Down and Out in Weslaco, Texas and Washington, D.C.: Race-Based Discrimination Against Farm Workers Under Federal Unemployment Insurance

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DOWN AND OUT IN WESLACO, TEXAS AND WASHINGTON, D.C.: RACE-BASED DISCRIMINATION AGAINST FARM WORKERS UNDER FEDERAL UNEMPLOYMENT INSURANCE

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This Article explains how federal law excludes half of the nation's farm workers from the unemployment insurance (UI) system. It describes how even those fortunate enough to work in covered employment often lose their benefits when employers use crew leaders who fail to report wages and pay unemployment insurance taxes. This discriminatory treatment of farm workers is then shown to be racially motivated and to have a disproportionate impact on the non-White majority of agricultural workers. Today's partial exclusion of these workers from UI is a legacy of Congress's complete exclusion of farm workers from all New Deal legislation intended to preserve the racist plantation society of the Jim Crow South. Finally, to correct the racial and social injustice of this discrimination, two simple changes in the Federal Unemployment Tax Act (FUTA) are proposed.

INTRODUCTION

Farmworkers . . . are at the bottom of the economic structure. They are faced with trying to make a living in an occupation with fewer and fewer jobs, one characterized by hard physical labor, low pay, and seasonal layoffs. Their exclusion from coverage is not only discriminatory, it denies the program's protection to a segment of the work force that needs it most.¹

Discrimination against farm workers under the Federal
Unemployment Tax Act of 1954\(^2\) (FUTA) exemplifies the failure
of our political and economic system to function democratically
and justly. Neither reason nor equity can explain the continued
exclusion of multitudes of farm workers from federal and state
unemployment insurance protection. This discrimination can
be explained only by the undemocratic, special interest power
of agricultural employers and the advantage that New Deal
racial bigotry has given them.\(^3\) Despite repeated independent
studies,\(^4\) each of which has led to recommendations that the
FUTA should be changed to cover farm workers on the same
basis as workers in other industries,\(^5\) the discrimination con-
tinues. Why? There are two answers.

The first, though distasteful, is hardly surprising. Economi-
cally weak members of racial minority groups have great
difficulty obtaining just results in Congress and state legisla-
tures against well-organized, powerful opponents. This scenario
is played out frequently on various issues and is a well-recog-
nized defect in a political democracy with huge discrepancies
in wealth and power.

The second reason for the continuing discrimination is not
so well understood, and it gives its agricultural-employer-
beneficiaries another built-in advantage. Agricultural employ-
ers benefit from the status quo: sixty years of de jure federal
preferences in the form of either exemption from or special
treatment under most federal labor, wage, and social welfare
laws enacted under the New Deal.\(^6\) In addition, as described
below, the history of federal preferential treatment for growers
and discrimination against farm workers, i.e., agricultural

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Security Act, 49 Stat. 639, it is now codified as amended at 26 U.S.C. §§ 3301–3311
(1994)).
3. See infra Part III.
4. E.g., ADVISORY COUNCIL ON UNEMPLOYMENT COMPENSATION, UNEMPLOYMENT
INSURANCE IN THE UNITED STATES: BENEFITS, FINANCING, COVERAGE 13 (1995)
[hereinafter ACUC]; COMMISSION ON AGRICULTURAL WORKERS, REPORT OF THE
COMMISSION ON AGRICULTURAL WORKERS at xxviii (1992); NCUC, supra note 1, at 27.
5. See, e.g., NCUC, supra note 1, at 27 ("The Commission recommends that
services performed by workers in agriculture be included under the provisions of the
FUTA relating to all other workers in general.").
6. See, e.g., MARC LINDER, MIGRANT WORKERS & MINIMUM WAGES: REGULATING
THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES 127–75 (1992)
describing the "racist underpinning" of the New Deal constituency and the similarly
racist legislation that the then prevailing politics produced.)
exceptionalism,7 was founded on racism. It arose from intentional discrimination against southern, Black plantation workers under the New Deal programs and legislation. The Jim Crow origin of this 1930s disparate treatment underlies each of the preferences growers now enjoy and requires reconsideration of all forms of discrimination against farm workers.

In this Article, we first describe the discrimination against farm workers in federal social welfare legislation and the economic impact of this discrimination on the workers. In Part II, we focus on the ways in which the government subsidizes farm employers and discriminates against the employees under the FUTA and state unemployment insurance (UI) laws through the use of quarterly payroll thresholds and crew leaders. We explain how such use leaves workers who most need UI protection without income when they are laid off. Part III traces the racist nature of farm worker exclusion from New Deal social welfare legislation. We will show that such discrimination was both a political accommodation to the Jim Crow plantation economy of the South, needed to pass sweeping New Deal reforms, and an expression of the racist nature of Congress itself during the New Deal. In Part IV, we present data demonstrating the disproportionate impact that farm worker exclusions have on Black and Mexican-origin workers. Finally, we propose simple, long overdue amendments that can be made to the FUTA to stop racially based discrimination against farm laborers.

I. FARM WORKERS IN AMERICA

Proposals to reform the welfare system emphasize work, its practical rewards, and the intangible benefits to families of having adults working, rather than living on public assistance.8

7. See id. at 125–27 (describing how the exclusion of predominantly Black and Latino farm workers from the overtime provision of the Fair Labor Standards Act resulted from the institutional racism of certain New Deal legislation).

8. See, e.g., Malcolm Gladwell, The Failure of Our Best Intentions, WASH. POST, Dec. 3, 1995, at C1 (“The focus today is on restructuring welfare so that it encourages the poor to work, to have fewer babies out of wedlock and otherwise change their own behavior so that they cure their own ills. The goal is to bring about a spiritual rejuvenation of the underclass . . . .”); Greg McDonald, Clinton Denounces Orphanage Proposal as Bad for Families, HOUS. CHRON., Dec. 11, 1994, at A2 (“For millions and
Perhaps the group of workers best exemplifying the ethic we encourage is farm laborers. In the labor marketplace, farm workers sell only their willingness to work hard, dedication to the job, honesty, and, for the years of their youth, good health. As an occupation that consists mostly of performing repetitive tasks that can be learned quickly, farm work does not pay well. It is for these workers with little bargaining power that federal labor, wage payment, and social protective statutes are most needed. But it is against these hard-working and vulnerable workers that federal law has discriminated.

More than ever, it is ironic that these workers find their labor devalued by both the marketplace and the law. Unlike other workers, they have no federal protection from discharge if they attempt to organize to bargain collectively. They are excluded from federal overtime and maximum hour coverage, though some farm laborers work as many as one-hundred hours per week. Because of the so-called "small farmer" exemption under the Fair Labor Standards Act (FLSA), nearly two-thirds of all farm workers are left unprotected by the federal minimum wage.

...
Even when it comes to Social Security and unemployment insurance (UI) protection, these working people are often left out. "Small farm" employers are exempted and farm workers employed by these farmers are excluded from UI. Under both the Federal Insurance Contributions Act (FICA) and the FUTA, farmers may avoid making social security and unemployment contributions for their farm laborers by using "crew leaders" to pay their workers. These intermediaries often fail both to report wages and to pay FICA and UI taxes, but federal laws allow their use to insulate farm employers from liability. As a result, farm workers lose their Social Security and UI coverage.

Farm workers are the lowest paid occupational group in the country. More than fifty percent of all workers in crop production live in poverty. Thirty-six percent own no property other than personal belongings. While market forces, such as oversupply, contribute to their destitution, exclusion of farm workers were excluded from federal minimum wage coverage under the FLSA, allowing employers to pay these workers less than the minimum wage. The minimum wage is currently $4.25 per hour. A more recent study suggests that in 1989 closer to 62% of farm workers were excluded from federal minimum wage coverage. Although these conditions are not legally sufficient to treat workers as employees of the crew leader for FUTA purposes, as a practical matter this loophole is also available to farmers to avoid paying UI taxes. See infra Part II.B.

