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Defeating the Agricultural Exemption: The Norris LaGuardia Act as a Means for Collective Action for Agricultural Labor

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DEFEATING THE AGRICULTURAL EXEMPTION: THE NORRIS LAGUARDIA ACT AS A MEANS FOR COLLECTIVE ACTION FOR AGRICULTURAL LABOR

I. INTRODUCTION

The freedom to collectively bargain without the fear of being fired by an employer is one of the most fundamental of all liberties guaranteed to the American worker.[1] This statement reflects the public policy of the United States, as indicated in the Norris LaGuardia Act (NLA),[2] one of the many pieces of labor-related legislation to come out of the turbulent labor movement of the 1930s. The NLA, known mostly for limiting the power of federal courts to issue injunctions in labor disputes,[3] also legalizes the right of workers to engage in collective bargaining without the fear of retaliation or discharge from the employer.[4]

However, without the protection of the NLA, agricultural workers who attempt to collectively bargain are left unprotected from employer retaliation or discharge. This is because other labor legislation, such as the National Labor Relations Act (NLRA)[5] and the Fair Labor Standards Act (FLSA),[6] contain a general agricultural worker exemption.[7] Therefore, agricultural workers are not afforded any of the protections of the seminal labor legislation in this country.[8]

The NLA provides an alternative for the agricultural worker. The NLA protects all workers from retaliation or discharge for collective bargaining attempts.[9] This right is guaranteed to all workers since the

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1. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (declaring that workers have a "fundamental right" to choose their own representatives for collective bargaining purposes without employer interference).

2. Norris LaGuardia Act of 1932, ch. 90, 47 Stat. 70 (hereinafter NLA) (codified as amended at 29 U.S.C. §§ 101-115 (1994 & West Supp. 1998)).

3. *See id.* § 101 (1994).

4. *See id.* § 102 (1994) (stating that the unorganized worker should have the "full freedom of association, self-organization, and designation of representatives of his own choosing . . . and that he shall be free from the interference, restraint, or coercion of employers of labor . . .").

5. National Labor Relations Act of 1935, ch. 372, 49 Stat. 449 (hereinafter NLRA) (codified as amended at 29 U.S.C. §§ 151-169 (1994 & West Supp. 1998)).

6. Fair Labor Standards Act of 1938, ch. 676, 52 Stat. 1060 (hereinafter FLSA) (codified as amended at 29 U.S.C. §§ 201-219 (1994 & West Supp. 1998)).

7. The NLRA offers some protection for workers fighting discharge claims because of concerted activity but exempts agricultural labor from its definition of "employee." This exemption results in agricultural laborers being unable to bring claims under the NLRA for unfair labor practices should the worker be discharged for engaging in concerted activity with his or her fellow workers. *See* 29 U.S.C. § 152(3); *see also* 29 U.S.C. § 213(a)(6) (exempting agricultural labor under the FLSA from benefiting from its overtime and maximum hours provision).

8. *See* 29 U.S.C. § 152(3); 29 U.S.C. § 213(a)(6) (exempting farm labor from the NLRA and the FLSA).

9. *See* 29 U.S.C § 102 (ensuring workers' collective bargaining rights).

NLA contains no exemptions.[10] However, the agricultural worker remains exposed to employer retaliation and discharge. This is because of the assertion that the exclusion of farm laborers from the NLRA should preclude their protection under the NLA as well.[11] However, the NLA does not exclude farm labor, and is one of the only laws which may be used to effectively protect agricultural workers in their efforts to improve their working conditions.[12] Thus, the NLA must be available to provide substantive protection to farm labor engaged in collective action.

This Note attempts to reconcile the inclusion of agricultural workers within the reading of the NLA with similar legislation such as the NLRA. Section II of this Note will discuss the historical setting from which the NLA was enacted. Specifically, this Section details the injustices faced by all workers at the time, particularly from the widespread use of judicial injunctions used to prohibit workers of all industries from any type of collective action.[13]

Section III examines the historical context of the farm worker exclusion from the major pieces of American labor legislation such as the NLRA and FLSA.[14] Specifically, this Section will discuss the history of labor-related New Deal legislation of the 1930s and the role it played in the farm worker exemption in these pieces of legislation. Section III also sets forth the reasons for the agricultural worker exemption to the NLRA and FLSA and addresses the fact that they do not preclude the inclusion of agricultural workers within the protection of the NLA.[15]

Section IV of this Note will discuss the NLA as an alternative for agricultural worker protection. The NLA will be discussed as a legis-

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10. *See id.* (excluding no class of workers from the NLA's protection).

11. *See* Respondent's Brief at 26, Rauda v. Oregon Roses, Inc., 935 P.2d 469 (Or. Ct. App. 1997) (No. 9410-75CV) (referencing Appellant's argument that exclusion of agricultural workers from the NLRA should exclude them from Oregon's NLA). However, the court rejected this argument by stating that it could find no indication from the legislative history of the acts which would dictate the exclusion of farm workers from the NLA. *See* Rauda v. Oregon Roses, Inc., 935 P.2d 469, 473 (Or. Ct. App. 1997), *review granted*, 952 P.2d 60 (Or. 1997).

12. Unlike the NLRA, the NLA contains no exemption of agricultural workers, or workers of any class. *See* 29 U.S.C. § 102.

13. *See* BERNARD SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: LABOR ORGANIZATIONS 5 (Robert F. Koretz ed. 1970) (discussing the widespread use of the judicial injunction against labor).

14. *See* 29 U.S.C. § 152(3) (1994); 29 U.S.C. § 213(a)(6) (1994 & West Supp. 1998) (exempting agricultural workers from the NLRA and the FLSA).

15. *See Rauda*, 935 P.2d at 473 (declaring the public policy of Oregon as evidenced through the state's NLA to confer substantive rights onto agricultural workers); Bravo v. Dolsen Cos., 888 P.2d 147, 155 (Wash. 1995) (deciding that the legislative intent of Washington's NLA and the public policy of the state protects workers from wrongful discharge). *But see* Respondent's Brief at 18, *Rauda* (No. 9410-75CV) (referring to the Appellant's argument that the exclusion of farm workers from Oregon's version of the NLRA indicated that Oregon's public policy did not protect agricultural labor from wrongful discharge claims). Despite the Appellant's argument in *Rauda*, the Oregon Appeals Court decided that the state's public policy protected all workers, including agricultural labor. 935 P.2d at 473.

lative act which confers substantive rights onto all workers. Oregon and Washington, two states which have versions of the NLA incorporated within their state codes,[16] have recently ruled that public policy provides agricultural workers the ability to collectively bargain without the fear of discharge.[17] Similarities between the NLA and the NLRA will also be discussed, as well as the role that federal preemption may play in labor cases involving exempted classes such as agricultural workers.

Section V will focus on North Dakota, a state with a strong agricultural base. North Dakota also has its own version of the NLA.[18] North Dakota's NLA will be closely examined to determine how it can protect agricultural laborers from employer retaliation and discharge. While North Dakota has ruled that its NLA does not confer rights on public employees,[19] it has yet to decide the fate of agricultural workers with regard to the Act. Thus, North Dakota courts could begin to follow the decisions from Oregon and Washington in finding that the NLA confers substantive rights on agricultural workers.[20]

II. THE NORRIS LAGUARDIA ACT AS A VICTORY FOR LABOR

The NLA which was enacted in 1932, was a major victory for labor.[21] It was enacted primarily to limit the use of judicial injunctions which were often used by courts to limit workers' strikes and collective action.[22] The NLA not only restricts the use of judicial injunctions in labor disputes, but also provides workers with much needed protection in collective bargaining activities.[23] The NLA grants workers the freedom of association, organization, and representation and protects

16. *See* OR. REV. STAT. §§ 662.010-.130 (1997); WASH. REV. CODE ANN. §§ 49.32.011-.020 (West 1990) (enacting versions of the federal NLA); *see also* THE DEVELOPING LABOR LAW 1095 (Patrick Hardin eds., 3d ed. 1992) (identifying those states with versions of the NLA incorporated within their state codes as being: Arizona, Connecticut, Hawaii, Idaho, Illinois, Indiana, Kansas, Louisiana, Maine, Massachusetts, Minnesota, New Jersey, New Mexico, New York, North Dakota, Oregon, Pennsylvania, Puerto Rico, Rhode Island, Utah, Washington, Wisconsin, and Wyoming).

17. *See Rauda*, 935 P.2d at 473-74 (holding that agricultural workers have a cause of action under the state's NLA); *Bravo*, 888 P.2d at 155 (deciding that the state's NLA confers actionable rights to agricultural workers).

18. N.D. CENT. CODE §§ 34-08-01 to -14 (1987 & Supp. 1997).

19. *See* City of Minot v. Gen. Drivers & Helpers Union No. 74, 142 N.W.2d 612, 617 (N.D. 1966) (holding that the state's NLA does not apply to striking public employees).

20. *See Rauda*, 935 P.2d at 473; *Bravo*, 888 P.2d at 155 (interpreting the NLA as giving substantive rights to agricultural workers).

21. *See* PHILIP TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 414 (1964) (describing the enactment of the NLA as "an outstanding legislative victory").

22. *See* SCHWARTZ, *supra* note 13, at 4 (describing the widespread use of the judicial injunction); *see also* FELIX FRANKFURTER & NATHAN GREENE, THE LABOR INJUNCTION 90-91 (1930) (describing judicial injunctions as restraining workers and their supporters).

23. *See* 29 U.S.C. § 102 (1994) (declaring public policy to include the worker's right to collective action without the fear of retaliatory discharge).

them from employer retaliation or discharge.[24] However, these liberties came after years of judicial intervention in labor disputes, which left workers, already weakened from the Depression, in need of protective legislation.[25]

A. JUDICIAL INJUNCTIONS AND THE NEED FOR GREATER WORKER PROTECTION

At the time of the NLA's enactment in 1932, workers were often prevented from improving their working conditions because of the widespread use of judicial injunctions, which viewed any combination of workers as an unlawful conspiracy and a threat to commerce.[26] The use of judicial injunctions had its roots in anti-trust legislation which emerged in America around the turn of the century.[27] The Sherman Antitrust Act, enacted in 1890, made any attempt at restricting interstate commerce illegal.[28] In *Loewe v. Lawlor*,[29] the United States Supreme Court held that a boycott by the United Hatters of North America obstructed the flow of the employer's product, thereby violating the Sherman Act.[30] After *Loewe*, it became clear that any collective worker action would invoke judicial injunctions under the Sherman Act since such action would inevitably impact some aspect of interstate commerce.[31]

Shortly after *Loewe* was decided, Congress enacted the Clayton Act in 1914.[32] The Clayton Act was intended to restrain the use of judicial injunctions which were so prevalent after the *Loewe* decision.[33] However,

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24. *See id.* (describing the freedoms of workers to collectively bargain).

25. *See* 73 CONG. REC. 4474, 4502 (1932) (describing the "cruelty of the injunction" as a reason for supporting the passage of the NLA).

26. Section 1 of the Sherman Act states: "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal." *See* ch. 647, 26 Stat. 209 (1890) (codified as amended at 15) U.S.C. §§ 1-7 (1994); *see also* Nat'l Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612, 620 (1967) (discussing how injunctions were often issued to prevent workers from organizing).

27. *See* Ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7) .

28. *See* 15 U.S.C. § 1 (declaring that every combination and conspiracy which restrained trade was illegal).

29. 208 U.S. 274 (1908).

30. Loewe v. Lawlor, 208 U.S. 274, 308-09 (1908). The *Loewe* case was known as the "Danbury Hatters' Case," since the location of the events in Danbury, Connecticut, involved a strike and a boycott by the Hatters' Union attempting to gain union recognition by D.E. Loewe & Company. *Id.* at 305; *see also* TAFT, *supra* note 21, at 411-14 (discussing the events surrounding the *Loewe* decision).

31. *See* Nat'l Woodwork Mfrs. Ass'n v. N.L.R.B., 386 U.S. 612, 620 (1967). The Court stated that "[f]ederal court injunctions [were] freely issued against all manner of strikes and boycotts under rulings that condemned virtually every collective activity of labor as unlawful restraint of trade."

32. The Clayton Act, ch. 323, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (1994)). The Clayton Act was described by organized labor to be the "industrial Magna Carta." *See* SCHWARTZ, *supra* note 13, at 5-6 (describing the reaction of organized labor to the enactment of the Clayton Act).

