves into the blood stream of American politics as he believed they were unfit for participation in politics. He referred to the abolition of the constitutional clause that added representation in Congress based on the Negro population, as depriving the south of its just share of political power. He likened the FLSA to this type of “federal action that interfered with white hegemony in the South.”

Representative Wilcox of Florida said, “There has always been a difference in the wage scale of white and colored labor… You cannot put the Negro and the white man on the same

27 MARC LINDER, MIGRANT WORKERS & MINIMUM WAGE: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES # (1992) [hereinafter LINDER, MIGRANT WORKERS & MINIMUM WAGE].
28 Id. at 154.
29 Id.
30 Linder, Farm Workers and the Fair Labor Standards Act, supra note 8, at 1374.
31 Id.
32 Id.
basis and get away with it.” He went on to warn of the grave social and racial conflicts that would result if the bill were passed. The best method, of course, for maintaining different wage scales for white and black labor was to exclude the overwhelmingly black agricultural labor force from FLSA provisions entirely. Equally notable and of crucial importance is the fact that part of the President’s purpose in passing minimum wage legislation was to reunite the Democratic Party, so the need to accommodate to the plantation interests of the South was a necessary compromise.

2. Southern Influence in New Deal Legislation

Although the purported legislative purpose articulated was “administrative reasons”, closer inspection of the southern plantation system’s dependence on cheap black labor as well as southern domination of the New Deal legislative process makes clear that the agricultural exclusion was about much more than administrative ease. Racism and the desire to keep farm workers in second-class status was the underlying motivation. The racial distribution of farm workers within the United States and the agricultural wage gap between the north and south reaffirms this. The overrepresentation of southern democrats in Congress enabled these racist motivations to infect legislation like the NLRA and FLSA. It kept the white farm owners in a position of power and their non-white workers exploited and powerless.

a) Southern Plantation Labor System

In the 1930’s agriculture was predominantly a southern industry and the South was the only predominantly agricultural region of the country. During this time half or more of the country’s farms and farm population were located in the South. Southern agriculture was overwhelmingly dominated by cotton. In fact, Southern farmers depended on cotton and tobacco

33 LINDER, MIGRANT WORKERS & MINIMUM WAGE, supra note 27, at 155.
34 Id. at 128-129.
35 Id. at 160.
for two-thirds of their cash income and cotton states accounted for one-fifth of all persons engaged in agriculture.\textsuperscript{36} Cotton and the other major crops grown in the south were all large-scale, labor-intensive operations that required huge amounts of labor. For all of these reasons southern farmers had a unique dependence on cheap black labor.\textsuperscript{37}

The abolition of slavery threatened to destroy the southern plantation system that southerners had so carefully created and protected. In order to keep their labor system in place, most southern states passed false pretense laws that ensured a stable and quasi-free work force at the lowest possible cost. For example, they criminalized the act of obtaining advances or failing to begin or complete contractually agreed upon work. They also passed laws prohibiting the “enticement”, through higher wages or better working conditions, of croppers, tenants, and laborers from their employers.\textsuperscript{38} In other words industries in the North or even other farm operators in the South were forbidden from soliciting and sending labor out of the state. These laws essentially served to re-enslave Blacks in violation of the thirteenth amendment. Even though these laws were unconstitutional, southern states passed and effectively enforced them.

This economic-racist animus was specific to the plantation – a feeling on the part of the planters of a sort of collective ownership of the workers in the community.\textsuperscript{39}

\textbf{b) Racial Distribution of Farm Workers}

Not only was a larger proportion of the population in the South composed of agricultural laborers, compared with other regions, but a much larger portion of that population was Black. In 1930, in the eleven states of the former Confederacy, 54.9\% of farm workers were non-white

\textsuperscript{36} \textit{Id.}
\textsuperscript{37} \textit{Id.} at 159.
\textsuperscript{38} \textit{Id.} at 158.
\textsuperscript{39} \textit{Id.} at 159.
and the black farm workers in these states accounted for 87.4% of all black farm workers.\textsuperscript{40} Outside of the Confederacy, Arizona, California, and New Mexico had the highest proportion of non-white farm workers, with most of them likely to be Hispanic and some ethnic Japanese and Chinese.\textsuperscript{41} Only 2.2% of farm workers in the remaining states were reported as non-white.\textsuperscript{42} In 1940 this racial distribution became even more skewed. Black farm workers in the south made up 92% of the total black farm worker population. This data demonstrates that the South used a predominately black agricultural labor force and that the Black farm worker population was almost entirely concentrated in the South.

All of these farm workers would have been covered by the NRLA and FLSA if there had been no blanket exclusion. Because the majority of the agricultural labor was in the South (and Southwest) the exclusion mostly benefited southern farmers. Since Blacks did most of the agricultural work in the south, they had the most to lose from this exclusion by not being able to bargain collectively with their employers or be paid a decent wage. Data shows that farms in the South were generally larger than those in the north. The South had the greatest concentration of black farm laborers with 55% of all farms reporting ten or more hired laborers.\textsuperscript{43} If you include California, Arizona and Mexico, these fourteen states accounted for 78% of all farms using ten or more hired laborers.\textsuperscript{44}

In summary, the majority of farm workers who would have been covered by the NLRA and FLSA were the non-white employees of southern and southwestern farmers. If workers had the right to unionize and strike over the conditions of their employment under the NLRA or if

\textsuperscript{40} Linder, \textit{Farm Workers and the Fair Labor Standards Act}, \textit{supra} note 8, at 1344.
\textsuperscript{41} Id.
\textsuperscript{42} Id.
\textsuperscript{43} Linder, \textit{Migrant Workers & Minimum Wage}, \textit{supra} note 27, at 169.
\textsuperscript{44} Id.
planted owners were forced to pay them minimum wage and overtime, the southern labor system and way of life would have collapsed.