19. See 26 U.S.C. §§ 3121(o), 3306(o) (1994). Under the FICA and the FUTA, a "crew leader" is defined as an individual who furnishes workers to another person (the grower) to perform agricultural labor, if such individual pays the workers and no written agreement exists between the individual and the grower designating the individual as an employee of the grower. Under these conditions, the workers are considered the employees of the crew leader for FICA purposes and not the grower. See 26 U.S.C. § 3121(o) (1994). Although these conditions are not legally sufficient to treat workers as employees of the crew leader for FUTA purposes, as a practical matter this loophole is also available to farmers to avoid paying UI taxes. See infra Part II.B.
20. See id.; see infra Part II.B.
23. Id. at 46.
24. U.S. DEPT' OF LABOR, MIGRANT FARMWORKERS: PURSUING SECURITY IN AN UNSTABLE LABOR MARKET 38 (1994) [hereinafter MIGRANT FARMWORKERS] (finding that "[a]t any point in the year, there is a plentiful supply of farmworkers (at least 190,000, or 12% of farmworkers) in the United States that are not working").
workers from equal protection under federal law greatly impedes an increase in their standard of living.\textsuperscript{25} If their exclusion from coverage under the FLSA and the FUTA were eliminated, annual farm worker earnings would increase by twenty-five percent.\textsuperscript{26} This increase would result from: (1) an increase in average hourly wage, caused by coverage of all farm work under the federal minimum wage; (2) an increase in pay for hours worked in excess of forty per week, caused by coverage of all farm work under federal overtime provisions; and (3) an increase in income between periods of employment, caused by universal coverage under the FUTA.

Discrimination against farm workers has a racist origin.\textsuperscript{27} Correcting the injustice of the racism in the unemployment system would point the way toward ending the substandard labor and social conditions of the agricultural labor market. If we want to make work pay, it is time that these low-wage workers get the minimal protection afforded to all other workers.

\textsuperscript{25} Id. at 32 (finding that farm workers seldom receive benefits, such as food stamps and cash assistance, from the welfare system). Although unemployed nearly half the year, on average, and although half these working families live below the poverty line, 77% did not receive any government assistance in the past two years. Id. Food stamps, the most commonly used form of government aid, was used by only 22% of farm worker households in the past two years. Id. Eighty percent of those interviewed were legal residents. Id. at 32–33.

\textsuperscript{26} A 13.7% increase in earnings would result from federal overtime coverage. Holt et al., \textit{supra} note 16, at 463, tbl. 8.10. An 8% increase would result from nondiscriminatory minimum wage coverage. \textit{MINIMUM WAGE STUDY COMM'N}, U.S. DEPT OF COMMERCE, \textit{COVERAGE OF AGRICULTURAL EMPLOYMENT UNDER THE FAIR LABOR STANDARDS ACT: A STATISTICAL PROFILE}, PART II, at 3, tbl. 3, 14, tbl. 14 (1981) (noting that a differential of approximately 13% was found between covered and uncovered farm wages, for field workers, $3.65 and $3.22, respectively; currently, uncovered farm work constitutes approximately 60% of all farm labor) (calculations by authors). In California in 1992, for example, crop employees received total wages of $2.8 billion and unemployment benefits of $190 million, seven percent of total wages. California has nondiscriminatory coverage of farm workers under UI. See Philip L. Martin, The H-2A Program and Unemployment Insurance 17, 24 (Aug. 22, 1994) (unpublished manuscript, on file with the \textit{University of Michigan Journal of Law Reform}). Thus, if the FUTA were amended, and all other states were prompted to cover the 60% of farm workers presently not protected by UI, \textit{see infra} note 34, this change would increase earnings of farm workers in these states by approximately 4.2% (7% times 0.60). Since workers outside California represent two-thirds of all farm workers, Martin, \textit{supra}, at 23, a 2.8% increase in total farm worker wages could be expected from nondiscriminatory coverage under the FUTA.

\textsuperscript{27} See \textit{infra} Part III.
II. DISCRIMINATION AGAINST FARM WORKERS UNDER THE FUTA

Until January 1, 1978, the FUTA completely excluded farm laborers from federal unemployment insurance protection. No FUTA taxes were imposed on agricultural employers. States, of course, were free to impose taxes on their own agricultural employers and provide benefits to their own agricultural workers, but, with the exception of California's near universal coverage of farm workers in 1976, this did not happen.

Like many other proposals dealing with UC, proposals for extending coverage to farmworkers have faced a key obstacle at the State level: the fear that a State's action would place its employers and industries in an adverse competitive position with neighboring States.

Since 1978, farm work has been covered in a limited fashion, including work only when it is performed by the largest farm operators and when these operators have chosen not to use a crew leader to hire and pay workers.

Two provisions of the FUTA currently provide an exemption to agricultural employers. First, growers must pay $20,000 in farm wages in a calendar quarter in order to be covered under the FUTA, compared with $1,500 a calendar quarter for other employers. Second, growers may avoid all tax paying responsibility under the FUTA if they use a crew leader as an intermediary between themselves and the workers. As a result, farm workers working for one or more exempt employers

29. See id. § 114, 90 Stat. 2667.
33. See supra note 19 and accompanying text.
during the course of a year are left either entirely uncovered by unemployment insurance or receive reduced benefits when they need them.34

A. The $20,000 per Quarter Payroll Threshold

The FUTA's definitions of both "employer"35 and "employment"36 include agricultural labor only when performed for persons who either: (1) have paid wages for agricultural labor of $20,000 or more in any calendar quarter of the current or preceding calendar year; or (2) have employed at least ten individuals in agricultural labor for some portion of a day during at least twenty separate calendar weeks in the current or preceding calendar year.37 All other workers are covered under the FUTA if their employers either pay wages of $1500 in a calendar quarter or employ at least one person for one or more days during each of twenty separate weeks, in either the current or preceding calendar year.38 Thus, under this scheme,
a grower can employ nine workers for forty hours per week, throughout the year, at the minimum wage of $4.25 per hour,\textsuperscript{39} without having to pay FUTA taxes. The grower can have an annual payroll of nearly $80,000 and remain exempt.\textsuperscript{40} Workers employed by such a grower are not entitled to unemployment benefits when they are laid off and are unable to find other employment. In all other businesses, employers must pay FUTA taxes and their employees are protected by UI, if the employer has only one full-time employee who works forty hours per week for nine weeks at the federal minimum wage.\textsuperscript{41} In total, about one-half of all farm workers are left uncovered by UI.\textsuperscript{42}

Most states have followed the FUTA and have included the federal exemption in their own laws.\textsuperscript{43} Only three states,
California,\textsuperscript{44} Rhode Island,\textsuperscript{45} and Washington\textsuperscript{46} cover farm workers on the same basis as all other workers, essentially providing first dollar coverage.\textsuperscript{47} Consequently, although most farm workers are unemployed on an average of three months each year, only twenty-five percent have reported receiving UI at any point in the two years prior to being surveyed during 1991.\textsuperscript{48} Although these workers have the greatest need for UI due to their regular periods of unemployment and low income, they get the least amount of UI protection and benefits.

\textbf{B. Grower/Crew Leader Scam}

Compounding the exclusion of hundreds of thousands of farm workers by the FUTA's payroll threshold for farm employer coverage is the FUTA's loophole allowing growers to avoid UI obligations by using crew leaders to hire and pay the workers.

\begin{itemize}
\item \textsuperscript{44} See Cal. Unemp. Ins. Code \textsection{} 611 (West 1986).
\item \textsuperscript{46} See Wash. Rev. Code Ann. \textsection{} 50.04.150 (West 1990).
\item \textsuperscript{48} NAWS, supra note 22, at 74; \textit{id.} at 58 (reporting on “SAS” workers that include “the vast majority of nursery products, field crops, including cash grains, and all fruits and vegetables” but exclude beef, poultry, fish and other livestock production, \textit{see} NAWS, supra note 22, at 1, n.1).
\end{itemize}
harvesting the growers' crops on the growers' land. Similar to a provision in the FICA that allows farmers to avoid paying Social Security taxes by using crew leaders, the FUTA's loophole has made a mockery of both the interpretation of UI laws and their enforcement. The result is that, where crew leaders are used, noncompliance with UI reporting and taxpaying requirements runs rampant. Growers and crew leaders benefit by lowering their costs and farm workers lose coverage, even when, in reality, they work for growers who would otherwise be covered employers.