33. Section 20 of the Clayton Act prohibited injunctions "in any case between an employer and employees . . . involving, or growing out of, a dispute concerning terms or conditions of employment,

despite its intentions the Clayton Act's effectiveness was limited by subsequent judicial decisions.[34]

For instance, in 1921, in *Duplex Printing Press Company v. Deering*,[35] the Supreme Court issued an injunction against workers who were engaged in a secondary boycott against their employer's products.[36] The Court reasoned that despite the Clayton Act's protections, the workers' actions obstructed the company's flow of production and were therefore a violation of the Sherman Act.[37] While the Clayton Act contained a policy statement,[38] granting workers a vague sense of worth, it came to be limited in its application, as evidenced by the *Duplex* decision.[39]

In 1927, in the case of *Bedford Cut Stone Company v. Journeyman Stone Cutters' Association*,[40] the Supreme Court again held the collective actions of workers to be a violation of the Sherman Act, despite the protective provisions of the Clayton Act.[41] The Supreme Court determined that the Clayton Act did not shield workers who engaged in "unlawful" acts, such as a secondary boycott, even if the acts were done

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unless necessary to prevent irreparable injury to property, or to a property right." *See* ch. 323, § 20, 38 Stat. 738 (codified at 15 U.S.C. § 20, *repealed by* Pub. L. No. 101-588, § 3, 104 Stat. 2880 (1990)); *see generally* Bodine Produce, Inc. v. United Farm Workers Org. Comm., 494 F.2d 541, 545-46 (9th Cir. 1974) (discussing the historical events surrounding the *Loewe* decision and eventual enactment of the Clayton Act); FRANKFURTER AND GREENE, *supra* note 22, at 9 (depicting the history of *Loewe v. Lawlor* and the events leading up to the enactment of the Clayton Act).

34. *See generally* Bedford Cut Stone Co. v Journeyman Stone Cutters' Ass'n, 274 U.S. 37 (1927); Coronado Coal Co. v. United Mine Workers of America, 268 U.S. 295 (1925); Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921) (holding that the Clayton Act did not prohibit judicial injunctions against workers' actions). The Supreme Court justified the judicial injunctions by constructing a limited interpretation of Section 20 by holding that the Clayton Act did not protect labor unions as parties "to a 'dispute concerning terms or conditions of employment,' which proximately affects only a few of them." *See, eg., Duplex Printing Press,* 254 U.S. at 472 (limiting § 20 of the Clayton Act).

35. 254 U.S. 443 (1921).

36. Duplex Printing Press Co. v. Deering, 254 U.S. 443, 478-79 (1921). The Supreme Court in *Deering* was the first court to issue an injunction against the workers, thereby reversing the lower courts' decisions. *See id.* at 461, 479.

37. *Id.*

38. Section 6 of the Clayton Act reads:

> The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor, agricultural, or horticultural organizations, instituted for the purposes of mutual aid and help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws.

See ch. 323, § 6, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 17).

39. *See* SCHWARTZ, *supra* note 13, at 6 (discussing the limits placed on the application of the Clayton Act by rendering actions against outside companies, such as in the case of a secondary boycott, as being violations of the Sherman Antitrust Act, and thus outside of the Clayton Act's protection).

40. 274 U.S. 37 (1927).

41. *See* Bedford Cut Stone Co. v. Journeyman Stone Cutters' Ass'n, 274 U.S. 37, 50 (1927) (ruling that § 20 of the Clayton Act was not intended to legalize secondary boycotts).

in furtherance of lawful goals.[42] Therefore, the Clayton Act afforded the Journeyman Stone Cutters' Association no protection, since the Supreme Court enjoined their secondary boycott as a violation of the Sherman Act [43]

As seen in the *Bedford Cut Stone Company* decision, employers continued to seek the use of the judicial injunction to curtail workers' collective activity, despite the enactment of the Clayton Act.[44] Judicial interpretations of the Sherman Act continued to defeat workers' attempts to organize themselves.[45] Therefore, the judicial injunction remained a readily available tool for the employer to use against any collective action on the part of workers.[46]

B. THE DEPRESSION AND ORGANIZED LABOR

The Depression exacerbated labor's problems because union efforts were focused on mass unemployment and relief.[47] There was such high unemployment at the time,[48] that many urban dwellers were forced to seek work outside the cities in the agricultural sector.[49] However, the situation in urban areas was no better, since the unemployed workers who stayed in the cities often staged marches and protests demanding relief in the form of food, medical care, and relief from eviction.[50] Thus,

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42. *See id.* at 55 (deciding that the means used by the union did not justify the lawful ends).

43. *Id.*

44. *See* SCHWARTZ, *supra* note 13, at 4-7 (discussing the widespread use of judicial injunctions against labor activity despite the enactment of the Clayton Act).

45. *See id.* at 4 (describing the application of the Sherman Act by the courts).

46. *See id.* at 6-7 (detailing the Supreme Court's use of the judicial injunction against unions despite the enactment of the Clayton Act).

47. It is estimated that in 1932 only four million people were receiving relief, which usually consisted of food items. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR 66 (1971) (estimating this figure to be only a small percentage of those who needed relief). An adult person may have been able to receive $2.00 per week, couples may have received $3.60 per week, and children 16 and older received $1.25 per week. Younger children received $0.75 per week along with some milk. *See* WILLIAM O. DOUGLAS, GO EAST YOUNG MAN 354 (1974) (detailing the weekly relief figures available to individuals during the Depression). *See generally* STUART MARSHALL JAMIESON, LABOR UNIONISM IN AMERICAN AGRICULTURE 16 (1945) (describing the weakened conditions of America's labor unions); TAFT, *supra* note 21, at 411-14 (detailing the efforts of unions to provide adequate relief to workers).

48. In August of 1931, unemployment was estimated at eight million workers. *See* PIVEN & CLOWARD, *supra* note 47, at 51 (describing government efforts to deal with the masses of unemployed workers). This figure rose to more than 12 million workers by March of 1933. *See* TAFT, *supra* note 21, at 416 (identifying the problem of unemployment as a reason for the New Deal legislation).

49. *See* JAMIESON, *supra* note 47, at 15 (explaining that during the early Depression years, the usual trend of the labor pool moving from rural parts of the country to urban centers, due to higher wages and better conditions, was no longer the case mainly because of the shortage of work in the nation's cities).

50. Evictions during this time were frequent and were often met with "rent riots," masses of people returning the furniture of evicted families back into their homes. In addition to these protests over evictions, groups of the unemployed, often led by members of the Communist Party, marched through cities like Washington, D.C., to demand relief from the disastrous conditions prevailing at the time. *See* PIVEN & CLOWARD, *supra* note 47, at 61-66 (describing the efforts of the unemployed to call

union membership in most industries, including membership within the agricultural industry, declined during this period.[51]

C. THE NORRIS LAGUARDIA ACT AND THE FREEDOM TO ORGANIZE

Due to the judicial maneuvering around the Clayton Act, and the further proliferation of judicial injunctions, as well as the economic effects of the Depression, it became apparent that existing legislation was no match for the problems faced by workers of all industries.[52] The American Federation of Labor (AFL),[53] addressed some of the problems, including advocating legislation that would curb the use of the widespread judicial injunction.[54] The AFL endorsed such a bill as early as 1928,[55] and continued to strongly promote the idea until it was again considered by Congress in 1931.[56]

In an effort to persuade the Senate to pass such an anti-injunction bill, Senator Norris of Nebraska spoke of the 389 injunctions that had been issued in federal and state courts against workers from 1922-1932.[57] Many of these injunctions not only prohibited workers from collective action such as striking and boycotting, but often forbade workers from warning others that companies operated with "yellow dog contracts."[58]

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attention to their poverty through political action).

51. In particular during 1930 through 1933 when the Depression was at its worst, strikes taking place on farms lessened considerably. *See* JAMIESON, *supra* note 47, at 16-17. The number of farm workers participating in strikes in 1930 was approximately 8,600, which dropped to around 3,200 in 1932. *See id.* (providing figures for the number of strikes taking place within the American agricultural sector prior to 1933).

52. *See* 73 CONG. REC. 4502, in which Senator Norris of Nebraska, one of the sponsors of the NLA, stated in a speech to the Senate that the use of the injunction had been used to repress workers' constitutional rights, rather than to simply protect employers' property interests as the Clayton Act required.

53. The American Federation of Labor was founded in 1886. *See* J. DAVID GREENSTONE, LABOR IN AMERICAN POLITICS 30 (Hugh Douglas Price consulting ed., 1969) (discussing the history of the AFL).

54. *See* TAFT, *supra* note 21, at 414 (indicating that a version of an anti-injunction bill was first introduced in 1927 by Senator Henrik Shipstead at the request of the AFL).

55. *Id.* While the bill failed to get sufficient votes for passage, the idea continued to gain popularity and was adopted in both the Republican and Democratic party platforms of the 1928 conventions. *See id.* at 414-15.

56. *Id.* at 415. The NLA was subsequently signed into law on March 23, 1932. *See id.*

57. *See* 73 CONG. REC. 4474, 4508 (1932).

58. A "yellow dog contract" is "[a]n employment practice by which an employer requires employee to sign an agreement promising as condition of employment that he will not join a union, and will be discharged if he does join." BLACK'S LAW DICTIONARY 1616 (6th ed. 1990). *See* Hitchman Coal & Coke Co. v. Mitchell, 245 U.S. 229, 248, 250-51 (1917), in which the Supreme Court upheld the "yellow dog contract" by applying an injunction to a labor dispute prohibiting the United Mine Workers of America from organizing workers who had signed such contracts. For a discussion of the *Hitchman Coal* case, *see* TAFT, *supra* note 21, at 361-62 (discussing the impact of the *Hitchman Coal* decision upon the use of such contracts); *see also* FRANKFURTER & GREENE, *supra* note 22, at 148-49 (discussing the widespread use of the "yellow dog contract"). Often if a worker refused to sign such a contract for one company, he left only to encounter them elsewhere. *See* 73 CONG. REC. 4504 (testimony of Senator Norris indicating that the use of the "yellow dog contract" was in some instances industry-wide).

In 1932, under the administration of President Herbert Hoover,[59] the anti-injunction bill known as the Norris LaGuardia Act was enacted.[60] Specifically, the NLA prohibits the use of injunctions in labor disputes,[61] outlaws the "yellow dog contract"[62] and contains a public policy statement which officially legitimizes the freedom of all workers to collectively bargain without the threat of retaliatory discharge by employers.[63] The Supreme Court gave the NLA substantive effect in

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59. *See* TAFT, *supra* note 21, at 415 (noting that the NLA was signed by President Herbert Hoover on March 23, 1932).

60. *See* ch. 90, §§ 1-15, 47 Stat. 70-73 (1932) (codified as amended at 29 U.S.C. §§ 101-15 (1994)). *See* TAFT, *supra* note 21, at 415 (indicating that the Act passed overwhelmingly with 363 of 376 votes in the House of Representatives and 75 of 80 votes in the Senate). For a legislative history regarding the NLA, *see* Bodine Produce, Inc. v. United Farm Workers Org. Comm., 494 F.2d 541, 548 n.16 (citing 73 CONG REC. 4502-11, 4618-30, 4676-96, 4754-61, 4914-20, 4927-39).

61. Section 1 of the NLA states:

> No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of this chapter, nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter.

47 Stat. 70 (1932) (codified at 29 U.S.C. § 101).

62. Section 3 of the NLA states:

> Any undertaking or promise . . . is declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States . . . [e]very undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby,[e]ither party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or [e]ither party to such contract or agreement undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains, a member of any labor organization or of any employer organization.

47 Stat. 70 (1932) (codified at 29 U.S.C. § 103).

63. Section 2 of the NLA states:

> In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited to this chapter, the public policy of the United States is declared as follows:
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> > Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership associations, *the individual unorganized worker*, is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby obtain acceptable terms and conditions of employment, wherefor, though he should be free to decline to associate with his fellows, *it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing*, to negotiate the terms and conditions of his employment, and that he *shall be free from the interference, restraint, or coercion of employers of labor*, or their agents, in the designation of such representatives or in self-organization or *in other concerted activities for the purposes of collective bargaining or other mutual aid or protection*; therefore, the following definitions of and limitations upon the jurisdiction and authority of the courts of the United States are enacted.