**c) Agricultural Wage Gap Between North and South**

With respect to the FLSA specifically, a wage analysis of farm worker salaries in the North as compared to the South further reveals that southern farmers would have more to lose than the North had agricultural workers been covered by the Act. Most farmers outside of the South, during the period the FLSA was being enacted, were already being paid the minimum wage of 25 cents per hour.\(^45\) Farm workers in the Cotton Belt of the South, however, were being paid about 10 cents per hour (40% of the federal minimum wage), and black farm workers in the South were being paid even less.\(^46\) This data makes it historically more convincing that the opposition to the inclusion of farm workers was not a general demand of the farm lobby, but rather a specific demand by southern plantation owners to maintain their power at the expense of rural Blacks.

**d) Overrepresentation of Southern Democrats in Congress**

The overrepresentation of southern democrats in Congress during the New Deal is undeniable and allowed the Southern interests previously discussed to be accommodated by President Roosevelt who was admittedly trying to unite the northern and southern democrats. The blatantly racist electoral procedures of the southern states insured that southern congressmen who fervently believed in the necessity of maintaining traditional race and class structure, remained in power.\(^47\) In 1938 when the FLSA was passed, Southerners chaired the Senate Agricultural Committee, Appropriations Committee, and Finance Committees.\(^48\) They also

\(^{45}\) _Id._ at 173.
\(^{46}\) _Id._ at 174.
\(^{47}\) _Id._ at 129.
\(^{48}\) _Id._
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chaired the House of Representatives Agriculture Committee and Ways and Means Committee. The House Speaker and Majority Leader were also southerners. The same committee chairmen presided when the NLRA was passed.49

President Roosevelt was unwilling to risk losing the support of these southern democrats so he made no attempt to reform the traditional racial and class patterns of the South. The South was in a favorable bargaining position not unlike the one it was in when our constitution was ratified with pro-slavery clauses to accommodate their interest in slave labor. The South clearly had the most to lose from their mostly black agricultural workers falling within the scope of NLRA and FLSA protections. Luckily for them they also had the political power to ensure this would never happened.

In summary, the policy of excluding farm labor from social and labor legislation during the New Deal involved unstated legislative decisions to perpetuate a non-white, low-income, disadvantaged labor force.50

II. Present Situation

The most significant change since the New Deal provisions were passed is the transformation in demographics of the agricultural work force.51 Black workers have been replaced by Latinos, many of who are undocumented immigrants, making them in many ways even more vulnerable to exploitation and especially deserving of labor protections.52 The working conditions and treatment of agricultural workers, however, has hardly changed.

Today, agricultural workers are still wholly excluded from the NLRA and although some have become entitled to the protections of the minimum wage provisions of the FLSA (small

49 Id.
50 Perea, A Brief History of Race and the U.S.-Mexican Border, supra note 4, at 308-309.
52 Id.
farms are still excepted from minimum wage requirements), they are the only numerically significant group of minimum-wage workers wholly excluded from the premium overtime and maximum hour provision.\textsuperscript{53} They are also not entitled to required rest or meal periods.\textsuperscript{54} The statutorily sanctioned exploitation and oppression intended to keep Blacks subservient now keep Latino farm workers subservient.\textsuperscript{55}

This section begins with current agricultural worker demographics in order to show that the population being effected today continues to disproportionately impact poor non-white workers. The current effects of agricultural exceptionalism on this population are then discussed. The exclusion continues to function as historically intended, by guaranteeing the profitability of plantation-style, quasi-slave labor that deprives employees of minimum standards of labor protection. Finally, specific examples of ways in which current farm worker conditions could be vastly improved by eliminating the agricultural exceptions from the NLRA and FLSA are presented.

A. Current Farm Worker Demographics

Approximately 1.4 million crop farm workers help plant, harvest, and pack food throughout the United States. Statistics about the race and immigration status of agricultural workers vary depending on whether they are hired by the employer directly (hired) or are contract workers (contract). According to the National Agricultural Workers Survey (NAWS), 70\% of hired and 97\% of contract farm workers are foreign born and, 75\% of hired and 99\% of contract workers are Hispanic/Latino.\textsuperscript{56} The percentage of farm workers unauthorized to work in the United States is significantly higher for contract workers (76\%) than for hired workers

\textsuperscript{53} LINDER, MIGRANT WORKERS & MINIMUM WAGE, supra note 27, at 126.
\textsuperscript{55} Perea, Destined for Servitude, supra note 7, at 245.
\textsuperscript{56} Id.
In California, 90-95% of the farm worker population is foreign born and most are undocumented (60-70%). This data shows that the agricultural workforce is mostly foreign born, Hispanic/Latino, and unauthorized to work in the United States. Farm workers also generally have low levels of education and minimal English skills.

With regard to income, contract workers generally receive lower wages than hired workers. The median annual personal income of farm workers reported between 2005-2009 was between $15,000 and $17,499. The median household income of farm workers was between $17,500 and $19,999, which is less than half of the median income for all U.S. households ($52,000 in 2008). One fourth of all farm workers have a family income that is below the federal poverty line.