Although the FUTA's special rule for farm workers working under crew leaders is inartfully written, this drafting problem can neither excuse nor explain its erroneous interpretation and the erroneous interpretation and application of corresponding state rules patterned after the FUTA. The FUTA rule establishes a test for determining whether the crew leader or the person to whom the crew leader provides workers is the "employer" responsible for reporting worker wages and paying UI taxes. Under this test, a grower is the FUTA-responsible employer if: (1) the crew members are his employees under the Internal Revenue Service test used to determine common law employment; (2) the crew leader is not registered as a farm labor contractor under the federal Migrant and Seasonal

50. Id. § 3121(o).
51. See sources cited infra note 60.
53. See 26 U.S.C. § 3306 (1994). FUTA taxes are paid to the Internal Revenue Service (IRS) in the amount of 0.8% of the first $7000 in wages paid to each worker each year. See 26 U.S.C. §§ 3301, 3302(c), 3306(b) (1994). Employers report wages of each worker to state UI agencies in order to credit the worker's earnings' account. See, e.g., PA. STAT. ANN. tit. 73, § 766 (1992). The wages reported to this account will determine whether an applicant for UI has sufficient earnings to draw UI benefits when an unemployed worker applies for benefits. See, e.g., id. § 801. The amount of wages credited to this account also will determine the amount of weekly benefits the unemployed worker will receive. See, e.g., id. § 804. If either growers or crew leaders fail to report wages to the state UI agencies, workers are either denied benefits altogether or receive less in UI benefits than they are due. Employers also pay state UI taxes at rates that vary from state to state and from employer to employer, but which average only 2.5% of taxable wages. See ACUC, supra note 4, at 75-76, tbl. 6-1. Excludible wages vary from state to state, upward from $7000. E.g., PA. STAT. ANN. tit. 43, § 753(x) (1992) (excluding wages over $8000 after 1984); CAL. UNEMP. INS. CODE § 930 (West 1986) (excluding wages over $7000).
Agricultural Worker Protection Act, or (3) there is an agreement between the crew leader and the grower providing that the crew leader is the grower's employee.

It is important to note that this rule has been adopted by most states. Use of the FUTA rule is problematic because it is confusing, and this confusion has been compounded by strange variations in state laws. Furthermore, the rule has

56. The "crew leader rule" provides:

For purposes of this chapter, any individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person shall be treated as an employee of such crew leader—

(A) if —

(i) such crew leader holds a valid certificate of registration under the Migrant and Seasonal Agricultural Worker Protection Act; or

(ii) substantially all the members of such crew operate or maintain tractors, mechanized harvesting or crop-dusting equipment, or any other mechanized equipment, which is provided by such crew leader; and

(B) if such individual is not an employee of such other person within the meaning of subsection (i).


58. Although in most states the special rule for determining the employer where a crew leader is involved follows the same structure as the FUTA, and although this structure causes some of the same problems, such as findings that crew leaders, not farm operators, are the employers of crew members, these laws use different tests to determine whether the farm operator is the employer. Some states use the common law test. E.g., ARK. CODE ANN. § 11-10-210(a)(1)(B) (Michie 1987 & Supp. 1995). Some use the "ABC" test that is otherwise used to determine whether workers are employees or independent contractors. E.g., OHIO REV. CODE ANN. § 4141.01(BB)(2)(c), 4141.01(B)(1)(b) (Anderson 1994). Other states use the minimum threshold test of $20,000 in wages paid in a quarter, without reference to any test for determining the employment relationship between the farm operator and the crew members. E.g., PA.
generally been interpreted and administered at the state level to classify crew leaders as the exclusive employers of farm workers for UI purposes. Because reporting wages and paying UI taxes by crew leaders is the exception rather than the rule, and because state departments of labor have generally given up investigating these itinerant operators, crew members

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59. See, e.g., Macias v. New Mexico Dep't of Labor, 21 F.3d 366 (10th Cir. 1994). The FUTA provides that the crew leader will be the employer of crew members only if the crew leader is registered as a farm labor contractor with the U.S. Department of Labor and the farm operator is not the employer of such crew members. See 26 U.S.C. § 3121(o) (1994); 29 U.S.C. § 1811 (1994). Where these two requirements are not met, the farm operator becomes the employer by default. State agencies, nonetheless, typically look only to the registration status of the crew leader and decide that he is the employer if he is registered. The United States Court of Appeals for the Tenth Circuit recently held that the New Mexico Department of Labor was acting within its discretion in considering crew leaders as employers under UI, so long as they were registered with the U.S. Department of Labor. Macias, 21 F.3d at 369. It may well be that most of the misinterpretation of the crew leader rule results from a failure to consult the language of the statute and a reliance instead on what is written about it. As a result, some state agencies have ignored the requirement that they determine that the crew members are not the employees of the grower before concluding that the crew leader is the employer. Submissions Answers to Questionnaires at 207–368, Macias v. New Mexico Dep't of Labor (CV 91-0509). The Advisory Council on Unemployment Compensation also has made this error. See ACUC, supra note 4, at 176.

60. See Deposition of Jimmy Sanchez, Unemployment Bureau Chief, at 9, Macias (CV-91-0509HB) (D.C.N.M. Aug. 5, 1991) (“[i]n this particular . . . industry, finding and locating individuals is a problem because of movement. They have got several addresses, they use other people's addresses, and it seems like they are never where they should be.”); Memorandum from Joe C. Salaz, Enforcement Agent, to Bob Gieseke, Chief of Tax (Jan. 31, 1991) (on file with the University of Michigan Journal of Law Reform) (exhibit 4 of deposition of Robert Geiseke Aug. 23, 1991, stating that crew leaders were engaged in "mass civil disobedience of the New Mexico Statutes"). Referring to a plea that the New Mexico Department of Labor (NMDOL) ensure that wages paid to farm workers furnished by crew leaders to pick chile peppers in southern New Mexico be reported, counsel for NMDOL stated, "[it] would be an impossible task at this point to ask the New Mexico Department of Labor to do that." Statement of Jerry Walz to the U.S. District Court at 20, Macias (CV-91-0509HB) (D.C.N.M. Mar. 16, 1992).

Our survey of crew leaders in three states that have state registration schemes showed that, in 1994, few even had state UI account numbers, a prerequisite for reporting wages and paying taxes. In New York, out of 206 registered crew leaders, only five had account numbers. Letter from Charles Horwitz, Senior Attorney, New York Department of Labor, to Larry Norton (June 14, 1994) (on file with the University of Michigan Journal of Law Reform). In New Jersey, only 17 out of 167 had numbers, and in Pennsylvania, only 4 out of 72 had numbers. Telephone Conversation with Juan Burgos, Esquire, Camden Regional Legal Services (Nov. 11, 1994); Telephone Interview with Laura E. Reohr, Director, Bureau of Employee Tax Operations, Pennsylvania Department of Labor and Industry (June 27, 1994). These discrepancies confirm the noncompliance found in New Mexico. The data, however,
seldom have their wages reported. Thus, treating crew leaders as employers invites noncompliance and loss of worker UI coverage. The FUTA should prohibit such treatment.61

The combined use of the $20,000 per quarter threshold and the crew leader scam invites another ruse to cut grower employment taxes and deprive farm workers of UI coverage. A large farm operator with hundreds of hand harvesters can deprive workers of UI by dividing the workers into crews working under different registered crew leaders, none of which has a payroll of more than $20,000 per calendar quarter. Each of the workers in what may actually be a large harvesting operation will then be excluded from UI coverage under the “small farmer” exemption.

III. AGRICULTURAL EXCEPTIONALISM AS RACISM

The FUTA’s discriminatory provisions discussed in Part II have an overreaching impact on some of America’s hardest working laborers. These provisions, however, must be changed

overstate the prevalence of noncompliance, because crew leaders need not have UI account numbers if: the grower is reporting and paying; the crew leader’s payroll does not exceed the $20,000 per quarter threshold; or, if the crew leader’s base of operations is in another state and he pays UI taxes there. See, e.g., PA. STAT. ANN. § 753(j)(i), (j)(2), (j)(3)(G)(a) (1992).

61. The 1980 Report of the National Commission on Unemployment Compensation also recommended that the farm operator be treated as the employer of workers for UI purposes, unless the farmer and crew leader sign an agreement to the contrary. NCUC, supra note 1, at 27. If farm operators remain able to disclaim responsibility for noncompliance where crew leaders are used, they will have an incentive to use these intermediaries and no legal or economic incentive to ensure that the crew leaders are reporting wages and paying UI taxes. If, however, the farm operator is made the responsible employer by law, it can either handle the reporting itself or delegate the paperwork to its crew leader or to any other employee. If reporting and payment are not made, however, the farmer remains liable and available for collection purposes. Therefore, the farm operator will have to take steps to ensure that reports are filed and that the taxes are paid by its agent. The only additional costs to farmers from this change will occur where either incomplete or no reporting and payment has occurred in the past. In such cases, farmers and crew leaders have enjoyed lower costs resulting from prior nonpayment of UI taxes. The change would properly require them to report wages and pay taxes on the same basis as their competitors, further ensuring that all covered employees received UI credits for their work. Thus, farmers who have benefited from the competitive advantage of incurring no UI costs for work performed on their property will only lose an unfair competitive advantage. Where crew leaders have been reporting and paying taxes and the farmers wish to assume this task, under our proposed scheme, farmers can just reduce payments to the crew leaders in the amount of the UI contributions. See infra text accompanying notes 175–77.
for an additional reason: they were racially motivated and have an extremely disproportionate racial impact. In this Part, we will trace the racist exclusion of farm workers from its origins in the Jim Crow South to the acceptance and practice of racism by the New Deal Congress. We will then, in Part IV, show the impact of farm worker exclusions on racial minorities, both in the 1930s and today.