47 Stat. 70 (1932) (codified at 29 U.S.C. § 102) (emphasis added).

1938 in *Lauf v. E.G. Shinner & Co.*[64] In *Lauf*, the Court held that an injunction had been improperly issued because the district court overstepped its jurisdictional limits set by the NLA.[65] In effect, the *Lauf* Court required district courts to look to the NLA and determine whether "irreparable injury to complainants' property" would result from the ensuing labor dispute, before issuing a judicial injunction.[66] Since the district court in *Lauf* made no determinations under the NLA, its injunction against the union was improper.[67]

Similarly, another case from 1938 gave unions protection from judicial injunctions under the NLA. In *New Negro Alliance v. Sanitary Grocery Co., Inc.*,[68] the Supreme Court broadened the application of the NLA by holding that the NLA protected workers in protesting racial discrimination in the workplace.[69] In *New Negro Alliance*, a union of African-American workers picketed their employer because it refused to hire African-Americans in certain locations.[70] The Court held that the NLA protected the union in its protest of the racially discriminatory hiring policy.[71] Therefore, the NLA was given substantive effect by the Court in terms of limiting judicial injunctions and protecting the workers' right to organize.[72]

III. THE AGRICULTURAL EXEMPTION: FROM LIKELY EXCLUSION TO ABSOLUTE EXEMPTION—THE NATIONAL INDUSTRIAL RECOVERY ACT AND THE NATIONAL LABOR RELATIONS ACT

In order to fully understand the need for the NLA as a means for farm workers to collectively bargain, it is necessary to consider the exclusion of farm labor from other legislation, such as the NLRA[73] and the FLSA.[74] Exclusion of farm workers from labor legislation began in 1933 with the enactment of the National Industrial Recovery Act (NIRA).[75] There was uncertainty in terms of whether agricultural wor-

64. 303 U.S. 323 (1938).

65. *See* Lauf v. E.G. Shinner & Co., 303 U.S. 323, 330 (1938) (determining that the district court exceeded its jurisdiction by issuing an injunction).

66. *Id.* at 329.

67. *Id.*

68. 303 U.S. 552 (1938).

69. New Negro Alliance v. Sanitary Grocery Co., 303 U.S. 552, 561 (1938).

70. *Id.* at 559.

71. *See id.* at 561 (holding that the NLA protected workers in protesting an employer's racially discriminatory hiring policies).

72. *See id.* at 563 (interpreting the NLA as protecting workers' rights to publicly express dissatisfaction with employment conditions and to "peacefully . . . persuade others to concur in their views").

73. *See* National Labor Relations Act, 29 U.S.C. § 152(3) (1994) (exempting agricultural labor).

74. *See* Fair Labor Standards Act, 29 U.S.C. § 213(a)(6) (1994) (exempting agricultural labor).

75. *See* ch. 90, §§ 1-10, 48 Stat. 195-200 (1933) [hereinafter NIRA] (held unconstitutional in

kers were included under the NIRA.[76] While agricultural workers were not expressly excluded from the NIRA, they were usually regarded as falling outside of the NIRA's provisions.[77]

The uncertainty regarding the possible exclusion of farm labor from the NIRA ended when the NIRA was declared unconstitutional by the Supreme Court in 1935.[78] However, the NIRA is thought to be the beginning of the farm worker exemption.[79] This exclusion was formalized with the enactment of the NLRA and FLSA and continues today.[80]

A. THE NATIONAL INDUSTRIAL RECOVERY ACT AND THE BEGINNING OF EXCLUSION

Along with the passage of the NLA in 1932, the NIRA and the Agricultural Adjustment Act, (AAA)[81] were enacted in 1933. Unlike the NLA which limited judicial injunctions, the NIRA and the AAA were enacted in order to revive a failing economy.[82] The NIRA further helped industrial workers by reducing unfair competition and limiting restrictions on commerce by setting up industry codes and regulating wages and hours.[83] These codes were enforced by the National Recovery Administration (NRA).[84] Like the NLA, the NIRA contained a policy statement which further sanctioned labor's ability to unionize.[85]

A.L.A. Schechter Poultry Co. v. United States, 295 U.S. 495 (1935)).

76. *See* Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1356 (1987) (describing the inter-agency conflict regarding coverage of farm workers under the NIRA).

77. *See id.* (stating that the practical effects of administrative interpretations of the NIRA usually resulted in farm labor exemptions).

78. *See generally A.L.A. Schechter Poultry Corp.*, 295 U.S. 495.

79. *See* Linder, *supra* note 76, at 1356.

80. *See* 29 U.S.C. §§ 152(3); 213(a)(6) (1994) (exempting agricultural workers from the NLRA and the FLSA).

81. Agricultural Adjustment Act of 1933 [hereinafter AAA], ch. 25, §§ 1-19, 48 Stat. 31-41 (1933) (held unconstitutional in United States v. Butler, 297 U.S. 1 (1936)). *See* Edward L. Schapsmeier & Frederick H. Schapsmeier, *Farm Labor Policy from FDR to Eisenhower: Southern Democrats and the Politics of Agriculture*, 53 AGRIC. HIST. 352, 359 (1979) (discussing the subsequent passage of the AAA of 1938).

82. *See* TAFT, *supra* note 21, at 416 (examining President Roosevelt's contention that there was a need for legislation that would provide for industrial recovery). Other legislation passed during Roosevelt's first months in office included: the Emergency Banking Act, the Economy Act, the Civilian Conservation Corps., the Federal Emergency Relief Act, the Tennessee Valley Authority Act, the Truth-in- Securities Act, the Home Owners Loan Act, the Glass-Steagall Banking Act, the Farm Credit Act, and the Railroad Coordination Act. *See* PIVEN & CLOWARD, *supra* note 47, at 71 (describing the legislation resulting from the economic collapse faced by Roosevelt's newly elected administration).

83. *See* GREENSTONE, *supra* note 53, at 46-47 (detailing legislation such as the NIRA which was enacted to regulate hours, wages and working conditions); *see also* TAFT, *supra* note 21, at 416 (describing the NIRA's objectives to include the freedom of commerce and an end to unregulated competition).

84. *See* Linder, *supra* note 76, at 1354 (describing the NRA's authorization to enforce the NIRA's provisions).

85. Section 7 of the NIRA states:

> [t]hat employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint, or

The NIRA's provisions providing legal protection for workers' collective action led to a dramatic upsurge in union activity.[86] For instance, in 1933, sixty-one strikes involving agricultural workers occurred in seventeen states.[87] The agricultural sector had, until then, only seen a few localized unions which declined even further during the early years of the Depression.[88]

Despite the victory that industrial workers felt about the passage of the NIRA,[89] it remained uncertain whether agricultural workers were entitled to its protection.[90] This is because the NRA interpreted the NIRA to regulate only industrial relations.[91] In addition, agricultural interests were believed to be enforced by the AAA, thus giving the NRA little jurisdiction to regulate agricultural labor.[92] The AAA's goal was to raise farm income, however, and it had the interests of farmers, rather than the interests of farm workers, in mind.[93] Therefore, agricultural workers, presumably covered by neither the NIRA nor the AAA, were left unprotected by early New Deal legislation.[94]

As seen by the increase in agricultural strikes, however, this exclusion was not always clear to the agricultural industry. Caught up in the general increase of union organizing, many agricultural workers proposed fair competition "codes" similar to those done for other

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coercion of employers of labor, or their agents, in the designation of such representatives in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

§ 7(a)(1), 48 Stat. 195 (1933); *see also* TAFT, *supra* note 21, at 416 (indicating that § 7 of the NIRA, like § 2 of the NLA, affirmed workers' right to organize and the freedom from retaliation by employers should workers exercise this right, or to refrain from joining a company union). The NIRA was declared unconstitutional in *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

86. Workers were reported to be joining unions in the tens and hundreds of thousands as indicated by the words of the AFL: "Hundreds of thousands of workers—more than 200,000 in the United Mine Workers alone—have been enrolled in the past two months in international unions and local unions directly affiliated with the American Federation of Labor." *See* TAFT, *supra* note 21, at 419.

87. These various strikes involved approximately 56,800 workers. *See* JAMIESON, *supra* note 47, at 16 (indicating that 56,800 workers took part in 61 strikes occurring in 17 states around the country in 1933). Reasons for this increase in activity include low wages paid to farm workers along with the perception that other industries were being advantaged by this legislation. *See id.* at 17.

88. *See id.* at 16 (listing the number of strikes in the agricultural sector during the 1930s).

89. In the words of the AFL: "For the first time in the history of the nation there has been written in a statute passed by the Congress of the United States a section according workers a legal right to organize and to be protected in the exercise of that right." *See* TAFT *supra* note 21, at 420 (discussing a release by the AFL to workers regarding the passage of the NIRA).

90. *See* Linder, *supra* note 76, at 1354 (describing the NIRA to be an "industrial recovery act" from which agricultural labor was excluded); *see also* JAMIESON, *supra* note 47, at 17 (contending that the NIRA and the AAA gave benefits to particular occupations, including farm owners, growers, and industrial laborers, while excluding farm workers).

91. *See* Linder, *supra* note 76, at 1356 (describing the NRA as an agency which thought itself to regulate industry only).

92. *See id.*

93. *See* Schapsmeier & Schapsmeier, *supra* note 81, at 359 (detailing the goal of the AAA as raising farm income by restricting total output).

94. *See* Linder, *supra* note 76, at 1359 (identifying administrative conflicts between the NIRA and AAA as resulting in exclusion of much farm labor from legislative protection).

industries under the NIRA.[95] However, the NIRA was created primarily for the benefit of industrial workers.[96] Thus, while agricultural labor was not expressly excluded, it was generally thought to lie outside of the NIRA's provisions.[97] While the NIRA was declared unconstitutional before the issue was ultimately decided,[98] it should nonetheless be considered to be the beginning of the agricultural labor exemption.[99]

B. THE NLRA AND THE FORMALIZATION OF THE FARM LABOR EXEMPTION

By 1935, with the passage of the NLRA, agricultural labor was expressly excluded from the protection provided to the industrial workforce.[100] The enactment of the FLSA, in 1938, led to the implementation of the agricultural exemption, which excluded agricultural workers from receiving the benefits of hour and wage protections.[101] One proposed reason for the utilization of these exemptions has to do with the political compromise by the southern block in securing an exemption for much of its workforce.[102] In addition, Congress seemed reluctant to regulate the agricultural sector which was thought to be more localized than other industries.[103] Thus New Deal legislation, while further legitimizing the strength of the industrial worker, expressly left the agricultural worker with little additional protection.

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95. *See* JAMIESON, *supra* note 47, at 18 n.4 (citing the ignorance of the NIRA's provisions, and the upsurge in overall union activity as the reasons why codes were sent to the National Recovery Administration (hereinafter NRA) from farm workers)).

96. *See* Linder, *supra* note 76, at 1356 (describing the NRA's interpretation of the NIRA as applying only to industrial labor) (citing R. WOODBURY, LIMITS OF COVERAGE OF LABOR IN INDUSTRIES CLOSELY ALLIED TO AGRICULTURE UNDER CODES OF FAIR COMPETITION UNDER NIRA 4 (1936)); *see also* Maurice Jourdane, *The Constitutionality of the NLRA Farm Labor Exemption*, 18 HASTINGS L.J. 384, 386 (1968) (citing the NIRA as covering industrial workers).

97. *See generally* Linder, *supra* note 76, at 1356-61 (describing the administrative confusion between the NIRA and the AAA, which often resulted in the agricultural sector declaring itself to lie outside of the NIRA's jurisdiction).

98. Ch. 90, 48 Stat. 195 (1933) (held unconstitutional in A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935)).

99. "Congress did not intend that codes of fair competition under the NIRA be set up for farmers or persons engaged in agricultural production." *See* Linder, *supra* note 76, at 1356 (citing WOODBURY, *supra* note 96, at 3).

100. *See* 29 U.S.C. § 152(3) (1994) (refusing to include agricultural workers within the NLRA's definition of "employee").

101. *See* FLSA, 29 U.S.C. § 213 (1994) (exempting agricultural workers from wage and hour provisions).

102. *See* Linder, *supra* note 76, at 1372 (describing the need for appeasement of southern legislators in order to ensure the passage of the FLSA).

103. *See* S. REP. NO. 74-573, at 2306 (1935) (describing the concern over Congress' role in regulating local matters).

The NLRA legitimized labor's ability to collectively bargain.[104] The NLRA contains the same protections for labor that the previous NIRA contained, by declaring that the worker has a "right" to organize[105] and to be protected from employer retaliation for exercising that right.[106] Even with the enactment of the NIRA, workers continued to struggle for their rights to organize.[107] Therefore, the NLRA provided for an administrative body, the National Labor Relations Board (NLRB), which would oversee and enforce its provisions.[108]

Unfortunately, this legislative victory had little regard for agricultural workers, as they were expressly left out of its coverage.[109] This exclusion cannot be attributed to a lack of need on behalf of farm workers.[110]

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104. Section 7 of the NLRA legislatively confirmed workers' rights to organize. *See* TAFT, *supra* note 21, at 416 (quoting language from § 7 of the Act stating, "that employees shall have the right to organize and bargain collectively through representatives of their own choosing").

105. Section 7 of the NLRA is as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

49 Stat. 452 (1935) (codified as amended at 29 U.S.C. § 157 (1994)).

106. Section 8 of the National Labor Relations Act states that it:

> [s]hall be an unfair labor practice for an employer—to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 157 of this title . . . to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter . . . to refuse to bargain collectively with the representatives of his employees . . . .