B. Current Impact of Agricultural Exceptionalism

Farm workers today are a largely marginalized population, both socially and economically, with limited availability to legal recourse to fight employer abuse and exploitation. This is due in large part to the doctrine of agricultural exceptionalism, the systematic exclusion of agricultural workers from legal protections, which promotes an unequal and disparate impact on farm laborers. Its effects are seen most blatantly in the employment

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57 Id.
60 Id. at 46.
61 Id. at 13.
62 Id.
63 Id.
64 Id. at 46.
conditions that farm workers endure daily, as well as in their powerlessness to speak out over these injustices.

1. Working Conditions

The conditions of agricultural labor are not well known due largely to the fact that little data is available to the public about the lives or working conditions of farm workers. However, The Inventory of Farmworker Issues and Protection in the United States is a survey produced in March of 2011, which responds to this deficit in public awareness by creating a comprehensive report that reveals the scope of employment abuses and safety issues facing U.S. farm workers.

The following are the primary issues that affect U.S. farm workers today:

- **Lack of Wage and Hour Standards.** Under the FLSA farm workers are not entitled to overtime pay, mandatory breaks for rest, or meal breaks during the workday. Some states include farm workers in their state wage and hour protections but even in those states, the laws are rarely monitored or enforced. One fourth of all farm workers have family incomes below the federal poverty line.

- **Prevention of Collective Bargaining.** The NLRA explicitly excludes agricultural workers from its coverage. A farm worker can be fired for joining a labor union and a farm labor union has no legal method to compel a company to sit down at the bargaining table to negotiate employment terms. This chills any type of meaningful organization because workers are in constant fear of retaliation from their employers. Not having union representation makes workers vulnerable to exploitation. For example, some

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67 Id.
68 Id. at 11.
69 Id. at 13.
70 Id. at 27.
employers require workers to pay exorbitant prices for food, housing, and other items provided by employer. Many of these issues could be solved with NLRA coverage.

- **Substandard Housing and Unsafe Transportation.** Despite legal and regulatory safety requirements, unsafe transportation and substandard housing are both commonly reported by legal advocates. Housing is often sparsely furnished and sometimes contaminated with raw sewage. It is often unclean, unsafe, lacks plumbing and air conditioning, has peeling paint, is moldy and has clogged and fly-infested outhouses. Poor housing exists because there is a lack of meaningful sanctions against growers who house workers in inferior housing.

- **Lack of Transparency by Contractors.** The use of labor contractors benefits agriculture at the expense of farm workers because with nothing but labor costs, the labor contractor can maximize his income by minimizing payments to workers. Employers can then effectively insulate themselves from workers’ claims arising from injuries and lost wages.

- **Sexual Harassment and Abuses.** Farm workers are frequently vulnerable to abuse, especially when they can be coerced to work through threats of deportation. Immigrant women are virtually powerless to protect themselves from sexual abuse because they are isolated, thought to lack credibility, generally do not know their rights, and often lack legal status.

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71 Luna, supra note 62, at 500.
73 Luna, supra note 62, at 503-504.
74 Id. at 495.
75 *MARY BAUER & MÓNICA RAMÍREZ, INJUSTICE ON OUR PLATES, IMMIGRANT WOMEN IN THE U.S. FOOD INDUSTRY*, 42 (Booth Gunter, 2010).
Exclusion from Unemployment Insurance and Lack of Workers’ Compensation Protections. Unemployment insurance is mandated and funded through the Social Security Act, but the agricultural sector has special regulations. Less than half of hired farm workers and only about one-fourth of contract workers are covered by unemployment insurance. Also, even though agricultural work is among the most hazardous occupations in the nation, with an occupational fatality rate five times the rate of the average worker, many states do not require agricultural employers to provide workers compensation coverage to migrant and seasonable workers.

Occupational Safety and Health Administration (OSHA) Loopholes. OSHA excludes agricultural workplaces from the majority of the safety standards designed to protect workers. One-third of all crop farm workers are working for employers that are not held accountable for complying with basic safety and health standards.

Field Sanitation Violations, Heat stress and Pesticide Exposure. Lack of regulation of field sanitation and drinking water in the fields exposes workers to kidney and bladder infections and further causes them to sacrifice their dignity when forced to use fields as an alternative facility. Heat stress is also a key health and safety issues for farm workers, but employers are not required to take even basic preventative measures such as providing adequate shade and providing employees with rest breaks. Pesticide exposure is also a big problem.

77 Id. at 34.
78 Id. at 46.
79 Luna, supra note 62, at 500-501.
Based on this data, it is apparent that farm workers today still work in the “sweat shops of the soil”. U.S. farm workers are employed in one of the most hazardous occupations in the nation but have far fewer legal protections than employees in other sectors of the economy. They continue to endure employment abuse and exploitation every day.

2. Farm Worker Powerlessness

Perhaps one of the most damaging effects of agricultural exceptionalism is the way it has functioned to disempower farm workers from being able to participate in our democracy and seek the relief they deserve. This is ironic given growers’ and consumers’ near-total dependence on them. Years of economic and political powerlessness and the scarcity of viable employment alternatives have taken a great toll on farm laborers. Their modest numbers, racial and ethnic composition, low fluency in English, lack of legal papers, lack of continuous employment and low status in the occupational hierarchy leave them vulnerable and consigned to the bottom of the socioeconomic ladder. Even when sporadic efforts by mainstream political and social allies have tried to improve farm workers lives, corporate agricultural interests with powerful lobbies in the national and state capitals argue in favor of agricultural exceptionalism, and continue to win this battle.