During the past decade, prominent historians, sociologists, economists, political scientists, and even journalists in the United States have embraced the view that the exclusion of agricultural workers from New Deal social legislation was rooted in the racism peculiar to the political economy of the South. Because the South was an "oligarchy," and the Roosevelt administration needed those congressional oligarchs to report legislation out of the committees that their seniority enabled them to control, New Deal socioeconomic legislation had to accommodate the South's economically based White supremacy. Consequently, according to Jill Quadagno, a leading Social Security historian, White southern legislators during the New Deal opposed any program that would grant cash directly to black workers, because direct cash could undermine the

62. See, e.g., JILL S. QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 2 (1994) ("Because of southern opposition, agricultural workers . . . most[ly] black men and women . . . were left out of the core programs of the Social Security Act.").

63. See, e.g., THEDA SKOCPOL, SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE 301 (1995) ("The influence of Southern agricultural interests in the New Deal depended on the insertion of . . . [the Democratic party's] social power as white racial oligarchs into federal political arrangements.").


65. See, e.g., Kenneth Feingold, Agriculture and the Politics of U.S. Social Provision, in THE POLITICS OF SOCIAL POLICY IN THE UNITED STATES 199, 206 (Margaret Weir et al. eds., 1988) ("[O]nly on their 'own peculiar problem' of race were Southern [New Deal] members of Congress united.") (citation omitted).

66. See, e.g., NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA 6, 14-15 (1991). "Sharecropping began in the immediate aftermath of the end of slavery, and was the dominant economic institution in the agrarian South for eighty years." Id. at 6. "The [Mississippi] Delta had the largest-scale farming of the quintessential sharecropping crop, cotton. It was in the state that had the quintessential version of Jim Crow." Id. at 15.

67. See LINDER, supra note 6, at 127-32; SKOCPOL, supra note 63, at 29-31.
entire foundation of the plantation economy. In 1935 more than three-quarters of African Americans lived in the South.

Because of southern opposition, agricultural workers and domestic servants—most black men and women—were left out of the core programs of the Social Security Act. They sought control over any social program that might threaten white domination, so precariously balanced on cotton production.

Theda Skocpol, a historical sociologist and student of social policy, has also adopted this view of the racist structure of New Deal social legislation.

The South's role [in the New Deal] cannot be understood without underlining the class structure of Southern cotton agriculture as a landlord dominated sharecropper system from the late nineteenth century through the 1930s. Nor could we possibly ignore the explicit racism that ensured minority white dominance over black majorities in all sectors of economic and social life.

The influence of Southern agricultural interests in the New Deal depended on the insertion of their class power as landlords and their social power as white racial oligarchs into federal political arrangements. Above all, Southern leverage was registered through a congressionally centered legislative process that allowed key committee chairmen from "safe" districts to arbitrate precise legislative details and outcomes. This [came] at the price of allowing the enactment of only those social policies that did not bring the national state into direct confrontation with the South's nondemocratic politics and racially embedded systems of repressive labor control.

Margaret Weir, a political scientist who has studied federal regulation of unemployment programs, similarly concludes that southern Democrats opposed New Deal programs that "threatened the planter elite . . . and local social and economic

68. QUADAGNO, supra note 62, at 21–22.
69. SKOCPOL, supra note 63, at 29–30.
relationships—most fundamentally, the laws and customs governing the low-wage, racially segmented labor force...”70

Finally, another political scientist, Kenneth Finegold, specializing in New Deal agricultural policy, concurs that “[s]outhern Democrats... eliminated national minimum standards that might have provided blacks adequate support” because “[e]ven a minimal social insurance program might reduce compulsion to work for low wages” whereas “large landowners... benefited from the economic insecurity of their agricultural workers and tenants.”71

Because the provisions of the FUTA that discriminate against farm workers must be studied in the context of their historical roots, the rest of this Part will discuss the historical background of the New Deal legislation which included the development of a UI system. This history will show that the New Deal Congress intended to discriminate against farm workers, who were predominantly Black, and thus passed laws which appeared racially neutral but were actually discriminatory in practice.

A. Jim Crow in the South During the New Deal

Racial discrimination against Blacks during the New Deal was institutionalized throughout the legal, political, economic, and social systems of the South. Institutional racism made possible the successive generations of racist southern congressmen, who were returned to Congress year after year to preserve these systems.72 The congressmen, both for themselves and on behalf of their White constituents, would allow no New Deal reforms to benefit Black farm workers,73 who performed the bulk of the labor on the cotton plantations and on whose exploitation racist southern society depended.

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71. Feingold, supra note 65, at 209, 211.
73. See LINDER, supra note 6, at 130–32.
The New Deal period in the South witnessed the unabated enforcement of a comprehensive system of legalized discrimination against Blacks in public facilities. Jim Crow laws separated Blacks from Whites in schools, railroad cars, street cars, hotels, restaurants, parks, playgrounds, theaters, and other public places. These de jure forms of racism persisted until they were toppled by the civil rights struggles of the 1950s and 1960s. Although White supremacists tried to create a legal justification for Jim Crow by claiming that segregated facilities were “separate but equal,” the schools, hospitals, libraries, streets, and other municipal services set aside for Blacks were blatantly inferior—if they existed at all.

Precisely such discrimination prompted the Executive Secretary of the National Urban League to testify before a congressional subcommittee on unemployment insurance legislation that one of the reasons his organization opposed committing administration of the UI program to the states was that “[t]he experiences of Negroes with State Governments has not been satisfactory.” As an example, he adduced the average expenditures by public schools in eighteen southern states, including Washington, D.C., to show that state spending on Whites far exceeded that on Blacks. In the mid-1930s, per capita expenditures in education for White children were triple those for Black children, in South Carolina, they were ten times as great. The average value of school property per student in ten southern states was almost five times greater among Whites than Blacks during 1935–1936.

Jim Crow laws and the discriminatory misallocation of public resources were the product of racist decisions made by southern White public officials, who were elected through political and electoral processes that intentionally excluded all but two percent of voting-age Blacks. Blacks were, as Gunnar Myrdal observed during World War II, “[f]or all practical purposes . . .

74. E.g. 2 Gunnar Myrdal, AN AMERICAN DILEMMA 628 (1944).
75. See, e.g., 2 id. at 581 (“The great difference in quality of service for the two groups in the segregated set-ups for transportation and education is merely the most obvious example . . .”).
77. Id.
78. See id.
79. See id.
80. See 2 Myrdal, supra note 74, at 947 n.f.
disfranchised in the South." Even the minuscule number of Blacks who voted in the general elections in the Deep South were a political irrelevancy since they were barred from the discriminatory White primaries of the Democratic Party, which in effect constituted the only real elections. In the elections for the Seventy-fourth Congress, which enacted the unemployment compensation program, the Democrats had all sixty-seven rural seats "in the cotton belt and Southeastern subtropical coast . . . entirely to themselves." Potential Black voters faced such obstacles as financially unbearable poll taxes, and property, education and "good character" requirements, as well as flagrantly manipulated rules that Blacks understand provisions of the Constitution to the "satisfaction" of White state registrars. Where such transparent shams failed to keep Blacks from voting, intimidation, violence, and terror filled in the gaps.

In order to preserve the discipline of the former slave system, the southern states enacted various statutory schemes to circumvent the prohibition of involuntary servitude embodied in the Thirteenth Amendment to the United States Constitution. Although they were repeatedly held invalid by the U.S. Supreme Court, southern states persisted, as late as the 1940s, in reenacting so-called false pretense laws, which forced farm workers to remain on the plantations by criminalizing the act of obtaining advances with an intent to defraud and willfully to fail to complete work.