49 Stat. 452 (1935) (codified as amended at 29 U.S.C. § 158(a)(1), (4) (1994 & West Supp. 1998)).

107. Three strikes which were instrumental during this period and indicative of workers' continued struggle for recognition are the San Francisco general strike by the Pacific Coast Longshoremen, the Minneapolis general strike by the truckers, and the Toledo Electric Auto-Lite Company strike in Toledo, Ohio. While all three strikes were considered successful, each was met with violent opposition by companies. For descriptions and accounts of these strikes, *see* GREENSTONE, *supra* note 53, at 42; TAFT, *supra* note 21, at 435-49.

108. *See* 29 U.S.C. § 153(a), (b) (1994) (creating the NLRB to oversee the provisions of the NLRA).

109. Section 2 of the NLRA states:

> The term "employee" shall include any employee . . . and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, . . . but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any person who is not an employer as herein defined.

49 Stat. 450 (1935) (codified as amended at 29 U.S.C. § 152(3) (1994)).

110. Unfortunately, not all courts realized this need. In *North Whittier Heights Citrus Ass'n v. N.L.R.B.*, 109 F.2d 76, 80 (9th Cir. 1940), the court indicated that agricultural workers, along with domestic servants, and persons employed by family members were exempt from the NLRA because all three groups had a "common denominator." The court interpreted this common trait to mean that these groups should have no difficulty in negotiating with employers, thus rendering the need for

For instance, in an effort to include agricultural labor in the bill's provisions, Representative Marcantonio of New York called attention to the plight of agricultural labor and testified on the United States House of Representatives floor that farm workers endure the worst conditions in the nation.[111]

Similarly, attempts by agricultural workers to unionize were often met with violence and imprisonment of workers and workers' advocates by growers' associations and local law enforcement.[112] Containing the unionization of workers was often easily achieved due to the specific problems facing the farm labor work force, which include its migratory nature, its low social position, its lack of political power, and the fact that it was often composed of poorer immigrants.[113] Thus, even in 1935 with

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collective bargaining rights minimal. *Id.* However, even taking this interpretation into account, the court stated that due to the growth of the agricultural industry (particularly the citrus industry as in this case) from the small farmer into large-scale industry, this "common denominator has ceased to exist." *Id.* Therefore, even accepting the argument that collective bargaining rights for agricultural workers were not as relevant at the time of the enactment of the NLRA, this need has become more urgent with the increasingly corporate and impersonal nature of the business. *See id.* (discussing the fact that through the growth of the citrus industry and the increasingly impersonal nature of the business, the need for collective bargaining may also become more important); *see also* Jourdane, *supra* note 96, at 392 (citing *Hearings on S. 1000, S. 1264, S. 1392, S. 1550, S. 1580, and S. 2123 Before the Senate Comm. on Education and Labor*, 76th Cong. 3638-39 (1939). This included the testimony of Ivan McDaniel, which expressed the romantic view that farm workers did not need collective bargaining rights because "[t]he worker and the farmer . . . eat at a common table, their children attend the same schools, they bow down together in religious worship").

111. *See* 79 CONG. REC. 9668, 9720 (1935) (recounting the statement of Representative Vito Marcantonio). Marcantonio gave further testimony regarding the struggle of the Southern Tenant Farmers Union in Arkansas and the violent reactions that accompanied their attempts to organize. *Id.* Representative Marcantonio was one of the few legislators at the time to express consistent concern with the plight of agricultural workers and to advocate on their behalf. *See* Austin P. Morris, *Agricultural Labor and National Labor Legislation*, 54 CAL. L. REV. 1939, 1951 n.55 (1966) (indicating that despite having an urban constituency, Representative Marcantonio was in favor of including agricultural workers within the NLRA); *see also* JAMIESON *supra* note 47, at 39 (describing annual wages in the agricultural sector to be some of the lowest among the general work force).

112. *See* JAMIESON, *supra* note 47 at 39-42 (discussing the violence and intimidation experienced by agricultural workers in their attempts to strike); *see also Labor Disputes Act: Hearing on H.R. 6288 Before the House of Representatives Comm. on Labor*, 74th Cong. 2501-25 (1935) (giving the testimony of James Rorty, a newspaper reporter, who was called before the House Committee for testimony regarding his harassment, imprisonment, and final expulsion from the Imperial Valley in Arizona by local law enforcement as he attempted to report on striking lettuce shed workers). Rorty indicated that the attempt of the union was to enforce a strike settlement that had been entered into in neighboring Salinas Valley in the previous year. *Id.* at 2516. The union was attempting to enforce the settlement in the Imperial Valley, since it concerned the identical work force (which had since migrated to the Imperial Valley), and the same union. *Id.*

113. For instance, in addition to the other problems faced by agricultural laborers as a whole, many southern farm workers at this time were not able to vote due to the racial laws that were still in effect. *See* JAMIESON, *supra* note 47, at 39 (discussing the difficulties of southern agricultural workers in gaining any political strength). This in turn resulted in an entire work force having no voice in the community. *Id.*

the enactment of the NLRA, farm workers were in need of protective legislation.[114]

C. REASONS FOR THE AGRICULTURAL EXEMPTION

Some argue that one reason for the agricultural exemption from the NLRA and FLSA is political.[115] In short, without the agricultural exemption, the powerful southern Democratic block threatened to derail President Roosevelt's New Deal legislation.[116] It may also be argued that the agricultural exemption was premised on Constitutional grounds, specifically regarding congressional commerce power.[117] Finally, the uniqueness of agricultural labor may have provided concern regarding the necessity of agricultural labor's inclusion within New Deal legislation.[118] These three reasons proved to be fatal for farm worker protection.[119]

1. The Agricultural Exemption in Political Perspective

The power that the southern block maintained during the time of the New Deal has been well documented.[120] The South had mainly an agricultural economy that was built on the exploitation of cheap black labor.[121] New Deal legislation, particularly the FLSA which regulated

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114. Congressman Marcantonio of New York offered an amendment to the NLRA as it was being debated on the House floor that would include agricultural workers within its provisions, stating, "[t]he same reasons urged for the adoption of this bill on behalf of the industrial workers are equally applicable in the case of the agricultural workers, in fact more so as their plight calls for immediate and prompt action." 79 CONG. REC. 9668, 9720 (1935).

115. *See generally* Jim Chen, *Of Agriculture's First Disobedience and Its Fruit*, 48 VAND. L. REV. 1261 (1995); Linder, *supra* note 76.

116. *See* Chen, *supra* note 115, at 1281 (referencing Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLINE L. REV. 649, 652-57 (1989)).

117. The NIRA, for example, was declared to be unconstitutional as it burdened interstate commerce, thus creating an improper use of congressional commerce power. *See* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495, 550, 551 (1935) (holding that the NIRA was an improper use of congressional commerce power); *see also* 79 CONG. REC. 9668, 9721 (1935) (regarding the statements of Representative Ellenbogen involving his concern as to whether agricultural labor fell under the label of "interstate commerce").

118. *See, eg.*, North Whittier Heights Citrus Ass'n v. N.L.R.B., 109 F.2d 76, 80 (9th Cir. 1949) (describing the small farmer's relationship with the farm worker to be adequate without the need for collective bargaining agreements). The court stated that this necessity may change as the scale of farming grows. *Id.*

119. *See* National Labor Relations Act, 29 U.S.C. § 152 (1994) (exempting agricultural labor); Fair Labor Standards Act, 29 U.S.C. § 213 (exempting agricultural labor).

120. *See* Schapsmeier & Schapsmeier, *supra* note 81, at 354 (explaining that at times the southern block became even more powerful due to its alliance with the midwestern wheat belt); *see also* GREENSTONE, *supra* note 53, at 48 (noting that despite the strength of the southern Democratic block, labor's interests were nonetheless served by Congress rather than by Roosevelt); *see generally* Linder, *supra* note 76, at 1351-53 (discussing the role of southern Democrats on New Deal policies and the need for their cooperation to see legislation through).

121. *See* Linder, *supra* note 76, at 1343 (describing the South as the only part of the nation with an agricultural economy); *see also* Chen, *supra* note 115, at 1274-87 (discussing southern agriculture and the role that slavery and black labor played in its maintenance).

wages and hours, endangered this economic power structure.[122] The New Deal, at least to the southern legislator, worsened the tensions between the North and South,[123] and sought to rid the South of its racially defined economic system.[124]

In order to placate this powerful block of legislators, the exclusion of agricultural labor from these New Deal policies was offered as a compromise to the otherwise labor-friendly legislation of the time.[125] This exemption excluded much of the southern labor force from enforcement of New Deal legislation, particularly with respect to the wage and hour provisions of the FLSA.[126] Therefore, the exclusion of agricultural labor from the FLSA was a compromise designed at least in part to ensure its passage.[127]

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122. *See* Linder, *supra* note 76, at 1342-53 (discussing the opposition by the southern block to New Deal legislation, particularly regarding the FLSA which regulated wages and hours for workers, as a threat to the southern plantation system); GEORGE BROWN TINDALL, THE EMERGENCE OF THE NEW SOUTH 618 (Wendell Holmes Stephenson & E. Merton Coulter eds., 1967) (discussing the effect of New Deal policies such as the NIRA on the existing racially-based power structure in the South).

123. *See* TINDALL, *supra* note 122, at 618-19 (discussing the "[n]orthernization" of the Democratic party following the passage of New Deal legislation such as the FLSA, the NLRA and social security, which worsened the tensions between northern and southern legislators).

124. *See* Linder, *supra* note 76, at 1342-43 (identifying the New Deal as a threat to the southern economic system); *see also* Chen, *supra* note 115, at 1281 (describing the FLSA as contradicting the southern reliance on inexpensive black labor).

125. *See* Chen, *supra* note 115, at 1281 (discussing the compromise made by southern Democrats with settling for the agricultural exemption to FLSA since they were unable to completely prevent the bill's passage (referencing Linder, *supra* note 76, at 1371-75 (regarding this compromise)).

126. *See* Chen, *supra* note 115, at 1281 (noting that the agricultural exemption to the FLSA would include much of the South's labor force); *see also* Linder, *supra* note 76, at 1344 (describing farm workers as constituting a larger population in the South as compared to other regions of the country).

127. *See* Chen, *supra* note 115, at 1281 (noting that southerners compromised since they were unable to completely prevent the FLSA's passage through Congress). However, with regard to collective bargaining rights, there is evidence to suggest that at least some members of Congress did not intend for the agricultural exemption to last indefinitely. 79 CONG. REC. 9721. In response to a proposed amendment which would include agricultural labor within the provisions of the NLRA, Congressman Connery of Massachusetts replied that he supported the agricultural exemption simply in order that the bill not attempt too much in its initial phase. He stated:

> We hope that the agricultural workers eventually will be taken care of. I might say to my friend from New York [Marcantonio] at this point, certainly I am in favor of giving the agricultural workers every protection, but just now I believe in biting off one mouthful at a time. If we can get this bill through and get it working properly, there will be opportunity later, and I hope soon, to take care of the agricultural workers.

Id.

Congressman Connery was not the only legislator who held such beliefs. During this same debate for instance, Representative Ellenbogen, in response to Representative Marcantonio's statement that farm workers should be included in the bill stated, "I personally believe that the agricultural workers should have all the protection we can give them." *Id.* Although Representative Ellenbogen questioned Representative Marcantonio's amendment with regards to congressional power in regulating the activity of interstate commerce, under whose jurisdiction the NLRA was to come, his beliefs that agricultural labor should be protected are clear. *Id.*

2. *Constitutional Concerns*

The agricultural exemption from the NLRA and FLSA was also possibly the result of congressional concerns regarding the constitutionality of its commerce power.[128] The recent rulings of the Supreme Court invalidating the NIRA on commerce grounds,[129] caused some members of Congress to be concerned about the constitutionality of the NLRA with respect to congressional commerce power.[130] Some legislators seemed reluctant to regulate agriculture, because it was considered to be a local concern.[131]

3. *The Uniqueness of Agricultural Labor*

A final reason advanced in favor of the agricultural exemption from New Deal legislation was the strong concern for the small farmer.[132] Farmers at this time were thought to employ no more than a few workers during the season and were thought to have suffered greatly under the economic strains of the Depression.[133] At the time, it was thought that

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128. *See* § 1 of the NLRA stating that "[i]t is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce." 49 Stat. 450 (1935) (codified as amended at 29 U.S.C. § 151 (1994)); *see also* 79 CONG. REC. 9721 (regarding congressional concern about whether agricultural labor fell under the label of "interstate commerce"). The constitutionality of the NLRA was eventually upheld in N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937).