Farm workers are often referred to as the “invisible people”. Because they are socially and geographically isolated, they are not seen, and because they are rarely given opportunity for legal recourse or participation in politics, they are not heard. Many migrant workers seem to accept the status quo and see no hope for change or improvement. In recent years, American

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82 Id., MARALYN EDID, FARM LABOR ORGANIZING: TRENDS & PROSPECTS 11 (1994).
83 Id.
84 Id. at 79.
society has done little to support farm workers or help empower them. Most Americans are ignorant of the economic underworld that the agricultural worker inhabits. In the closing of the 1960 CBS documentary *Harvest of Shame*, Edward R. Murrow suggests that an enlightened, aroused, and perhaps angered public could have the strength to influence legislation. It was clear to him that although farm workers had the strength to harvest our fruits and vegetables, they did not have the strength to influence legislation.\(^8^5\) Over 50 years later, this still holds true and although some advances were made shortly after the documentary aired\(^8^6\), American society as a whole has done little to support changing federal labor policy.

In summary, agricultural exceptionalism is a regulatory structure that has no place in the present, because it fails to reflect democratic conceptions of the workplace and thwarts widespread participation of workers within the rural economy which leads to despicable working conditions.\(^8^7\)

C. NLRA and FLSA Protections Would Positively Impact Agricultural Workers

Until employees are granted the right to bargain collectively, any attempt to improve their working conditions is futile. The NLRA makes it an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees.\(^8^8\) It is also makes it an unfair labor practice for an employer to terminate an employee for their union involvement.\(^8^9\) Without these protections employers are free to threaten workers with their livelihoods. Sabas Arrendondo, a table grape picker, relays that “the majority of farm workers are too scared to


\(^8^6\) United Farm Workers movement and national grape boycotts led to the passage of the Agricultural Labor Relations Act (ALRA), which provides farm workers in California with essentially the same protections as the NLRA. Edid, *supra* note 75, at 11.

\(^8^7\) Luna, *supra* note 62, at 509.


\(^8^9\) National Labor Relations Act § 158(a)(3).
organize” because the employers “tell us if we try to join the union, we’ll get fired.” 90 Estella Gutierrez has nearly 30 years experience working in the fields and knows first hand the difference between working with and without a union contract. She says “the difference between the two is huge” because “we are treated like human beings and not animals; we are also respected by our supervisors. With a union, workers are given a voice and the chance to positively change their lives.” 91

Many groups in America, such as auto workers, steel workers, electrical workers, truck drivers, and garment workers, have dramatically raised their standard of living and working by choosing union representation. There is no guarantee this would happen to farm workers, but union contracts *could* help govern wages, benefit plans, decent housing, access to medical care, and pensions for retirees. 92 Collectively bargained agreements could also lead to tighter enforcement of health and safety laws. When the United Farm Workers Union held contracts with several fruit and vegetable growers in California, wages were well above the national average and the working and living condition of unionized farm workers changed dramatically for the better. 93

Some economists suggest that unions also lead to higher productivity, and stronger employee morale. 94 Many people commend unions for promoting employee participation and for being an outpost of democracy in the workforce. Unions could be the first step for farm workers in reclaiming their voices and power after such a long history of oppression and exploitation.

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91 Id.
92 EDID, *supra* note 75, at 15.
93 Id.
94 Id. at 100.
The benefits of FLSA protections are straightforward. Farm workers would no longer have to work unreasonably long hours that are not justified by the normal demands for labor. If they did work over 40 hours per week they would be entitled to overtime pay. Overtime coverage of farm workers could actually end up promoting the original purpose of the provision, encouraging employers to hire additional workers, without burdening farmers financially.95

In summary, many of the deplorable working conditions that farm workers endure could be addressed by giving them the right to bargain collectively over the terms and conditions of their employment and by making sure they are subject to maximum hour provisions and entitled to overtime pay. Unionism would also empower farm workers because their voices would finally be heard. Congress has the power to amend this legislation, but they have not done so in over 70 years. The final section of this paper argues that the best way to address the issue is through the judiciary, as they have the authority to strike legislation that is unconstitutional.

III. The Agricultural Worker Exception is Unconstitutional and Should Be Overruled

The power of the judiciary to review federal and state laws for their constitutionality was established in 1803.96 It is the province and the duty of the judiciary to say what the law is, and it is the United States Supreme Court that ultimately decides what is and what is not constitutional.97 This article argues that the agricultural worker exception to the NLRA and FLSA violates the equal protection clause and is unconstitutional. The fourteenth amendment says no state shall deny any person within its jurisdiction the equal protection of the law.98 Although it does not directly apply to the federal government, the Supreme Court has long held

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95 LINDER, MIGRANT WORKERS & MINIMUM WAGE, supra note 27, at 291.
97 Id.
98 U.S. CONST. amend. XIV, § 1.
that through the reverse incorporation doctrine, the equal protection clause also applies to federal action.