81. 2 id. at 475.
82. 2 id. (including Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, South Carolina, and Texas).
84. 1 Myrdal, supra note 74, at 474-90 (1994).
86. 1 Myrdal, supra note 74, at 484.
87. 1 id. at 474-90; The President's Comm. on Civil Rights, To Secure These Rights 40 (1947) ("In addition to formal, legal methods of disfranchisement, there are the . . . techniques of terror and intimidation . . . .") [hereinafter To Secure These Rights]; cf. Ralph Bunche, The Political Status of the Negro in the Age of FDR 51 (Dewey W. Grantham ed., 1973) ("The social situation and mores of the South create an atmosphere of essential intimidation for the Negro registrant who presents himself to what must always be presumed to be hostile officials . . . .").
90. See Linder, supra note 72, at 1348-50.
New Deal social welfare and protective legislation was on its face racially neutral and applied equally to all races in the categories it covered. Equal treatment of Blacks in the South under federal law, however, would have conflicted with the disparate treatment and discrimination against Blacks in southern institutions, legislation and especially in agriculture, where an equalizing impact would have benefited Blacks and injured Whites the most. Because the White South was implacably opposed to all challenges to its system of apartheid, it resisted the application of labor protective legislation to agriculture and any statutory reforms that by law would have mandated equality of the races.

The institutionalized political and racist imperatives of the plantation society formed the focal point at which all the southern forces opposing the application of social security benefits to Black farm workers converged. The central role of the plantation in the political economy of the South meant that the conferral of mandatory protection against the vicissitudes of old age and unemployment, and later the imposition of wage, hour, and child labor standards, on plantations would have destroyed the underpinnings of the entire southern racist regime.

In 1938, President Roosevelt, himself an adopted Georgian who paid his own Black farm workers the equivalent of six to eight cents an hour, suggested that the regime was a “feudal system” little different from Fascism. Three years after he signed into law the social security legislation that resulted in the exclusion of Black farm workers, President Roosevelt took great pains to assure southern White racists that he would not then turn around and confer minimum wage and overtime protection on Black farm workers. At a press conference, he announced that, contrary to the claims of southern business associations, “[o]f course, there has never been any thought of including field labor in the Wages and Hours Bill.” Lest his

92. See, e.g., Feingold, supra note 65, at 206–09.
93. Linder, supra note 6, at 156, 174–75.
95. Franklin D. Roosevelt, The United States is Rising and is Rebuilding on Sounder Lines, Address at Gainesville, Georgia (Mar. 23, 1938), in 7 The Public Papers and Addresses of Franklin D. Roosevelt: 1938, at 164, 167–68 (Samuel I. Rosenman ed., 1941) (“If you believe in the one, you lean to the other.”).
96. 11 Complete Presidential Press Conferences of Franklin D. Roosevelt 296 (1972).
bid for racist support be overlooked, he became even more explicit. Quoting from full-page ads placed by the southern lumber industry in women's magazines warning housewives that, "'[i]f the Wages and Hours Bill goes through, you will have to pay your negro girl eleven dollars a week,'" Roosevelt explained that the New Deal had no intention of interfering with the background conditions shaping the labor market in the South: "'[Y]ou know if you come from the South, you can employ lots of excellent domestic help in the South for board and lodging and three or four dollars a week. No law ever suggested intended a minimum wages and hours bill to apply to domestic help."97

The race-based exclusion of farm workers from Social Security was part and parcel of the New Deal's discriminatory treatment of southern Blacks under the National Industrial Recovery Act, the Agricultural Adjustment Act, the Fair Labor Standards Act, the Civilian Conservation Corps, and the Tennessee Valley Authority.98 Even the Farm Security Administration, which a major historian of the New Deal has characterized as "scrupulously fair in its treatment of the Negro [a]t the risk of its political life,"99 conformed to the law of apartheid by operating segregated farm labor camps for black and white workers.100 The federal government's administration of the New Deal in the South unabashedly supported the region's racist Jim Crow institutions, some of which federal agencies openly adopted nationwide. The Federal Housing Administration's loan guarantee program, for example, encouraged the use of restrictive covenants to prohibit "occupancy of properties except by the race for which they were intended" and to prevent "the infiltration of . . . inharmonious racial groups" and "nuisances . . . such as . . . pig pens."101

The common theme running through each of these exclusions or otherwise discriminatory provisions is a congressional intent

97. Id. at 297.
98. LINDER, supra note 6, at 132–53.
100. Letter from Allison T. French, Manager, Employment Service Office, to Dr. Fons A. Hathaway, Director, Florida State Employment Service (Feb. 18, 1941) enclosure (Mar. 14, 1941) at 2, in Records of the War Manpower Commission, Bureau of Placement, Rural Industries Division, General Records of the Farm Placement Service, 1939–1946, State (Fla.), 1941 folder, National Archives, RG 211, Box No. 5, Entry 198 (on file with the University of Michigan Journal of Law Reform).
101. FEDERAL HOUSING ADMIN., UNDERWRITING MANUAL ¶¶ 935, 980(3) (1938).
to preserve for the plantation oligarchy a virtually inexhaustible supply of Black labor deprived of any alternative to working for starvation wages. The Works Progress Administration (WPA), which employed a total of eleven Blacks among its more than 10,000 supervisors in the South, typified the impact of the New Deal in reinforcing unconstitutional state legislation designed to prevent Black farm workers from escaping their collective masters. The WPA accommodated the needs of plantations by means of a racially bifurcated wage structure that deterred nonwhite workers from remaining on its rolls and a policy of expelling Black and Mexican-origin workers from its rolls whenever planters demanded an immediate supply of the cheapest possible labor.

The exclusion of farm workers from old-age pensions and unemployment compensation was an absolute prerequisite, not for the U.S. farm sector in general, but for the continued existence of the southern plantation system, which depended for its survival on the unimpeded, unconstitutional, and terroristic exploitation of a largely Black labor force at wages far below the national average. The plantation owners—who included a number of well-placed congressmen—could maintain their power only by preserving their quasi-feudal control over their formerly slave labor force.

102. See LINDER, supra note 6, at 125–26, 132.
105. See QUADAGNO, supra note 62, at 21–22. The growing acceptance of this interpretation of the centrality of economically rooted southern agrarian racism for the origins of New Deal social legislation can be gauged by its popularization and incorporation into the prize-winning book of journalist Nicholas Lemann. LEMANN, supra note 66. Based on his in-depth study of people who migrated to Chicago from the Mississippi Delta, the center of the sharecropping system, where "all the sharecroppers were black and lived in self-contained plantation communities . . . where the conditions were much closer to slavery than to normal employment," id. at 11, Lemann arrives at the same conclusions as the aforementioned scholars:

The issue of the labor supply in cotton planting may not sound like one of the grand themes in American history, but it is, because it is really the issue of race. . . . For hundreds of years, the plurality of African-Americans were connected directly or indirectly to the agriculture of cotton . . . .

. . . The political institution that paralleled sharecropping was segregation; blacks in the South . . . beginning in the 1890s . . . were denied the ordinary legal rights of American citizens . . . . Segregation strengthened the grip of the sharecropper system by ensuring that most blacks would have no arena of opportunity in life except for the cotton fields. . . .
B. The Legislative History of the Racist Exclusion of Farm Workers from Social Security / Unemployment Insurance

Although realism about racism today may penetrate popular consciousness, the legislative mind has always been much more comfortable explaining the ongoing exclusion of farm workers from the unemployment insurance system in the United States by reference to more neutral-sounding considerations. The two most frequently proffered explanations, or rather excuses, for exclusion of farm workers from the unemployment compensation system have been alleged administrative difficulties\(^\text{106}\) and the benign nature of the family farm.\(^\text{107}\) Yet the fact that the programs of many, if not most, other advanced economies in

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Segregation’s heyday and sharecropping’s heyday substantially coincided. Together the two institutions comprised a system of race relations that was . . . just as much a thing apart from the mainstream of American life as slavery had been . . . .

\[\ldots\]

Every big plantation was a fiefdom; the small hamlets that dot the map of the Delta were mostly plantation headquarters rather than conventional towns. Sharecroppers traded at a plantation-owned commissary, often in scrip rather than money. . . . Their children walked . . . to plantation-owned schools . . . without heating or plumbing. Education ended with the eighth grade . . . . The planter could and did shut down the schools whenever there was work to be done in the fields. . . .

\[\ldots\]

There was no brake on dishonest behavior by a planter toward a sharecropper. For a sharecropper to sue a planter was unthinkable. Even to ask for a more detailed accounting was known to be an action with the potential to endanger your life. The most established plantations were literally above the law where black people were concerned. The sheriff would call the planter when a matter of criminal justice concerning one of his sharecroppers arose, and if the planter said he preferred to handle it on his own (meaning, often, that he would administer a beating himself), the sheriff would stay off the place.