129. The NIRA had been held to be unconstitutional by the Supreme Court in 1935 because the Act was held to be an improper delegation of congressional commerce power. *See* A.L.A. Schechter Poultry Corp. et al. v. United States, 295 U.S. 495, 550 (1935). The Court held that the NIRA burdened intrastate commerce, with only an indirect affect on interstate commerce, thus constituting an improper use of congressional power. *See id.* at 550, 551 (holding that the NIRA was an improper use of congressional commerce power).

130. *See* 79 CONG. REC. 9721 (regarding the concerns of Representative Ellenbogen as to whether agricultural workers fell under the term "interstate commerce" as held by the Supreme Court).

131. *See* S. REP. NO. 74-573, at 2306 (1935) (indicating the reluctance of Congress to regulate local matters). This reasoning was given by one court to explain that states have the power to rule in cases involving collective bargaining rights of agricultural labor since their exclusion from the NLRA resulted from a congressional determination to refrain from asserting power over agricultural workers. *See* N.L.R.B. v. Comm. of Interns & Residents, 566 F.2d 810, 815 n.5 (2d Cir. 1977) (comparing excluded workers due to Congress' intention to refrain from asserting jurisdiction with excluded workers whom Congress decided need not be entitled to the provisions of the NLRA due to national labor policy).

132. *See* Morris, *supra* note 111, at 1970-71 (regarding the sense of concern expressed for farmers who would be burdened without the legislative exemption of farm workers).

133. *See* 79 CONG. REC. 9721. Representative Boileau stated:

> I grant there may be some sections of the country where it would be desirable to permit the organization of share-croppers or tenant farmers or other types of agricultural labor . . . [i]n some states of the Union, especially in the Middle West, the farmers seldom employ more than one or two employees, and then for only seasonal employment.

Id. Cf. North Whittier Heights Citrus Ass'n v. N.L.R.B., 109 F.2d 76, 80 (9th Cir. 1949) (explaining that the worker and farmer may no longer have a direct relationship due to the growth and industrialization of the citrus industry).

inclusion of the agricultural sector within the NLRA and FLSA could potentially harm farmers more than industrial employers.[134] This concern was due to the recognition that a strike of agricultural workers would pose a particular hardship for farmers due to the perishable nature of their crops.[135]

Thus, agricultural workers were excluded from New Deal legislation for a variety of reasons. In order to ensure protective legislation of any kind, political compromises were made, particularly to satisfy powerful southern legislators.[136] Secondly, congressional concern regarding the proper usage of commerce power may have convinced some legislators to postpone the inclusion of agricultural workers within protective legislation.[137] Finally, sympathy for the small farmer and the uniqueness of the agricultural sector led some to resist the inclusion of agricultural workers within New Deal legislation.[138]

IV. ALTERNATIVE ROUTES OF ADVOCACY FOR THE AGRICULTURAL WORKER

Workers are entitled to the right to bargain collectively.[139] The NLRA grants most workers this protection.[140] The NLRA is therefore an extension, rather than a limitation on the rights expressed in the NLA.[141] Thus, despite the exclusion of farm labor from the NLRA, agricultural workers have alternative protection under the NLA since the NLA affirms every worker's right on unionize.[142] Two states have ruled that the NLA confers substantive rights to agricultural workers which protect them from wrongful discharge and retaliation.[143] Finally, regulation of

134. *See* Jourdane, *supra* note 96, at 397 (discussing the theory that the inclusion of farm labor within the NLRA would harm farmers more than employers of other industries who, due to the perishable nature of their crops, would be in a difficult situation should workers choose to strike).

135. *See id.*

136. *See* Chen, *supra* note 115, at 1281 (referencing Linder, *supra* note 76, at 1371-75).

137. *See* 79 CONG. REC. 9721 (depicting the statements of Congressman Connery of Massachusetts describing his hope that agricultural workers would eventually be given the same protections that industrial workers were to be given under the NLRA); *see also id.* (regarding congressional concern as to whether agricultural workers fell under "interstate commerce").

138. *See* Jourdane, *supra* note 96, at 393 (citing Morris, *supra* note 111, at 1970-72).

139. In *American Steel Foundries v. Tri-City Cent. Trades Council*, 257 U.S. 184, 209 (1921), the Supreme Court stated that unions were not only legitimized by the Clayton Act, but were "organized out of the necessities of the situation." The Court continued by explaining that "[a] single employee was helpless in dealing with an employer . . . [u]nion was essential to give laborers opportunity to deal on equality with their employer . . . [t]he right to combine for such a lawful purpose has in many years not been denied in any court." *Id.*

140. *See* 29 U.S.C. § 157 (1994) (protecting workers in their collective activity).

141. *See* TAFT, *supra* note 21, at 457 (discussing the opinion of Senator Wagner, sponsor of the NLRA, that the Act extended the rights guaranteed by the NLA).

142. 29 U.S.C. § 102 (1994).

143. *See* Rauda v. Oregon Roses, Inc., 935 P.2d 469, 473 (Or. Ct. App. 1997); Bravo v. Dolsen Cos., 888 P.2d 147, 155 (Wash. 1995) (deciding that the NLA grants farm laborers substantive rights).

agricultural workers under state law may offer an additional alternative despite the exemption of farm labor from the NLRA.[144]

A. THE NLRA DOES NOT LIMIT WORKERS' RIGHTS EXPRESSED IN THE NORRIS LAGUARDIA ACT

Section 7 of the NLRA was modeled after the NLA and therefore should be thought to encompass the same principles and rights.[145] The enactment of the NLRA occurred in 1935 in an effort to strengthen and further secure the worker's right to organize.[146] First, Section 7 of the NLRA provides workers the right to collectively bargain without the fear of discharge, as does the NLA.[147] In addition, the NLRA provides for the NLRB to oversee and enforce its provisions.[148] Therefore, the NLRA simply strengthens worker protection afforded under the NLA.[149]

1. The Norris Laguardia Act, Like the NLRA, Confers Substantive Rights on Workers

To be of any use to agricultural or industrial labor, the NLA's public policy statement must be something more: it must be a declaration that every worker has the substantive right to collective activity without the fear of discharge.[150] The Supreme Court, as early as 1938 in *Lauf v. E. G. Schinner & Company, Inc.*,[151] ruled that the NLA's public policy statement defined an employer's and worker's relationship.[152]

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144. *See* Willmar Poultry Co., Inc. v. Jones, 430 F.Supp. 573, 578 (D. Minn. 1977) (finding that agricultural workers had protection under state law because the NLRA did not preempt state action). For a discussion of federal preemption involving labor issues, *see* generally Stephen F. Befort, *Demystifying Federal Labor and Employment Law Preemption*, 13 THE LAB. LAW. 411, 429 (1998).

145. *See National Labor Relations Board: Hearings on S. 1958 Before the Senate Comm. on Educ. and Labor*, 74th Cong. 38 (1935) (discussing the similarities between the NLA and the NLRA:

> [t]he main provisions of the present bill define four unfair labor practices, and provide suitable means of preventing them . . . The first unfair labor practice in substance forbids an employer to interfere with, restrain, or coerce employees in the exercise of their rights to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual protection. This language flows practically verbatim the familiar principles embedded in our law by . . . Section 2 of the Norris LaGuardia Act).

146. *See* GREENSTONE, *supra* note 53, at 47 (comparing the NLRA and the NLA).

147. *Compare* the NLRA, 29 U.S.C. § 157, *with* the NLA, 29 U.S.C. § 102 (declaring that workers should be free to collectively bargain).

148. *See* 29 U.S.C. § 153 (a), (b) (1994) (creating the NLRB).

149. *See* TAFT, *supra* note 21, at 457 (discussing the opinion of Senator Wagner, sponsor of the NLRA, that the Act was an extension of the NLA).

150. *See id.* (declaring that workers have the right to collectively bargain without the fear of employer interference).

151. 303 U.S. 323 (1938).

152. Lauf v. E.G. Schinner & Co., Inc., 303 U.S. 323, 330 (1938). The Court in this case ruled that the lower courts had erred by issuing an injunction prohibiting the workers from picketing the defendant's meat market without first having looked at the provisions of the NLA. *Id.* at 329. The

This was an indication that the NLA could confer substantive rights on workers since the Court ruled that it was incorrect to disregard the NLA's public policy statement in resolving labor disputes that were defined by the Act.[153]

However, the Supreme Court was not the first court to recognize the substantive nature of the NLA's policy statement since this was done by the Wisconsin Supreme Court as early as 1934.[154] In *Trustees of Wisconsin State Federation of Labor v. Simplex Shoe Manufacturing Company*,[155] the Wisconsin Supreme Court ruled that the state's version of the NLA[156] was a "deliberate declaration" of the rights to which workers were entitled.[157] The court stated that "[t]o hold otherwise would amount to saying that the Legislature did not intend what it said, but merely intended to write into the statutes language pleasing to labor."[158] Thus, two years after its enactment, Wisconsin's NLA was held to substantively grant workers the power to act together in trying to improve their working conditions without fear of retaliation by their employer.[159]

The next case which sought to confer substantive rights to non-agricultural workers through the NLA did not come again until 1965.[160] In the case of *Krystad v. Lau*,[161] the Washington Supreme Court, noting that there was very little case law which gave substance to the NLA's policy statement,[162] looked to Wisconsin's 1934 *Simplex* decision.[163] The *Krystad* court followed the Wisconsin ruling in *Simplex* in deciding that the Washington NLA[164] does in fact substantively protect workers from discharge through the expressed public policy of the state.[165]

Court additionally gave the NLA's public policy statement effect by pointing out that it defined the rights of the parties. *Id.* at 330. Therefore, the employer, in order to respond to the workers' demands, must operate within the relationship as defined by the NLA's policy statement. *Id.*

153. *Id.*

154. *See* Trustees of Wis. State Fed'n of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 60-61 (Wis. 1934) (ruling that Wisconsin's version of the NLA granted substantive rights to workers in their freedom from retaliation when engaging in collective bargaining and concerted activity).

155. 256 N.W. 56 (Wis. 1934).

156. WIS. STAT. ANN. §§ 103.51-.62 (West 1997).

157. Trustees of Wis. State Fed'n of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 60 (Wis. 1934).

158. *Id.* at 61.

159. In *Simplex*, the defendant employer refused to meet with representatives of the International Boot and Shoe Workers' Union, which was affiliated with the AFL, in efforts to improve general working conditions, wages, and hours. *Id.* at 57.

160. *See* Krystad v. Lau, 400 P.2d 72, 83 (Wash. 1965) (conferring actionable rights onto workers to be free from employer interference when seeking to unionize).

161. 400 P.2d 72 (Wash. 1965). In *Krystad*, employer David Lau and his wife, Kow May Lau, refused to employ members of the Laundry and Dye Works Drivers' Union to work in their laundry business. *Id.* at 73. Unfortunately, the Laus' animosity toward the union came about after Lau himself had in the past attempted to join the union but had been denied membership because of his Chinese ancestry. *See id.*

162. *Id.* at 78.

163. *Id.*

164. WASH. REV. CODE ANN. §§ 49.32.011-.020 (1990).

165. *See Krystad*, 400 P.2d at 83 (deciding that the state's NLA confers substantive rights onto

Subsequent to *Krystad*, the Washington courts continued to follow its holding, but refused to expand its interpretation of Washington's NLA.[166] In the 1974 case, *International Union of Operating Engineers Local No. 286 v. Sand Point Country Club*,[167] the Washington Supreme Court held that while the NLA conferred actionable rights upon workers to engage in concerted activity, it did not create an affirmative duty on the part of employers to enter into collective bargaining discussions with union representatives once they have been chosen.[168] The *Sand Point* court reasoned that the *Krystad* holding was distinguishable because the policy statement, which viewed in context of the Act as a whole, expressed a statutory right.[169] However, the court in *Sand Point* declined to expand the interpretation of Washington's NLA as conferring an implied duty on the part of employers to bargain with union representatives.[170]

Any concern that Washington's NLA had been weakened by the *Sand Point* court was resolved five years later in *Culinary Workers & Bartenders Union No. 596 v. Gateway Cafe, Inc.*,[171] in which the holding of *Krystad* was upheld.[172] *Culinary Workers* involved an employer who decided unilaterally which union would represent the workers, thereby restricting workers' choices in designating their own bargaining agent.[173] Workers who refused to join the designated union were fired.[174]

The *Culinary Workers* court decided that the employer had interfered with the workers' bargaining rights because it unilaterally decided which bargaining agent would represent the workers, without consulting the workers themselves.[175] The court therefore upheld the holding in

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workers); *see also id.* at 81 (addressing the dual purpose of the Act by identifying the original purpose as being a limitation on judicial intervention: "[b]ut would not the granting of substantive rights by a declaration of policy likewise be a limitation upon the power of the courts to grant injunctions? Was not the whole act a limitation on the equity powers of the court?").