Legislation can constitutionally divide people, but Congress’ power to classify is not unlimited. The government must identify a sufficiently important objective for its discrimination. The levels of scrutiny that courts apply to determine the constitutionality of legislation depends on the type of classifications drawn. As early as 1938 the Supreme Court recognized that prejudice against discreet and insular minorities may be a special condition, which tends to seriously limit the operation of political processes ordinarily relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry. Our current constitutional law doctrine has developed according to this idea. When government discrimination is based on a racial classification, courts apply strict scrutiny, the most heightened and least deferential standard of review. Under strict scrutiny, the purpose for the discrimination or the “end” must be compelling, and the means must be necessary, narrowly tailored, or the least restrictive alternative to achieve that end. Rationality review is the minimum level of scrutiny that all laws challenged under equal protection must meet. Under rationality review, the end must be legitimate and the means must be rationally related.

This equal protection claim is broken up into three sections. First, previous case law upholding the agricultural worker exclusion and the reasoning behind the decisions are examined. Second, the racial motivation behind the exclusion and its disparate impact on minorities is shown. This proves that the exclusion is a racial classification subject to strict scrutiny. The exclusion served as pretext to discriminate against blacks in violation of the equal protection clause. Third, the reasons why prior decisions upholding the exclusion no longer hold

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99 Jourdane, supra note 20, at 386.
true are exposed. There is no rational basis for the exclusion even under the most deferential standard of review.

A. Background: Previous Case Law Upholding the Exclusion

The Supreme Court decided *Carmichael v. Southern Coal & Coke Co.* and *Steward Machine Co. v. Davis* on the same day in 1937. The plaintiffs in both cases were corporations in industries that were not excluded from federal legislation of the New Deal, and they argued that the particular exemption of particular classes of employers, in this case agriculture, was arbitrary and therefore violative of the constitution. The court’s response was extremely deferential to Congress. They stated that the legislature is free to make distinctions as long as there is a rational basis behind them, and that when subjected to judicial scrutiny, these distinctions must be presumed to rest on that rational basis if there is any conceivable state of facts that would support it. In other words, the court applied rationality review and found the following to be “conceivable states” that supported the exclusion. First, the exclusion was rational because the legislature is free to withhold the burden of legislation for what it conceives to be a beneficent enterprise, or an enterprise that produces something good or beneficial. Agriculture was deemed to be beneficent, so the court sustained this exemption “for the encouragement of agriculture”. It could also be seen as an effort by Congress to save the

102 *Carmichael* was an action against the Alabama Unemployment Compensation Act. *Steward Machine* was an action against the Federal Social Security Act. *Steward Machine* relied on the analysis in *Carmichael* stating that if the agricultural exclusion “is lawful for states, it is lawful, a fortiori, in legislation by the Congress, which is subject to restraints less narrow and confining.” *Id.*
103 Chas C. Steward Mach. Co., 301 U.S. at 886-887.
104 301 U.S. 495 at 509.
105 *Id.* at 512.
compensation fund from the drain of a large deficit industry.\textsuperscript{106} Lastly, administrative considerations, including the relatively great expense and inconvenience of collection, justified the exemption from taxation of farmers not likely to maintain adequate employment records.\textsuperscript{107}

\textit{Romero v. Hodgson}, a federal district court decision decided in 1970, also involved an equal protection challenge to the agricultural worker exception from federal unemployment compensation.\textsuperscript{108} The court in \textit{Romero} applied the same loose standard of review as \textit{Carmichael} and \textit{Steward Machine} and found three conceivable scenarios that justified the exception. The exclusion of agriculture could have been 1) an indirect subsidy of a beneficent enterprise, or 2) an effort to save the compensation fund from the drain that would result from inclusion of a large deficit industry, or 3) a necessary political compromise.\textsuperscript{109} \textit{Romero} essentially reaffirmed the Supreme Court’s first two justifications from \textit{Carmichael}, did away with the “administrative burden” argument\textsuperscript{110}, and added the “necessary political compromise” justification. On direct appeal, the Supreme Court summarily affirmed this district court ruling, which means they affirmed \textit{Romero} without issuing an opinion.\textsuperscript{111} So, although racial discrimination was mentioned in the \textit{Romero} briefs, the issue was never presented or decided by the Supreme Court.

Consequently, when another equal protection challenge to the agricultural worker exception reached the Second Circuit two years later in \textit{Doe v. Hodgson}, the court relied heavily

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\textsuperscript{106} A deficit industry is one that distributes more money in unemployment compensation to unemployed workers in that industry than it produces through taxes levied against the industry. This justification was specific to unemployment and does not apply to the NLRA or FLSA. Romero v. Hodgson, 319 F. Supp. 1201, 1205 n.2 (N.D. Cal. 1970).
\textsuperscript{107} 301 U.S. at 513.
\textsuperscript{109} \textit{Id}.
\textsuperscript{110} Farms are now required to keep records for the Internal Revenue Service and Social Security Administration so the argument was outdated. \textit{Id} at 1202.
\textsuperscript{111} \textit{Id} at 1201.
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on the Supreme Court’s summary affirmance in *Romero*.\(^\text{112}\) Some circuits believe that a summary affirmance by the Supreme Court has very little precedential significance, but the Second Circuit felt bound by it. However, because the plight of migrant laborers was so unfortunate, they did so with “considerable hesitation”.\(^\text{113}\) The plaintiff’s in this action argued that the denial of protection from countless state and federal laws, including the NLRA and FLSA, were part of a systemic exclusion which constituted invidious discrimination. However, the lower court found no reason to consider the argument. There was no proof of racial motivation, therefore their disproportionate effect on minorities were “inadvertent impacts” of the agricultural exception.\(^\text{114}\) Rationality review was applied and *Romero* was followed. This article nevertheless argues that the agricultural worker exception was in fact motivated by invidious discrimination and should have been subject to more stringent scrutiny.