\textit{Id.} at 6, 14–15, 17–19.


107. \textit{See infra} note 113 and accompanying text.
the 1930s already included, and today still include, agricultural employees suggests that such obstacles are hardly insuperable.108

Indeed, Congress from the outset was well aware that other countries had already incorporated agricultural workers within their Social Security programs. Edwin Witte, the executive director of the Committee on Economic Security (CES), which President Roosevelt had created to develop Social Security legislation, submitted with his testimony before the Senate Finance Committee a table from the CES Report to the President showing that the social insurance laws of Austria, Belgium, Bulgaria, Czechoslovakia, France, Germany, Great Britain, Italy, and the Netherlands all included agricultural employees.109 In fact, CES staff reports had recommended coverage in UI of agricultural workers including sharecroppers on the same basis as industrial workers in part by reference to their inclusion in European social insurance programs during the 1930s.110

Forty years later, an international review of unemployment insurance coverage pointed out that, unlike the United States, countries such as Canada, West Germany, Israel, and Norway maintained no specific occupational exclusions.111 Other countries, including France, Italy, and Spain, have created separate programs to accommodate the seasonality of agricultural work.112

108. By 1936, for example, Great Britain had included agricultural employment in its Unemployment Insurance Act. Unemployment Insurance (Agriculture) Act, 26 Geo. 5 & 1 Edw. 8, ch. 13, § 12, sched. 5 (1936) (Eng.).
109. Finance Comm. Hearings, supra note 106, at 51; see also Economic Security Act: Hearings on H.R. 4120 Before the House Comm. on Ways and Means, 74th Cong., 1st Sess. 78–79 (1935) [hereinafter House Hearings] (detailing provisions of foreign old-age pension laws through 1933). The Social Security plans of Austria and France, however, were less explicit. See Finance Comm. Hearings, supra note 106, at 51 (showing that Austria had “special schemes for agricultural workers” and that France limited coverage for farm workers’ benefits during old age and upon death).
112. Id. at 88.
Soon after the Social Security Act went into effect, the Social Security Board (Board) began examining the empirical plausibility of the other major policy reason for excluding farm workers, namely the benign nature of the family farm:

The reluctance to extend the operation of social legislation to agricultural labor appears to be closely associated with the general feeling that agriculture in the United States is predominantly a family enterprise in which hired labor plays a relatively unimportant part. It is often pointed out that when only one or two hired hands are employed on a farm, they usually enjoy a close personal relationship with their employer which tends to assure them of more favorable consideration than is usual in ordinary employer-employee relationships.

. . . It is therefore particularly important to know if, where, and to what extent agricultural wage workers are employed on farms singly or in very small groups, on the one hand, and in larger numbers, on the other.113

In order to test this family farm thesis, the Board caused the Bureau of the Census to make special tabulations of the 1935 Census of Agriculture to determine the distribution of farms and workers by number of hired laborers per farm.114 The data revealed that behind the general picture of the family farm lay "conceal[ed] the fact that a relatively large number of hired farm laborers were on farms employing hired labor in substantial numbers, and that these hired laborers were concentrated on a very small number of farms."115 In January 1935, 18% of all workers were employed on 0.2% of all farms, which accounted for 2% of all farms with hired labor.116 Estimates for July of the same year were similar: 20% of the workers were employed on 0.4% of all farms, which in turn accounted for 2% of the farms that hired workers.117

114. Because covered employment under the federal unemployment insurance scheme was originally defined by reference to employers who hired eight or more individuals, the Census Bureau and the Board collected data on farms reporting eight or more hired laborers. Social Security Act, ch. 531, § 907(a), 49 Stat. 620, 642 (1935); Wendzel, supra note 113, at 561–62.
116. Id. at 564 tbl. 1, 565 tbl. 2.
117. See id. at 567 tbl. 4, 568 tbl. 5.
Congress, in the course of enacting Social Security legislation, was repeatedly put on notice not only that the exclusion of agriculture meant the wholesale exclusion of Blacks, but also that this pattern of racist exclusionism had already become the hallmark of New Deal programs such as the Public Works Administration and the Tennessee Valley Authority. Charles Houston, representing the National Association for the Advancement of Colored People (NAACP), testified to the House Ways and Means Committee that in the South,

where your Negro population is heaviest, you will find the majority of Negroes engaged either in farming or else in domestic service, so that, unless we have some provisions which will expressly extend the provisions of the bill to include domestic servants and agricultural workers, I submit that the bill is inadequate on the unemployment-compensation provision.118

As part and parcel of the racism he was attacking, Houston went on to observe that, to the extent that federal programs relied on local or state entities for administration, they would have to deal with the South “according to the law [of] separate institutions . . . for Negro and white citizens.”119 He therefore urged that Congress insert into the bill a provision that, “where the money is allocated to the States and by law in public institutions you have a separation of races, there must be an equitable distribution between the white and colored citizens.”120 It was precisely the letter and spirit of such racial equality that southern congressmen succeeded in suppressing as the price for their cooperation with the Roosevelt administration.

In his testimony before the Senate Finance Committee, Houston noted that the Social Security bill would exclude 3.5 million of 5.5 million Black laborers because they were employed either as farm workers or domestics.121 He then expressed the NAACP’s regret that it could not support the proposed legislation because “the more it studied the bill the more holes appeared, until from a Negro’s point of view it

119. *Id.*
120. *Id.*
look[ed] like a sieve with the holes just big enough for the majority of Negroes to fall through."\textsuperscript{122} Manning Johnson for
the National Executive Council of the League of Struggle for
Negro Rights, informed another congressional committee hold­
ing hearings on unemployment insurance that "[p]ractically 85
percent of the Negroes in the South are agricultural work­
ers."\textsuperscript{123} The Executive Secretary of the National Urban League
testified to the same committee:

The Negro working population is largely agricultural . . . .
A little more than 65 percent of all Negroes who were
engaged in 1930 labored as farmers and domestic and
personal servants. Shutting off benefits to farmers and
domestic and personal-service workers would immediately
exclude almost two-thirds of all Negro workers.\textsuperscript{124}

George Haynes, the Executive Secretary of the Federal
Council of Churches, Department of Race Relations, in urging
the Senate Finance Committee to include a nondiscrimination
clause in the social security bill, stated that in:

the distribution and administration of Federal funds, both
under the regular services furnished by the States with the
help of Federal funds as well as in the emergency measures
that have been carried out under legislation for recovery,
there has been repeated wide-spread and continued dis­
rimination on account of race or color, as a result of which
Negro men and women and children did not share equita­
ibly and fairly in the benefits . . . .\textsuperscript{125}

Haynes focused on the "inequalities that have arisen in the
cotton-acreage reduction as a part of the recovery program,"
which he deemed especially pertinent "because Negro share
tenants and share croppers are more largely affected than
white share tenants and share croppers by the cotton-acreage

\textsuperscript{122.} Id. at 640–41.
\textsuperscript{123.} \textit{Labor Comm. Hearings}, supra note 76, at 147 (statement of T. Arnold Hill,
Executive Secretary, National Urban League).
\textsuperscript{124.} Id. at 327.
\textsuperscript{125.} \textit{Finance Comm. Hearings}, supra note 106, at 479–80 (statement of George E.
Haynes, Executive Secretary, Department of Race Relations, Federal Council of
Churches).
reduction conditions." Haynes stressed that the extraordinary concentration of Blacks in agriculture and domestic service meant that "about three-fifths of all Negroes gainfully employed in the United States will be excluded by the very terms of this bill from its unemployment and old-age benefits." Commentary is superfluous on the fate of Haynes's intriguing proposal that in order to compensate for wage discrimination against Black workers vis-à-vis Whites with the same jobs: "Wherever there is this discrimination in wages on account of race or color, this bill should provide an equalization of the percentage of the tax to be paid by the employee so that the employer will be required to pay a larger percentage of the tax." Five years later, the Chair of the committee before which he was testifying, Senator Byron "Pat" Harrison of Mississippi, one of Roosevelt's most reliable legislative leaders, told the team conducting the Carnegie Corporation's Survey of the Negro in America: "'The nigra is satisfied down there from a political standpoint. In my state, the nigra has played no part in politics for forty years and has no desire to do so. We are all content to leave the situation alone as it is.'" This legislative history, as interpreted against the background of the political economy of the South, demonstrates that the exclusion of agricultural workers from Social Security was the deliberate result of a congressional decision to ensure that no federal legislation interfered with the post-slavery statutory and social subjugation of the rural Negro in areas of high concentrations of colored population . . . [where] whites are relatively fewest, that the plantation system of agriculture is most highly developed, that the economic system is most dependent upon black workers, and that the white-black socio-economic system, commonly thought to be characteristic of the entire South, is most highly developed. . . .