166. *See* Peter B. Gonick, Bravo v. Dolsen Cos.: *Shoring Up Employer Bargaining Power by Sandbagging Nonunion Workers*, 70 WASH. L. REV. 203, 210 (1995) (discussing the decisions leading up to the 1993 Washington Court of Appeals decision of Bravo v. Dolsen Cos., 862 P.2d 623 (Wash. Ct. App. 1993)). The decision by the appellate court in *Bravo*, which held that farm workers did not have protection from discharge under the state's NLA was reversed in *Bravo v. Dolsen Cos.*, 888 P.2d 147 (Wash. 1995). *Id.* at 225.

167. 519 P.2d 985 (Wash. 1974).

168. Int'l Union of Operating Eng'rs Local No. 286 v. Sand Point Country Club, 519 P.2d 985, 988 (Wash. 1974).

169. *Id.* at 987; *see also* Gonick, *supra* note 166, at 210 (detailing the *Sand Point Country Club* decision).

170. *Sand Point Country Club*, 519 P.2d at 990. The appellants in *Sand Point Country Club* made no claim that there had been employer interference with their right to choose union representatives. *Id.* at 987.

171. 588 P.2d 1334 (Wash. 1979).

172. Culinary Workers & Bartenders Union No. 596 v. Gateway Cafe, Inc., 588 P.2d 1334, 1345 (Wash. 1979).

173. *Id.*

174. *Id.*

175. *Id.*

Krystad by concluding that the NLA conferred actionable rights on workers to be free from employer interference.[176] The historical development of case law indicates that the NLA, like its successor, the NLRA, assertively protects workers from discharge due to the worker's concerted activity.[177]

2. *Both the Norris Laguardia Act and the NLRA Protect Workers from Employer Interference*

The formation of a union and the collective bargaining through representatives chosen by the workers themselves, is meaningless when the threat of discharge hangs over workers in their exercise of this "fundamental"[178] right.[179] As such, the Supreme Court thus held in *N. L. R. B. v. Washington Aluminum Co.*[180] that freedom from interference is a crucial element of the worker's overall right to unionize.[181] In *Washington Aluminum Co.*, unorganized workers walked out in an effort to call attention to the extreme cold under which they had been made to work.[182] All seven workers were fired for their ations.[183] The Court ruled that the employer's actions constituted an unfair labor practice under Section 7 of the NLRA despite the fact that the workers did not

176. *Id.* Workers are guaranteed such freedoms under the NLRA as well. *See* 29 U.S.C. § 158 (a)(2) (1994). Under the NLRA, if an employer interferes with a worker's right to form or participate in a labor organization, that employer has committed an unfair labor practice. *See id.* Thus, workers are guaranteed the same freedom from employer interference under both the NLA and the NLRA. *See Culinary Workers*, 588 P.2d at 1345 (holding that the NLA confers actionable rights on workers to be free from employer interference); 29 U.S.C. § 158(a)(2) (finding employer interference to be an unfair labor practice).

177. *See* Ch. 90, § 2, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 102 (1994)) (stating that the worker "[s]hall be free from the interference, restraint, or coercion of employers of labor, or their agents . . ."); *see also* § 8 of the NLRA (stating "[i]t shall be unfair labor practices for an employer . . . to interfere with, restrain, or coerce employees . . . to discharge or otherwise discriminate against an employee because he has filed charges"). Ch. 372, § 8, 49 Stat. 452 (1935) (codified as amended at 29 U.S.C. § 158(a)).

178. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (declaring the right of a worker to select representatives for the purposes of collective bargaining a "fundamental right"). The Court also clarified that workers should be free to exercise this right by stating: "[d]iscrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority." *Id.*

179. In *Phelps Dodge Corp. v. N.L.R.B.*, 313 U.S. 177, 186 (1941), the Supreme Court stated: "[W]e have seen the close link between a bar to employment because of union affiliation and the opportunities of labor organizations to exist and to prosper." In this case, the refusal of a company to hire workers because of their affiliation with the International Union of Mine, Mill, and Smelter Workers came within the principles set forth under the NLRA which prohibits the discharge of workers for union affiliation. *Id.* at 186-87.

180. 370 U.S. 9 (1962).

181. N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 17 (1962). Here the Court stated, "[I]ndeed concerted activities by employees for the purpose of trying to protect themselves from working conditions . . . are unquestionably activities to correct conditions which modern labor-management legislation treats as too bad to have to be tolerated in a humane and civilized society like ours." *Id.*

182. N.L.R.B. v. Washington Aluminum Co., 370 U.S. 9, 12 (1962).

183. *Id.*

belong to a union and had not provided the employer with formal demands.[184] The *Washington Aluminum Co.* Court broadly interpreted Section 7 of the NLRA to include unorganized workers within its protection.[185] Therefore, workers, even unorganized workers, may leave their place of work in an effort to better their working conditions.[186]

In addition, the United States Supreme Court has also ruled that protected activity covered under the NLRA includes such actions as employee distribution of union literature on company grounds during non-working hours.[187] In reasoning that worker protection needed to be broadened, the Court recognized the dual purpose presented in Section 7 of the NLRA.[188] The general "mutual aid or protection" language of Section 7 is sufficiently broad to protect activity such as the distribution of union literature to co-employees,[189] while still substantively protecting the worker's rights to "self organization" and "collective bargaining."[190] Thus, the NLRA protects direct bargaining through the employee-employer relationship, as well as more indirect activities which may lie outside of this direct relationship.[191]

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184. *Id.* at 14. The Court reasoned, "[t]he seven employees here were part of a small group of employees who were wholly unorganized. They had no bargaining representative . . . of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could." *Id.* Federal courts have similarly ruled. *See* Halstead Metal Prods. v. N.L.R.B., 940 F.2d 66, 69 (4th Cir. 1991) (citing Joanna Cotton Mills Co. v. N.L.R.B., 176 F.2d 749, 752-53 (4th Cir. 1949) as authority that unorganized workers are also protected by § 7 of the NLRA); *see also* N.L.R.B. v. Tamara Foods, Inc., 692 F.2d 1171, 1179-80 (8th Cir. 1982) (recognizing that § 7 of the NLRA protects workers who walked out of the company plant after repeated notice of chemical fumes as engaging in protected concerted activity).

185. *Washington Aluminum Co.*, 370 U.S. at 14.

186. *See id.* at 14 (indicating that a narrow reading of § 7 of the NLRA, "would only tend to frustrate the policy of the Act to protect the right of workers to act together to better their working conditions"); *see also* N.L.R.B. v. Tamara Foods, Inc., 692 F.2d 1171, 1180 (8th Cir. 1982) (ruling that the walkout by workers after detecting chemical odors was protected activity under § 7 of the NLRA).

187. *See* Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 575-76 (1978) (deciding that the worker distribution of union literature is closely related to the important policies of the NLRA). Federal courts have made similarly broad rulings. *See* Hajoca Corp. v. N.L.R.B., 872 F.2d 1169, 1177 (3d Cir. 1989) (stating that threatening striking workers with dismissal is an unfair labor practice under the NLRA); *see also* N.L.R.B. v. Pizza Crust Co. of Pa., Inc., 862 F.2d 49, 51 (3d Cir. 1988) (regarding the questioning of a worker about the identity of other union members). However, such a right to distribute union literature is not guaranteed to non-workers. *See* Lechmere, Inc. v. N.L.R.B., 502 U.S. 527, 537 (1992) (finding that non-workers have no right to trespass on an employer's property to distribute union literature unless no "reasonable" alternative means of access to the workers exists).

188. *See Eastex*, 437 U.S. at 565 (discussing the legislative intent regarding § 7 of the NLRA).

189. "[P]rotecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid and protection." 29 U.S.C. § 151 (1994).

190. *See Eastex*, 437 U.S. at 565.

191. *See generally id.* at 565-66. In addition to union distribution, other activities which may occur outside of the direct bargaining relationship between the worker and the employer, but which are still protected under the NLRA, include workers' use of administrative or judicial forums and workers' requests to the legislature. *See id.* at 566.

The Court identified that the language from Section 7 of the NLRA was modeled after that found in Section 2 of the NLA.[192] Both Acts contain language indicating that workers should have both the general freedom to improve conditions as well as specific protection regarding concerted activity.[193] Therefore, both the NLRA and the NLA protect workers' rights from discharge resulting from attempts to better working conditions.

3. *Agricultural Workers are Protected Under the Norris LaGuardia Act*

Broad protection of the rights of workers to better their working conditions is especially important for the agricultural laborer who is often unorganized and may be unaware of what constitutes "concerted activity."[194] Since the agricultural worker has no recourse under the FLSA,[195] it is especially important that they are protected from having their vulnerable position taken advantage of.[196] The NLA was specifically enacted for the unorganized worker.[197]

In 1995, the Washington Supreme Court held that agricultural laborers, like most other workers, could not be fired for attempting to better their working conditions.[198] In *Bravo,* dairy workers were discharged after striking in order to improve their conditions after their

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192. *Id.* at 565 n.14.

193. *Id.* The Court compared the NLRA's language policy on this matter with that of the NLA by quoting the legislative intent behind this broad policy: "[T]his section of the Norris LaGuardia Act [§ 2] expresses Congress' recognition of the 'right of wage earners to organize and to act jointly in questions affecting wages, conditions of labor, *and the welfare of labor generally.*'" *Id.* (citing S. REP. NO. 163, at 9 (1932)) (emphasis added).

194. Agricultural workers are especially difficult to organize into labor organizations due primarily to low wages, the migratory and seasonal nature of the work itself, and a historic lack of public support. *See* JAMIESON, *supra* note 47, at 406 (discussing the historic problems of agricultural worker unionization).

195. *See* 29 U.S.C. § 213 (1994) (exempting agricultural workers from the minimum wage and overtime pay requirements of the FLSA's wage and hour provisions).

196. The Migrant and Seasonal Agricultural Worker Protection Act [hereinafter AWPA] was originally enacted in 1983 in an attempt to protect the farm worker through limited measures such as the regulation of farm labor contractors and farm labor housing. However, it does little to regulate wages and hours. *See* Migrant and Seasonal Agricultural Worker Protection Act, Pub. L. No. 97-470, 96 Stat. 2584 (1983) (codified as amended at 29 U.S.C. §§ 1801-72 (1994)). For a critical discussion of AWPA, *see* Marc Linder, *Paternalistic State Intervention: The Contradictions of the Legal Empowerment of Vulnerable Workers*, 23 U.C. DAVIS L. REV. 733, 755-58 (1990).

197. Section 2 of the Act states:

> the *individual unorganized worker* is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor . . . it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing . . . and that he shall be free from the interference, restraint, coercion of employers of labor, or their agents . . .

Ch. 90, § 2, 47 Stat. 70 (1932) (codified at 29 U.S.C. § 102 (1994)) (emphasis added).

198. Bravo v. Dolsen Cos., 888 P.2d 147, 155 (Wash. 1995).

employer refused to negotiate with them.[199] The *Bravo* court ruled that the workers had a cause of action for discharge under the state's NLA because of their statutory right to be free from employer interference for engaging in concerted activity.[200] The court reversed the lower court's ruling, and reasoned that the state's NLA mandated an expressed public policy which grants agricultural workers a substantive right to be free from employer interference.[201]

However, the *Bravo* court's holding did not turn on the plaintiffs' status as agricultural workers since the court specifically did not discuss their status as farm laborers.[202] Rather, the decision was the result of the court's interpretation of the NLA in granting substantive rights to unorganized workers to engage in concerted activity and subsequently to be protected from discharge.[203] The court discussed similar NLRA provisions, particularly with respect to the fact that neither the NLA nor the NLRA limits its protection to only unionized workers.[204] However, the court did not consider the agricultural exemption from the NLRA or the FLSA in its discussion of the NLRA.[205] Rather, the Washington Supreme Court concluded that the legislative intent of the state NLA granted substantive rights to workers.[206] The *Bravo* court ultimately concluded that agricultural workers were not excluded from the Washington NLA's protection.[207]

The Oregon Court of Appeals has similarly held that agricultural workers fall within the provisions of Oregon's NLA.[208] Specifically, the court in *Rauda v. Oregon Roses, Inc.*,[209] reasoned that there was nothing in the state's version of the NLA which precluded agricultural workers from being protected from discharge for concerted activity.[210]

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199. *Id.* at 149. For a discussion regarding the *Bravo* case at the appellate level, *see* Gonick, *supra* note 166.