**B. The Exclusion is a Racial Classification Subject to Strict Scrutiny**

When race is a motivating factor in a governmental decision, judicial intervention is warranted. Strict scrutiny is applied to equal protection challenges when laws discriminate based on race. However, if laws are neutral on their face but have a racially disproportionate impact, proof of racially discriminatory intent or purpose must also be demonstrated.\(^\text{115}\) In *Washington v. Davis*, a race neutral law that required people to pass a qualifying test before being able to apply for police officer positions, had a hugely disproportionate impact on black applicants, but because there was no proof of discriminatory purpose, the law was upheld.\(^\text{116}\)


\(^{113}\) *Id.*


\(^{116}\) *Id.*
part of a disparate impact analysis is proving this intent prong. It is hard to prove that a racially neutral law actually serves as pretext for racial discrimination.

1. Proof of Discriminatory Intent

Courts consider the following factors, listed in Village of Arlington Heights v. Metropolitan Housing Development Corp., to analyze the intent prong of a disparate impact equal protection claim: 1) the impact of official action and whether it bears more heavily on one race than another, 2) a clear pattern otherwise unexplainable 3) departure from normal procedure and substance, 4) the historical background and context and 5) discriminatory statements made on the legislative record. Although it is difficult to prove intent, it is possible.

In Hunter v. Underwood, the Supreme Court found invidious motivation to discriminate against Blacks in an Alabama law that disqualified people who committed certain crimes from voting, even though the language of the statute was race neutral. Plaintiffs alleged that the crimes selected for inclusion were believed by the delegates to be more frequently committed by Blacks. The court relied mostly on evidence of legislative intent and historical context, the fourth and fifth Village of Arlington Heights factors. This evidence consisted of delegate’s statements during official proceedings, several historical studies and the testimony of two expert historians who showed that the Alabama Constitutional convention of 1901 was part of a movement that swept the post-Reconstruction South to disenfranchise blacks.

Like Hunter, the exclusion of agricultural workers from the NLRA and FLSA was also motivated by discrimination against Blacks. First, the impact of the official action was the denial to black farm workers, of the right to form unions, bargain collectively, and receive a decent wage at a much higher ratio than whites. Second, like the effort to disenfranchise blacks in

119 Id. at 228-229.
Hunter, the exclusion of agricultural workers from the NLRA and FLSA was also part of a movement that swept the New Deal. Agriculture was exempted from all legislation that could damage the south’s quasi-slave plantation system. This constituted a clear pattern, unexplainable on grounds other than race. Third, the exclusion was a substantive departure from normal procedure. Agricultural workers were especially deserving of labor protections so their exclusion was substantively inconsistent. There was no reason, from a labor standpoint, to exclude them. Already there was a racially disproportionate impact on blacks, a racially discriminatory pattern to systematically exclude them from labor protections, and a substantive departure from normal procedure, all factors tending to support an improper purpose.

Historical background can also be particularly telling. Hunter shows us that the Supreme Court will accept opinions of historians when legislation is part of a racially discriminatory movement. The historical context surrounding the New Deal movement, detailed in Part I, explains the South’s dependence on cheap black labor and illustrates southern democrats’ ability, because of their overrepresentation in Congress, to force legislation that excluded Blacks. Southern democrats were not secretive about their purpose and some discriminatory statements were also made on the record. For example Senator Smith’s depiction of the FLSA as interfering “with white hegemony in the South” was blatantly racist. Edward Cox of Georgia also stated his concern that the FLSA would “render easier the elimination of racial and social distinctions” which would not bode well for the South. These comments were made by congressman, and can be taken into account to consider impermissible purpose. In sum, the

120 See Linder, Farm Workers and the Fair Labor Standards Act, supra note 8, at 1353-1371 (analysis of other New Deal legislation that contained the exception).
121 See generally Morris, supra note 23 (legislative history and testimony from congressmen).
122 Linder, Farm Workers and the Fair Labor Standards Act, supra note 8, at 1374.
123 LINDER, MIGRANT WORKERS & MINIMUM WAGE, supra note 27, at 157.
124 Linder, Farm Workers and the Fair Labor Standards Act, supra note 8, at 1339 n.27.
historical context and statements made on the record, also clearly point to a discriminatory motivation.

Agriculture supporters may try to argue that they southern congressmen did not intend to racially discriminate against blacks and point to the fact that some whites were also negatively affected by the exclusion. They might also argue that the discrimination against farm workers was not based on race but rather on private economic interests. First, *Hunter* declared that the fact that a statute also affects some Whites does not render the purpose to discriminate against Blacks as moot.\(^{125}\) Second, it is important to understand that the NLRA and FLSA threatened the entire southern labor system, which was based on the subjugation of Blacks. Therefore the economic and racial justifications behind excluding agricultural workers are inextricably linked. Without the agricultural worker exception, the southern economy would have collapsed. The exception was implemented to ensure the South could continue to benefit from their racially discriminatory labor system. The nexus between slavery and agricultural economics is undeniable. The agricultural worker exception could not have been included in the NLRA and FLSA for purely economic reasons because there is no way to un-link the south’s private economic interest in cheap labor with their discrimination against and mistreatment of black farm workers.