The maintenance of southern Democratic solidarity has depended fundamentally on a willingness to subordinate

126. Id. at 485.
127. Id. at 487.
128. Id. at 490.
129. See BUNCH, supra note 87, at 434–35 (quoting Interview with Senator Byron Patton Harrison, in Washington, D.C. (Feb. 16, 1940)).
to the race question all great social and economic issues that tend to divide people into opposing parties.\textsuperscript{130}

Plantation owners and their representatives had no qualms about articulating the racism behind their resistance to the extension of Social Security programs to their laborers, on the ground that even a modest level of income security and supplement would have tended to raise workers' reservation wage, thereby weakening confinement to a quasi-captive labor market.

Southerners worried about [Social Security's] implications for race relations. "The average Mississippian," wrote the Jackson \textit{Daily News}, "can't imagine himself chipping in to pay pensions for able-bodied Negroes to sit around in idleness on front galleries, supporting all their kinfolks on pensions, while cotton and corn crops are crying for workers to get them out of the grass."\textsuperscript{131}

Congress promptly dispelled southern racist concerns by excluding agricultural and domestic employees altogether—and thus the vast majority of southern Black workers—from coverage.\textsuperscript{132} Yet the indirect exclusion of Blacks from the old-age pension provisions of the bill did not satisfy southern congressmen, who bitterly attacked the old-age assistance provision because it gave the federal government the power to dictate to the states how much should be paid to whom.\textsuperscript{133} As the executive director of the CES observed of the congressional process:

In this position, Senator Byrd [of Virginia] was supported by nearly all of the southern members of both committees, it being very evident that at least some southern senators

\begin{itemize}
  \item \textsuperscript{130} V.O. Key, Jr., \textit{Southern Politics: In State and Nation} 315-16 (1949).
  \item \textsuperscript{131} William E. Leuchtenburg, \textit{Franklin D. Roosevelt and The New Deal} 1932–1940, at 131 (1963) (citation omitted). Even more recently, agricultural economists have expressed their concern over "[t]he use of unemployment insurance as 'rocking chair money' to provide additional income to seasonal workers who, by accident or design, earn enough to qualify for benefits, but whose employment in any case would be seasonal." Stanley K. Seaver & James S. Holt, \textit{Economic Implications of Unemployment Insurance for Agriculture}, 56 Am. J. Agric. Econ. 1084, 1090 (1974).
  \item \textsuperscript{132} See Social Security Act, ch. 531, § 210, 49 Stat. 620, 625 (1935).
  \item \textsuperscript{133} See Finance Comm. Hearings, supra note 106, at 71–79 (statement of Edwin E. Witte, Executive Director, Committee for Economic Security).
\end{itemize}
feared that this measure might serve as an entering wedge for federal interference with the handling of the Negro question in the South. The southern members did not want to give authority to anyone in Washington to deny aid to any state because it discriminated against Negroes in the administration of old age assistance.134

Senator Huey Long confirmed this point in a speech before the United States Senate, stating that, so long as they were without the vote, Blacks in the South would receive no pensions.135 This racist opposition made it "apparent that the bill could not be passed as it stood and that it would be necessary to tone down all clauses relating to supervisory control by the federal government."136

This statutory accommodation of southern racism, masked as states’ rights,137 was part of "the reluctance of the dominant race to provide for aged Negroes, Mexicans and Indians [that] accounted for a part at least of the slowness of the Southern States, and for the failure of Oklahoma and New Mexico to take action during the old-age pension movement in Congress."138 Since southern mores included "the assumption that the standard of living of the Negro and his cost of living do not rise above the barest subsistence . . . of the Negro share-croppers and cotton tenants,"139 "there was a tendency to grant lower sums, especially in the South, to aged Negroes than to aged Whites."140 The circle of discrimination was completed by "[t]he lack of federal administrative authority to fix the standards for personnel selection [which] . . . made it possible for the Southern States to consistently exclude the negro from any appointments."141

In contrast to this statutory accommodation of southern racism, a set of rival bills, initiated by Representative

136. WITTE, supra note 134, at 144.
137. See Social Security Act, ch. 531, § 2, 49 Stat. 620, 620 (1935) (allowing the states to create their own programs, given certain requirements).
139. Id. at 157.
140. JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM: A HISTORY OF NEGRO AMERICANS 538 (3d ed. 1967).
141. Davis, supra note 138, at 198.
Lundeen, a member of the Minnesota Farmer-Labor Party, entitled the Workers' Unemployment, Old Age, and Social Insurance or the Workers' Social Insurance Act, not only provided for universal coverage, giving implied parity to agricultural workers, but also explicitly prohibited discrimination based on race or color in the distribution of benefits. Indeed, the National Urban League testified that it supported this alternative bill precisely because "it benefits all workers irrespective of race [or] color." Six decades later, however, the scope of this legislative proposal remains unimplemented.

C. The New Deal Jim Crow Congress

That the United States Congress during the New Deal enacted the racially motivated exclusion of farm workers from Social Security legislation was no aberration: the Congress in the 1930s was itself a profoundly segregated and racially exclusionary institution. The Seventy-fourth Congress, which enacted the Social Security Act, like the other New Deal Congresses, could boast of only a single Black member. The Congress demonstrated its support of institutional discrimination against Blacks by approving the funding of segregated schools in the District of Columbia. Two months before it passed the Social Security Act, Congress appropriated money "[f]or maintenance and instruction of colored deaf-mutes of teachable age belonging to the District of Columbia, in Maryland, or some other State," as well as for an "industrial home

142. See Social Insurance: Hearings on S. 3475 Before the Senate Comm. on Education and Labor, 74th Cong., 2d Sess. 1, 4 (1936) ("The system must . . . provide insurance for all workers, including all wage earners, all salaried workers, [and] farmers . . . . Compensation . . . shall not be denied . . . by reason of . . . race [or] color . . . .") (emphasis added).
143. Labor Comm. Hearings, supra note 76, at 328 (statement of T. Arnold Hill, Executive Secretary, National Urban League).
145. This congressman was Representative Oscar DePriest, a Republican from Chicago. See Elliot M. Rudwick, Oscar De Priest and the Jim Crow Restaurant in the U.S. House of Representatives, 35 J. NEGRO EDUC. 77, 77 (1966). Representative DePriest held office during 1929-1935 and was the first Black congressman of the twentieth century. Id.
school for colored children."146 The District of Columbia was, as the President's Committee on Civil Rights observed as late as 1947, "not just the nation's capital . . . [but] the point at which all public transportation into the South becomes 'Jim Crow.'"147 The Committee asserted that "the core of Washington's segregated society is its dual system of public education. It operates under congressional legislation which assumes the fact of segregation . . . ."148 Congress mandated racial segregation for the entire District of Columbia school system into the 1950s.149 However, Congress reserved the harshest discriminatory treatment of Blacks for its own facilities. Congressionally run and funded public restaurants in the Capitol excluded Blacks during the New Deal;150 and as late as 1947, Black journalists were still banned from the press gallery.151

It was emblematic of southern racist domination of the New Deal Congress that, just one year before, it enacted racially exclusionary Social Security legislation, representatives conducted a debate on the exclusion of Blacks from the House restaurant,152 which had been ordered by the North Carolina chairman of the committee that oversaw its operation. In the course of that debate, southern congressmen on the House floor

147. To Secure These Rights, supra note 87, at 89.
148. Id. at 90.
149. See D.C. CODE ANN. § 31-1110, -1111 (1940). The statute provided as follows:

It shall be the duty of the Board of Education to provide suitable and convenient houses or rooms for holding schools for colored children, to employ and examine teachers therefor, and to appropriate a proportion of the school funds, to be determined upon number of white and colored children . . . and to endeavor to promote a thorough, equitable and practical education of colored children in the District of Columbia.

Any white resident shall be privileged to place his or her child . . . at any one of the schools provided for the education of white children in the District of Columbia he or she may think proper to select . . . and any colored resident shall have the same rights with respect to colored schools.