200. *Bravo*, 888 P.2d at 155. The *Bravo* court relied heavily on the preceding cases interpreting the NLA. *See* Krystad v. Lau, 400 P.2d 72, 83 (Wash. 1965) (interpreting the NLA's policy statement as conferring substantive rights onto workers); *see also* Int'l. Union of Operating Eng'rs Local No. 286 v. Sand Point Country Club, 519 P.2d 985, 987 (Wash. 1974) (indicating that *Krystad* gave substance to the expressed legislative intent of the NLA).

201. *Bravo*, 888 P.2d at 155.

202. *See generally id.* (discussing the NLA with no mention of the plaintiffs' status as farm laborers).

203. *Id.* at 152.

204. *Id.* at 153.

205. *Id.* The *Bravo* court compares the NLA and the NLRA only in identifying the ability of non-unionized workers to establish a claim of wrongful discharge under both Acts. *Id.* at 150-51.

206. *See id.* at 155 (discussing the legislative intent of Washington's NLA as granting workers substantive rights and the freedom from wrongful discharge).

207. *See id.* (holding that agricultural workers are protected under Washington's NLA, thereby affording them a wrongful discharge claim).

208. OR. REV. STAT. §§ 662.010-.130 (1997).

209. 935 P.2d 469 (Or. Ct. App. 1997).

210. Rauda v. Oregon Roses, Inc., 935 P.2d 469, 471 (Or. Ct. App. 1997). This victory has not

Instead, the court emphasized that the state's NLA granted rights to all workers.[211]

The *Rauda* court referred to previous interpretations of its own state's NLA to decide whether the statute conferred actionable rights on agricultural workers.[212] The *Rauda* court decided in the affirmative, as it looked to the case of *City of Roseberg v. Roseberg City Firefighters*,[213] which had previously analyzed the legislative intent surrounding the public policy statement of the statute.[214] In *Roseberg City Firefighters*, the Oregon Supreme Court identified the state's NLA as a recognition of the importance of workers' rights to collectively bargain.[215]

The *Rauda* court also considered other previous cases such as *Schwab v. Moving Picture Operators*[216] and *Wallace v. International Association of Mechanics*.[217] Both *Schwab* and *Wallace* involved striking and picketing union workers.[218] The Oregon Supreme Court determined in these cases that the legislative intent behind Oregon's NLA was to grant workers collective bargaining rights.[219] The *Rauda* court was convinced that the policy statement of the NLA did in fact confer action-

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gone unnoticed. In Oregon's 1997 legislative term, Senate Bill 1205 passed both houses of the state legislature and sought to overturn the decision handed down in the *Rauda* case. While Oregon's Governor vetoed the bill on August 8, 1997, and other state officials have protested the bill, it is unclear whether the rights of farm workers recognized in *Rauda* will be lost should the judgement be reversed by the Oregon Supreme Court. The Oregon Supreme Court granted review of the *Rauda* case on December 16, 1997. Rauda v. Oregon Roses, Inc., 952 P.2d 60 (Or. 1997). As of the time that this edition went to print, the Oregon Supreme Court had not yet entered a decision on the *Rauda* case.

211. *Rauda*, 935 P.2d at 473.

212. *Id.* at 471-72.

213. 639 P.2d 90 (1981).

214. *Rauda*, 935 P.2d at 471. The *Rauda* court relied upon an indication from the *Roseberg City Firefighters* case which stated:

> In 1933, the Oregon legislature recognized the interest of laboring people in organizing for their common welfare. It did so in terms which left no question as to the importance of the interest and, although statutes regulating labor disputes have been modified over the years, the declaration of public policy in ORS 662.020 remains unchanged since its adoption in 1933.

See Rauda, 935 P.2d at 471 (citing City of Roseberg v. Roseberg City Firefighters, 639 P.2d 90 (1981)).

215. *Roseberg City Firefighters*, 639 P.2d at 100. The court discussed the importance of this right in the context of unfair labor practices as defined by Oregon's Public Employee Collective Bargaining Act. *See id.* at 100 (discussing the Public Employee Collective Bargaining Act).

216. 109 P.2d 600 (Or. 1941). The *Schwab* court stated:

> The restraint imposed upon courts in the use of the injunctive process *was intended to aid working men in their efforts to reach a plane of bargaining equality with employers* by making their 'combination extend beyond one shop,' [sic] and so to raise the standards of wages and improve the working conditions throughout an entire industry.

Rauda, 935 P.2d at 472 (citing Schwab v. Moving Pictures Operators, 109 P.2d 600, 607 (Or. 1941)).

217. 63 P.2d 1090 (Or. 1936).

218. *See Schwab*, at 608-09 (upholding an injunction under the state's NLA because of union efforts to gain a monopoly through the plaintiff's business); Wallace v. Int'l Ass'n of Mechanics, 63 P.2d 1090, 1099 (Or. 1936) (prohibiting an injunction against striking workers).

219. *See Rauda*, 935 P.2d at 472 (citing *Schwab*, 109 P.2d at 607; *Wallace*, 63 P.2d at 1096).

able rights on all workers, rather than simply limiting the injunctive power of the courts.[220]

However, unlike *Bravo* the *Rauda* court did consider the role of the agricultural labor exemption in the state's version of the NLRA and how that exemption should affect agricultural workers' inclusion within the state's NLA.[221] The court noted that the legislative history of the NLRA indicated that the exemption of farm labor was incorporated into the statute because of the belief that regulation would lead to administrative problems.[222] More significantly however, the court considered the exclusion in terms of federal preemption.[223]

B. FEDERAL PREEMPTION OF STATE LAW

It has been ruled in one federal district court that the NLRA's agricultural exemption does not preempt state law.[224] *Willmar Poultry Co., Inc. v. Jones* [225] decided that the legislative history of the NLRA evidenced a lack of interest on the part of Congress regarding the problems of farm laborers.[226] The *Willmar Poultry* court concluded that the exclusion of farm labor from the NLRA was due to congressional indifference.[227] Therefore, the court concluded that Congress did not intend to leave farm labor wholly unregulated, but was rather unconcerned with its problems.[228] As such, congressional indifference made it possible for the *Willmar Poultry* court to rule that the NLRA's exclusion of farm labor did not preempt state law.[229]

The courts have indicated that the NLRA's preemption of state law will occur in three instances,[230] and "may be implied by the nature of the legislation."[231] The first instance when federal preemption must occur is when the activity is either protected under Section 7 of the NLRA or prohibited as an unfair labor practice under Section 8 of the Act.[232] The second instance occurs when the NLRB has jurisdiction over a labor

220. *Rauda*, 935 P.2d at 471.
221. *Id.*
222. *Id.* at 473.
223. *Id.*
224. Willmar Poultry Co. v. Jones, 430 F. Supp. 573, 578 (D. Minn. 1977).
225. 430 F. Supp. 573 (D. Minn. 1977).
226. Willmar Poultry Co., Inc. v. Jones, 430 F. Supp. 573, 578 (D. Minn. 1977).
227. *Id.*
228. *Id.*
229. *Id.*
230. *See id.* at 576-77 (giving an analysis of the three instances in which federal preemption over state action must occur).
231. *See* Bethlehem Steel Co. v. N.Y. State Labor Bd., 330 U.S. 767, 772 (1947) (discussing the instances in which federal preemption is appropriate).
232. *See* San Diego Bldg. Trades Council v. Garmon 359 U.S. 236, 244 (1959) (indicating that when it is evident that the actions sought to be regulated by the state are already regulated by § 7 or § 8 of the NLRA, state action must give way).

dispute, but it has declined to assert its jurisdiction.[233] Finally, where it is the intent of Congress to leave an area unregulated from both federal and state action, the state must refrain from acting.[234] The *Willmar Poultry* court relied on the third category of cases.[235]

In deciding which preemption test to apply, the *Willmar Poultry* court decided that since agricultural workers were exempt from the NLRA, their conduct could not be governed by it at all.[236] Thus, the NLRB had no jurisdiction over the workers, nor did their activity or the activity of the employer fall within Sections 7 or 8 of the Act.[237] Therefore, the first and second instances in which federal preemption normally would govern, thus preventing state law from being applied, did not apply.[238] The court decided that Congress, in creating the exemption for agricultural labor, had no intention of leaving agricultural labor wholly unregulated, which left room for state action to occur.[239] Therefore, agricultural workers came within Wisconsin state law despite being exempt from the NLRA.[240]

Similarly, the *Rauda* court considered the role of federal preemption regarding the exemption of farm labor under the NLRA.[241] The court relied heavily on the *Willmar Poultry* ruling and agreed that the exclusion of farm workers from the NLRA did not indicate that Congress intended for these workers to be unable to gain protection for engaging in collective action under an alternative statute.[242] As such, the court ruled that Oregon's public policy, as defined by the state's NLA, provides for the inclusion of all workers within the NLA's protection.[243]

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233. *See Bethlehem Steel*, 330 U.S. at 776 (discussing the NLRB's decision to decline an assertion of jurisdiction in some cases).

234. *See* Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Employment Relations Comm'n, 427 U.S. 132, 140 (1976) (referencing cases in which congressional intent indicates that the area should remain unregulated).

235. *Willmar Poultry*, 430 F.Supp. at 577.

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* at 578. The court looked to the *Bethlehem Steel* case for guidance when the Supreme Court explained:

> [W]here [the NLRA] leaves the employer-employee relation free of regulation in some aspects, it implies that in such matters federal policy is indifferent, and since it is indifferent to what the individual of his own volition may do, we can only assume it to be equally indifferent to what he may do under the compulsion of the state.

See id. (citing *Bethlehem Steel Co.*, 330 U.S. at 733).

240. *Willmar Poultry*, 430 F.Supp. at 578.

241. Rauda v. Oregon Roses, Inc., 935 P.2d 469, 473 (Or. Ct. App. 1997).

242. *Id.*

243. *Id.*

V. NORTH DAKOTA'S NORRIS LAGUARDIA ACT SHOULD PROTECT AGRICULTURAL WORKERS FROM WRONGFUL DISCHARGE CLAIMS

North Dakota enacted its own version of the Federal NLA in 1935.[244] North Dakota's version of the NLA contains similar language to that of the Federal NLA, including a public policy statement which gives the right of collective bargaining to all workers.[245]

The North Dakota Supreme Court has not had an occasion to rule on whether agricultural workers have collective bargaining rights under the state's NLA. North Dakota has a version of the NLRA,[246] which exempts farm workers from its protection.[247] This exclusion may cause the court to consider whether the legislative intent surrounding the agricultural exemption from the state's NLRA affects the application of the state's NLA to North Dakota farm workers.[248] However, other states such as Oregon and Washington have held that the agricultural exemption from the NLRA does not exempt farm laborers from the NLA's protection.[249] Thus, North Dakota should likewise find that the state's public policy as defined by North Dakota's NLA protects agricultural workers in their collective bargaining rights.[250]

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244. Norris LaGuardia Act, 1967 N.D. LAWS, S.B. 213, codified at N.D. CENT CODE § 14; 1935 N.D. LAWS, H.B.188, codified at N.D. CENT. CODE §§ 34-08-01, -02, -05 to -13; 1919 N.D. LAWS, H.B. 57, codified at N.D. CENT CODE § 34-08-04 to -04 (1987 & Supp. 1997).

245. Section 2 of the Act states:

> For the purpose of the interpretation of the provisions of this chapter, the public policy of this state is declared to be that a worker of this state must be free to decline to associate with his fellows, but that he also has full freedom of association, self-organization, and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he is free in such matters, as well as in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, from interference, restraint, or coercion by employers of labor or their agents.

N.D. CENT. CODE § 34-08-02 (1987).

246. *See* N.D. CENT. CODE § 34-12-01 to -14 (1987 & Supp. 1997).

247. "Employee . . . does not include any individual employed as an agricultural laborer . . . ." N.D. CENT. CODE § 34-12-01.

248. *See* Respondent's Brief at 26, Rauda v. Oregon Roses, Inc., 935 P.2d 469 (Or. Ct. App. 1997) (No. 9410-75CV) (citing Appellant's argument that the exclusion of agricultural workers from the NLRA should preclude their inclusion within Oregon's NLA). The *Rauda* court held that agricultural workers were entitled to the NLA's protection. *See Rauda*, 935 P.2d at 473 (including agricultural workers within the NLA's protections).

249. *See Rauda*, 935 P.2d at 473 (deciding that the exclusion of farm workers from the state's NLRA did not preclude agricultural labor's inclusion within the state's NLA); Bravo v. Dolsen Cos., 888 P.2d 147, 155 (Wash. 1995) (holding that agricultural workers have a cause of action under the state's NLA).

250. *See* N.D. CENT. CODE § 34-08-02 (declaring the public policy of the state to include the right of workers to collectively bargain and to be free from employer interference).