2. Proof of Disparate Impact

Proof of discriminatory effect must also be proven when statutes are race-neutral. As Part I demonstrates, the agricultural worker exception in the NLRA and FLSA had a direct and disproportionate effect on racial minorities when it was enacted. The farm worker population was concentrated mostly in the south and southwest and these geographic areas also had the highest minority farm worker populations. Part II demonstrates that the exception continues to

\(^{125}\) 472 U.S. at 232.
have this effect today. Current demographics reveal that most farm workers are foreign-born Hispanic/Latinos. Agricultural workers remain disproportionately affected by their isolation from federal labor protections.\(^{126}\)

In summary, the agricultural worker exception to the NLRA and FLSA although neutral on its face, violated the equal protection clause because the original enactment was motivated by a desire to discriminate against minorities and it had and continues to have that discriminatory impact today.

3. White Supremacy is Not a Compelling End

In *Loving v. Virginia*, a Virginia law banning interracial marriage was deemed unconstitutional because it restricted the freedom to marry based on race.\(^{127}\) The Supreme Court held that preserving the racial integrity of its citizens was not a compelling government purpose, because the underlying goal of the ban was white supremacy.\(^{128}\) Similarly, the government here cannot prove that the exclusion of agricultural workers from the NRLA and FLSA is a means of achieving a compelling end, because the exploitation and subjugation of minorities in order to maintain white supremacy in the South is not a compelling interest. The agricultural exception to the NLRA and FLSA is a racial classification in violation of the equal protection clause and therefore unconstitutional.

C. There Is No Rational Basis for the Exclusion

The agricultural worker exception should be subjected to strict scrutiny. However, even if courts were to follow *Romero, Carmichael*, and *Steward* and apply rationality review, the justifications put forth in those cases are not sufficient to pass constitutional muster today. The *Romero* justifications and the arguments that agriculture has put forward over the years to

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\(^{126}\) *LINDER, MIGRANT WORKERS & MINIMUM WAGE*, *supra* note 27, at 175.

\(^{127}\) 388 U.S. 1 (1967).

\(^{128}\) *Id.*
explain the exception, fail to take into account the dramatic changes that the agricultural industry has gone through since the New Deal, the substandard working conditions that agricultural workers endure as a result of farm owners’ private economic interests, and the unlawful racial motivations behind the political compromise during the New Deal. Furthermore, *Romero* was decided before the Supreme Court began deciding equal protection cases under rational basis with considerably more bite and more realistic application than had previously been thought appropriate.\(^{129}\)

1. Farming is No Longer Unique

*Carmichael* and *Romero* argue that farming is unique and therefore a justifiably beneficent industry that Congress can choose to subsidize. They also suggest that Congress was more focused on industrial employment during the New Deal and that NLRA and FLSA requirements on employers would be too burdensome for the typical farm that was small and family run.\(^{130}\) Also the perishable nature of agriculture is asserted as a reason why agriculture should be treated differently than other kinds of economic enterprises.\(^{131}\) Lastly, agricultural employers claim that the exclusion is really about economics and that the NLRA and FLSA would impose impossible financial burdens on farmers.\(^{132}\)

There has been a revolution in American agriculture since the 1930’s when these laws were enacted. The number of small farms has steadily decreased while major industrial farms have both increased in size and number.\(^{133}\) Many more farms today are large-scale organizations that function like industrial employers. Recent figures show that 15,000 of the largest farms in America account for more than one-quarter of all farm profits in the United States and are so

\(^{129}\) *Hodgson*, 478 F.2d at 540.
\(^{130}\) LeRoy & Hendricks, *supra* note 25, at 489.
\(^{131}\) *EDID*, *supra* note 75, at 11.
\(^{133}\) *Romero*, 319 F. Supp at 1205 (Zirpoli, J., dissenting).
large that they are sometimes referred to as factory farms.\footnote{LeRoy & Hendricks, supra note 25, at 504.} This emerging corporate farm cannot be reconciled with the “family farm” that Congress intended to protect.

Agriculture is perishable and so inopportune strikes could have a particularly detrimental effect on farmers, but packers and haulers would have the same effect on employers if they struck, yet both are covered under the NLRA. Furthermore, by viewing the exclusion in purely economic terms, the human element of this work is disregarded. Agricultural workers should be able to pressure employers through strikes and other concerted action in order to get decent wages and working conditions. Given the growth and expansion of agribusinesses, the financial burdens on most farms are not unfeasible. Even if we end up having to pay more, our nation should at least acknowledge its debt to those whose unnecessarily hard lives have made possible thoughtlessly plentiful diets for others.\footnote{Romero v. Hodgson, 319 F. Supp 1201, 1206 (N.D. Cal 1970) (Zirpoli, J., dissenting).} For all of these reasons the need to give agriculture special treatment is no longer a legitimate purpose and so the agricultural exception from the NLRA and FLSA is not rational.

\section*{2. NLRA and FLSA Were Enacted to Benefit Employees Such As Agricultural Laborers}

A classification that closes a class of people to protections can only be sustained if there is a rational basis consistent with the purposes of the legislation.\footnote{Id. at 1204.} There is no truly conceivable state of facts to uphold a classification which constitutes the exclusion of more than 1,500,000 agricultural workers from the benefits of a statutory scheme intended to correct the very evils of which they probably suffer more than any other class.\footnote{LINDER, MIGRANT WORKERS & MINIMUM WAGE, supra note 27, at 306.} The NLRA policy promoted industrial peace and protected the right to bargain collectively. The policy behind the FLSA was the elimination of labor conditions detrimental to the maintenance of the minimum standard of living.