A. AGRICULTURAL WORKERS ARE DISTINGUISHABLE FROM PUBLIC EMPLOYEES

To date, the North Dakota Supreme Court has only ruled that the NLA does not include public employees[251] within its protection.[252] In *City of Minot v. General Drivers & Helpers Union No. 74*, the court held that the state's NLA did not prevent an injunction from being issued against a strike by public employees.[253] The court reasoned that public employees have a distinct role in society that gives them a special status with respect to their role as workers.[254] This status derives from the public employee's service to society rather than to a private employer.[255]

The *General Drivers* court used as its primary authority the United States Supreme Court case of *United States v. United Mine Workers.*[256] In *United Mine Workers,* the Supreme Court distinguished private from public employers, and concluded that the NLA did not apply to employees working for the government.[257] The Court's reasoning included an analysis of the definition of "person" within the meaning of the NLA.[258] Since the government could not be considered a "person" for purposes of the NLA, the government could not be involved in a "labor dispute" for which the Act was designed.[259] Many states have followed *United Mine Workers* in ruling that their states' NLA does not apply to public employees.[260] Appellants in *Rauda v. Oregon Roses,*

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251. *See id.* § 34-11.1-01 (1987) (defining "public employee").

252. *See* City of Minot v. General Drivers & Helpers Union, 142 N.W.2d 612, 617 (N.D. 1966) (holding that the state's NLA does not apply to public employees engaged in a strike).

253. *Id.* This case involved a strike by the Teamsters Union after contract negotiations broke down. *Id.* at 613. The Union picketed the Public Works Building in Minot and asked its workers to stay away from work. *Id.* The City asked the court for a temporary restraining order in order to prevent the Union from picketing, which eventually resulted in a decision by the district court to issue a permanent injunction against the Union. *Id.* at 614.

254. *Id.* at 619. The court stated that public employees "[o]ccupy a status entirely different from those who carry on a private enterprise. They serve the public welfare and not a private purpose." *Id.* (quoting Norwalk Teachers Ass'n v. Bd. of Educ., 83 A.2d 482, 484-85 (Conn. 1951)).

255. *See id.* (citing *Norwalk Teachers Ass'n*, 83 A.2d at 484-85).

256. 330 U.S. 258 (1947).

257. United States v. United Mine Workers, 330 U.S. 258, 275 (1947). In *United Mine Workers,* an injunction was issued against the union preventing members from striking because the mines were under the control of the federal government. *Id.* at 307.

258. *Id.*

259. *Id. See* 29 U.S.C. § 104 (1994) (stating that "[n]o court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case *involving or growing out of any labor dispute to prohibit any person or persons* participating or interested in such dispute."); 29 U.S.C. § 113 (1994) (stating that "[a] case shall grow out of a labor dispute when the case involves persons . . . or when the case involves any conflicting or competing interests in a 'labor dispute' . . . of 'persons participating or interested' therein") (emphasis added).

260. *See* Sch. Dist. No. 351 Oneida County v. Oneida Educ. Ass'n, 567 P.2d 830, 833 (Idaho 1977); Elder v. City of Jeffersonville, 329 N.E.2d 654, 660 (Ind. 1975); Hanson v. Commonwealth, 181 N.E.2d 843, 848 (Mass. 1962); Delaware River & Bay Auth. v. The Int'l Org. of Masters, Mates & Pilots, 211 A.2d 789, 795 (N.J. 1965); County of Westchester v. Arfmann, 279 N.Y.S.2d 467, 469

Inc. also attempted to limit the state NLA's application to farm workers by comparing them to public employees.[261] A Utah case cited by appellants in *Rauda* based its conclusion that its state's NLA did not confer substantive rights on workers because the employees in that case were public employees.[262]

However, agricultural workers are not public employees.[263] They are engaged in an industry which operates for a profit, in which workers must have the right to act together in their own best interests without the fear of discharge.[264] While an employer may discharge a worker for a justifiable cause, it may not do so because of that worker's present or previous status in a union.[265] However, the North Dakota Supreme Court has ruled that even if a worker is involved in a union, that worker may be discharged because of the worker's inefficiency or insubordination.[266] The motivating factor for the dismissal however, cannot be the worker's union status.[267] As such, the court could thus find that public employees are different from agricultural workers.[268]

(N.Y. App. Div. 1967); Westly v. Bd. of City Comm'rs of Salt Lake City Corp., 573 P.2d 1279, 1280 (Utah 1978); Retail Clerks Local v. Univ. of Wyo., 531 P.2d 884, 888 (Wyo. 1975). *But cf.* Charbonnet v. Gerace, 457 So.2d 676, 678 n.2 (La. 1984) (indicating that since a strike by public employees is not statutorily prohibited, Louisiana's NLA could theoretically cover them); Bd. of Educ. of City of Minneapolis v. Pub. Sch. Employees' Union Local No. 63, 45 N.W.2d 797, 801 (Minn. 1951) (deciding that only public employees involved with public safety, such as police officers and firefighters, are outside of the state's NLA).

261. *See* Respondent's Brief at 25-26, *Rauda* (No. 9410-75CV) (referring to Appellant's Opening Brief at 25-26).

262. *See id.* (citing *Westly*, 573 P.2d at 1280). *Westly* ruled that Utah's NLA did not apply to employees of the state. *Westly*, 573 P.2d at 1280; *see also Retail Clerks Local*, 531 P.2d at 888 (ruling that Wyoming's NLA did not confer substantive collective bargaining rights on public employees).

263. *See* City of Minot v. General Drivers & Helpers Union No. 74, 142 N.W.2d 612, 619 (N.D. 1966) (citing Norwalk Teachers' Ass'n v. Bd. of Educ., 83 A.2d 482, 484-85 (Conn. 1951) (describing public employees as those who work for the "public welfare," providing them with a status different from private workers).

264. *See id.* at 618 (citing Bd. of Educ. of Community Unit Sch. Dist. No. 2 v. Redding, 207 N.E.2d 427, 430 (Ill. 1965) (addressing the Illinois Supreme Court's description that the profit incentive in a free economy is a distinguishing factor between private and public employees).

265. Sand v. Queen City Packing Co., 108 N.W.2d 448, 451 (N.D. 1961).

266. *Id.* at 452.

267. *Id.* There is now a distinct process by which an employee shall challenge a discharge in a "mixed motive" case, whereby the reason given by the employer for dismissal must be legitimate and additional to any reason regarding the worker's union status. *See* N.L.R.B. v. Transp. Management Corp., 462 U.S. 393, 403-04 (1983) (affirming the NLRB's 1980 decision in Wright Line, 251 N.L.R.B. 1083 (1980)). In the *Wright Line* analysis, the General Counsel of the NLRB must carry the burden of persuasion in showing that the employer's decision to discharge the worker was motivated by the worker's union status. *Transp. Management Corp.*, 462 U.S. at 400. The employer can nonetheless avoid liability if it can show by a preponderance of the evidence that the worker's discharge would have occurred regardless of union activity. *Id.* While the employer must show that a discharge would have nonetheless occurred, the burden of persuasion does not shift from the General Counsel of the NLRB. *Id.* at 401. Before the 1983 decision in *Transp. Management*, there had been a split in the circuits regarding the adoption of the *Wright Line* analysis. *Id.* at 397 n.3. However, it is clear now that the *Wright Line* analysis is the standard by which mixed motive cases brought under the NLRA should be judged. *Id.* at 403-04.

268. *See General Drivers*, 142 N.W.2d at 618 (citing *Redding*, 207 N.E.2d at 430, while discussing the difference between public and private employees).

B. PROBLEMS FACED BY AGRICULTURAL WORKERS IN NORTH DAKOTA

Farm workers in North Dakota and across the country face a variety of problems.[269] While agricultural laborers in North Dakota are entitled to the minimum wage,[270] language barriers, housing shortages, and pesticide notification remain realities for farm workers in the state.[271] Farm workers' wages, after accounting for inflation, have declined by as much as twenty percent over the last twenty years.[272] Left with few alternatives, farm workers have turned to hunger strikes to protest wage decreases.[273] When faced with such problems, agricultural workers in North Dakota should be able to exercise some control over their working conditions.[274] As a result, North Dakota should give substantive effect to the state's NLA and hold that agricultural workers have the right to improve their working conditions without the fear of discharge.[275]

VI. CONCLUSION

Agricultural workers, like all workers, should be free from the fear of retaliation and should be able to engage in concerted, collective activity to improve their working conditions.[276] The NLA is an opportunity to further congressional intent by protecting workers in these efforts. Unlike the NLRA, the NLA does not exclude agricultural workers from its provisions.[277] Public employees have been held to be outside of the Federal NLA's protection by the United States Supreme Court and outside of the state NLA's protection by the North Dakota Supreme

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269. *See generally* David M. Saxowsky et al., *Employing Migrant Agricultural Workers: Overcoming the Challenge of Complying with Employment Laws*, 69 N.D. L. REV. 307 (1993) (focusing on farm workers in North Dakota and Minnesota).

270. *See* N.D. CENT. CODE § 34-06-01 to -21 (1987) (providing for a minimum wage to all workers in North Dakota). Employees include "any individual employed by an employer. Provided, an individual is not an 'employee' while engaged in a ridesharing arrangement, as defined in §8-02-07." *Id.* § 34-06-01(2).

271. *See* Saxowsky et al., *supra* note 269, at 323-27 (describing challenges faced by both farm laborers and growers in the Red River Valley).

272. *See* Mireya Navarro, *Florida Tomato Pickers Take on Growers*, N.Y. TIMES, Feb. 1, 1998, at A12 (detailing the plight of 2,500 nonunionized farm workers in Immokalee, Florida).

273. *See id.* (depicting the 30 day hunger strike by six farm workers in Florida which ended only after the intervention of former President Jimmy Carter).

274. *See* American Steel Foundries v. Tricity Cent. Trades Council, 257 U.S. 184, 209 (1921) (stating that the individual worker is "helpless in dealing with an employer" in terms of the need for workers to be able to unionize); *see also* PATRICK H. MOONEY AND THEO J. MAJKA, FARMERS' & FARM WORKERS' MOVEMENTS 138 (Irwin T. Sanders ed., 1995) (citing CAREY MCWILLIAMS, FACTORIES IN THE FIELDS 303-04 (1939)) (declaring that, "[t]he solution to the farm-labor problem can only be achieved through the organization of farm workers").

275. N.D. CENT CODE § 34-08-02 (1987).

276. *See American Steel Foundries*, 257 U.S. at 209 (discussing the necessary function served by unions in providing workers' strength to negotiate with their employers).

277. *See* 29 U.S.C. § 102 (1994) (defining the public policy of the NLA).

Court.[278] However, agricultural workers work in the private sector and therefore, occupy a different status than public workers.[279] Agricultural workers should have the same right to improve their working conditions as workers in other private employments.[280] Finally, two states have held that agricultural workers are included within their versions of the NLA.[281]

The NLA confers substantive rights onto agricultural workers.[282] Exemptions of agricultural labor from other legislation such as the NLRA and the FLSA should not preclude agricultural labor from being granted the same collective bargaining rights to which workers of other industries are entitled.[283] To deny farm labor this right would not only leave many workers unprotected, but would defeat the expressed legislative intent of the Act.[284]

Kayce R. Compton[285]

278. *See* United States v. United Mine Workers, 330 U.S. 258, 275 (1947); City of Minot v. General Drivers & Helpers Union No. 74, 142 N.W.2d 612, 617 (N.D. 1966) (holding that the NLA does not apply to public employees).

279. *See General Drivers*, 142 N.W.2d at 619 (citing Norwalk Teachers' Ass'n v. Bd. of Educ., 83 A.2d 482, 484-85 (Conn. 1951)).

280. *See* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937) (declaring the right to collectively bargain to be "fundamental").

281. *See* Rauda v. Oregon Roses, Inc., 935 P.2d 469, 473 (Or. Ct. App. 1997); Bravo v. Dolsen Cos., 888 P.2d 147, 155 (Wash. 1995) (including agricultural workers within NLA protection in Oregon and Washington).

282. *See Rauda*, 935 P.2d at 473; *Bravo*, 888 P.2d at 152 (granting substantive rights under the state's NLA to agricultural workers).

283. *See Rauda*, 935 P.2d at 473 (discussing public policy as requiring Oregon's NLA to include all workers within its protection).

284. *See* Krystad v. Lau, 400 P.2d 72, 83 (Wash. 1965); Trustees of Wis. State Fed'n of Labor v. Simplex Shoe Mfg. Co., 256 N.W. 56, 60 (Wis. 1934) (declaring that the public policy of the state gives workers the freedom from discharge because of their union status and activity); *see also* N.L.R.B. v. Wash. Aluminum Co., 370 U.S. 9, 14 (1962) (discussing that the NLRA's similar policy of advocating workers' rights to act in concert to better their working conditions should be followed).

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