\footnotesize
\begin{thebibliography}{9}
\item LeRoy & Hendricks, supra note 25, at 504.
\item LINDER, MIGRANT WORKERS & MINIMUM WAGE, supra note 27, at 306.
\item Id. at 1204.
\end{thebibliography}
necessary for the health and well being of employees. Both statutes are social welfare legislation designed to protect workers from exploitation and both specifically deny these benefits to agricultural workers who could benefit greatly from their protections. The exclusion only serves to benefit farm owners, as it completely subsidizes agriculture. There is no rational relationship between the exception and the admitted purposes of the NLRA and FLSA; therefore the exception is arbitrary and not justified under equal protection. Discrimination for the sake of discrimination is not legitimate. It is so unreasonable as to fail even rational basis review.  

3. A Political Compromise that is Racially Motivated is Not Rational

The “necessary political compromise” referred to in *Romero* is not and cannot be a valid consideration for a classification which would otherwise clearly be unconstitutional. If there is one thing southern political leadership agreed upon, it was race legislation. The unremitting accommodation to southern racism during the New Deal represented more than the ordinary dynamics of a pluralist political compromise. It constituted the deliberate denial of socioeconomic and political rights to a disenfranchised minority, made possible by southern domination of the New Deal Congress.

In *Palmore v. Sidoti*, the defendant wanted to use his Caucasian ex-wife’s marriage to and co-habitation with a black man, as a changed circumstance that justified modification of their child custody order. The Supreme Court held that racial classifications cannot be the basis for removing children from otherwise fit parents even though the child might suffer because of the reality of private biases concerning mixed race households. The court reasoned

139 Id.
140 LINDER, MIGRANT WORKERS & MINIMUM WAGE, *supra* note 27, at 131.
141 Id.
that, although private biases may be outside the reach of the law, the law cannot give such biases any effect.  

Similarly, the statements made by many Southern congressmen like Wilcox and Smith during congressional hearings regarding New Deal legislation, prove their racist intentions and private biases against Blacks. Even though the reality of what Wilcox said may have been true, that the ramifications of white and black people receiving the same wages would be catastrophic, the law cannot give such biases any effect. Like Palmore, these are impermissible considerations under equal protection. President Roosevelt’s acquiescence to Southern congressman’s demands does not make that racism rational. Therefore, the political compromise that President Roosevelt made in order to pass the New Deal legislation cannot be put forth as a rational justification for the agricultural worker exception.

Conclusion

The agricultural exception to the NLRA and FLSA is unconstitutional therefore Carmichael, Steward Machine, and Romero must be overruled. Although following precedent is of fundamental importance to the rule of law, the Supreme Court accepts that legislative classifications must be judged in light of present circumstances, and that a classification deemed reasonable at the time of enactment can become quite arbitrary with the passage of time. For example, in 1896 the Supreme Court held that a State law could validly segregate races in separate but equal facilities or accommodations because separation did not necessarily imply the inferiority of one race over another. In Brown v. Board of Education, the court overruled that

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143 Id. at 433.
144 LINDER, MIGRANT WORKERS & MINIMUM WAGE, supra note 27, at 155.
146 Plessy v. Ferguson, 163 U.S. 537 (1896).
decision and held that the separate but equal doctrine deemed constitutionally sound only fifty-eight years earlier, was actually inherently unequal.\footnote{347 U.S. 483 (1954).}

Clearly precedent is not sacrosanct, but departure from precedent does demand special justification.\footnote{Patterson v. McLean Credit Union, 491 U.S. 164, 172 (1989).} One of the “special justifications” that validates the abandonment of precedent is if prior decisions are inconsistent with the prevailing sense of justice in this country.\footnote{Id. at 173-174.} This is the special justification for overruling \textit{Steward Machine, Carmichael,} and \textit{Romero.}

Precedent becomes more vulnerable as it becomes outdated and after being tested by experience, has been found to be inconsistent with our sense of injustice or social welfare.\footnote{Id. at 174.} The agricultural worker exception is seventy-four years old and is rooted in institutional racism dating back to slavery. Since the New Deal, the Supreme Court has made it clear that our nation has a responsibility to eradicate racial discrimination. Opinions like \textit{Brown v. Board of Education} and anti-discriminatory legislation such as Title VII, all point to our society’s deep commitment to racial justice. Continuing to deny protections along racial lines is completely inconsistent with these goals. Furthermore, our federal labor policy is committed to providing all workers with safe, healthy and fair conditions at work. Maintaining this exclusion is inconsistent with social welfare. Agricultural workers are in such a vulnerable position today because of their total exclusion from basic worker protections in the past. If the agricultural worker exception is not eliminated, the same conditions will be reproduced in the next generation of agricultural workers.\footnote{Linder, \textit{Farm Workers and the Fair Labor Standards Act}, \textit{supra} note 8, at 1381.}

Farm workers receive low wages, get no overtime protection, are subjected to abuse and harassment, substandard housing, health and safety risks and constant exploitation. They
provide the demanding labor necessary to feed our families and yet have been systematically
discriminated against and taken advantage of as a result of agricultural exceptionalism. It is the
responsibility of the courts to abolish legislation that is unconstitutional. There is no rational
justification for the continued marginalization of farm workers. It is time for the courts to
recognize this and bring farm workers under the scope of these important protections.