Id.; see also Carr v. Corning, 182 F.2d 14, 18–19 (D.C. Cir. 1950) (citing the D.C. Code as evidence of congressional intent not to desegregate the schools).
152. The Senate restaurant also refused to serve Blacks. Rudwick, supra note 145, at 77.
openly avowed their contempt for Blacks. For example, Representative George Terrell, Democrat of Texas and farm employer of Black workers, wrote to his sole Black colleague, Representative Oscar De Priest, Republican of Illinois, that he was

not in favor of social equality between the races. If there [were] enough Negroes around the Capitol to justify a restaurant for them to patronize, [he] would have no objection to establishing a restaurant for their use. [He could] neither eat nor sleep with the Negroes, and no law could make [him] do so. 153

In the end, the House of Representatives affirmed the codification of southern White supremacist traditions by excluding Blacks from its restaurant. 154

Even after the Social Security Act went into effect, Black organizations continued to remind the Roosevelt administration of its racial impact. Thus, on January 4, 1937, the National Urban League sent a memorandum to President Roosevelt urging amendatory legislative action: “Because the majority of Negro workers are in domestic or agricultural employments, the benefits of the Social Security Act are denied to them.” 155

The memorandum also placed this discrimination in the context of the overall racial bias of the New Deal programs. It suggested, for example, that the federal government ban racial discrimination by contractors on public works projects, “increase the number of Negro assistants in its various agencies in order to facilitate the carrying out of the government policy of non-discrimination in relief and work relief,” and rectify discrimination in the Cotton Belt, where thirty-five percent of Whites had work relief compared to eighteen percent of Blacks, and White families received twice as much in relief than did Black households. 156

156. Id.
IV. THE DISCRIMINATORY IMPACT ON BLACK AMERICANS OF EXCLUDING FARM WORKERS FROM THE SOCIAL SECURITY ACT

A. Historical Impact

The actual discriminatory impact of the Social Security Act on Blacks corresponded closely to the predictions that Black organizations had made to Congress. \(^{157}\) Because of the agricultural and domestic service exclusion most Black workers did not receive UI benefits. In a contemporaneous doctoral dissertation, Frank Davis calculated that, based on the 1930 census, revealing almost two-thirds of all Black gainful workers excluded from coverage by virtue of their work in agriculture and domestic service, only "8.8 percent of the total gainfully employed Negro workers are now actually accumulating taxable earnings and satisfying the conditions of eligibility for old age and unemployment insurance."\(^{158}\)

The race-specific impact of the exclusion of farm workers from Social Security is understated by the aggregate data for agriculture, which include farmers. Yet even these figures show that in 1930, forty percent of all Black, and thirty-eight percent of all Mexican workers were employed in agriculture, compared to only nineteen percent of Whites.\(^{159}\) If only "employees" are considered, however, the gap widens. The class, "employees," should not be confined to those whom the Census Bureau labeled "wageworkers" within the larger group of "farm laborers." This inappropriately narrow definition of employees followed, according to the Social Security Board, from

the census practice of considering sharecroppers as farm operators . . . . There is, however, a strong basis for considering them as hired employees of the plantation owners. It is usually considered that a primary condition of an employer-employee relationship is the ownership of the tools of production by the employer, and that this condition

\(^{157}\) See supra notes 76–80, 109–28 and accompanying text.

\(^{158}\) Davis, supra note 138, at 90, 97.

is fundamental to employee insecurity. By this criterion, it is clear that sharecroppers should be regarded as employees . . . . 160

If sharecroppers are included with wage workers, then, in 1930, the proportion of Black workers excluded from Social Security by virtue of their status as agricultural employees was nineteen percent, more than three times greater than that of White workers, six percent of whom were excluded.161

The race-specific impact of the exclusion of farm workers from the unemployment insurance program was magnified by the fact that the farms and plantations that would have been included, if agricultural employers with eight employees had been covered under the federal UI tax provision,162 were concentrated in areas—the South, California, Arizona, and New Mexico—where Black and Mexican farm workers clearly predominated.163 In the South, for example, the Black farm laborer had had “the field of farm labor to himself” since the end of the nineteenth century.164 These fourteen states accounted for seventy-five percent of all farms with eight or more workers and seventy-nine percent of all farm workers in 1935.165

160. Wendzel, supra note 113, at 568. The staff reports of the CES not only agreed that “[c]roppers are practically hired laborers . . . [and] are as a class almost constantly without resources with which to meet unemployment,” but expressly took note of the fact that in 1930, 43% of all “colored” farm “owner-operators” were croppers compared with only 7% of Whites. Josiah C. Folsom, Economic Security of Farmers and Agricultural Workers, in ECONOMIC SECURITY, supra note 110, at 808, 811, 835 tbl. II.

161. See U.S. BUREAU OF THE CENSUS I, supra note 159, at 76 tbl. 3; BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, 3 AGRICULTURE: TYPE OF FARM, PART 2—THE SOUTHERN STATES 35 tbl. 9 (1932). Because the 1930 Census of Agriculture classified Mexican and Mexican-American sharecroppers as White, it is not possible to compute the percentage of excluded workers for this ethnic group.

162. See Social Security Act, ch. 31, § 907, 49 Stat. 620, 642–43 (1935) (applying text to employees with eight or more employees, while excluding all agricultural labor).

163. LINDER, supra note 6, at 165–66, 169.


165. Wendzel, supra note 113, at 564–67 (calculation based on statistics from Alabama, Arizona, Arkansas, California, Florida, Georgia, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Tennessee, Virginia, and West Virginia).
B. Current Impact

The original exclusion of farm workers from the unemployment compensation provision of the Social Security Act had, and continues to have, a disproportionate impact on the nonwhite majority of agricultural workers, who were and remain vastly overrepresented in the agricultural work force. Exactly what proportion of farm workers today are members of such minorities is impossible to determine. As the Commission on Agricultural Workers recently acknowledged, “no national survey ... accurately counts the people that the industry employs.”166 This official ignorance of the number of agricultural workers is emblematic of public indifference toward them. It is ironic that the chief obstacle to the collection of accurate employment data is the threefold subject matter of this very Article—the lack of universal coverage for farm workers under unemployment compensation statutes, the noncompliance with their obligations by employers who are covered, and the lack of enforcement of these obligations by the Internal Revenue Service, Social Security Administration, United States Department of Labor, and state employment agencies.

Within the limitations of the current data, the National Agricultural Workers Survey (NAWS), recently established by the Department of Labor, makes possible an estimation of the proportion of farm workers who are racial and ethnic minorities. The NAWS samples workers performing seasonal agricultural services (SAS) related to all crops but excludes livestock.167 For 1990, NAWS found that 62% of all SAS workers were foreign-born: 57% were Mexican, 2% were of other Latin origin, 1% were non-Spanish-speaking Caribbean, and 2% were Asian.168 An additional 13% were U.S.-born Hispanics, while 2% were African Americans.169 In other words, 77% of SAS workers were members of racial and ethnic minorities and only 23% were Whites. In 1993–1994, the percentage of Whites

166. Commission on Agricultural Workers, supra note 4, at 1.
167. NAWS, supra note 22, at 3.
168. Id. at 16 tbl. 1.1.
169. Id.
declined to 17%.\textsuperscript{170} Virtually the entire large subset of SAS workers who are migrant farm workers and most in need of protection against the severe disemployment effects of seasonal agricultural patterns are non-White: in 1989–1991, eighty-five percent were born abroad—ninety-five percent of them in Latin America; ten percent were U.S.-born Hispanics. In all, ninety-nine percent of all migrant farm workers "are, or have immediate family members who are, Hispanic or foreign-born."\textsuperscript{171}

Today Latinos, Blacks, and other discrete and insular racial minorities, constitute about one-fifth of the total U.S. population and work force.\textsuperscript{172} Yet, based on estimates of non-SAS livestock and poultry workers, who are currently excluded from the NAWS survey, the latter's directors estimate that members of racial minority groups may make up seventy to seventy-five percent of the entire agricultural work force.\textsuperscript{173}

The racially based exclusion of farm workers from UI in 1935 had its intended results—it denied protection to African Americans to a much greater degree than it harmed White Americans. This disparate impact was particularly pronounced in the South. Today's partial exclusion of farm workers from the FUTA has an even greater disproportionate impact on Black and Mexican-origin workers.

\textbf{Conclusion}

Although past racial injustice may not be easily corrected in Congress, prospective relief from discrimination against farm workers under UI requires only two simple changes in the FUTA.\textsuperscript{174} First, the special definitions for agricultural coverage

\begin{itemize}
\item \textsuperscript{170} Telephone Interview with Ruth Samardick, U.S. Department of Labor, Washington, D.C. (Feb. 23, 1995).
\item \textsuperscript{171} \textit{U.S. Dep't of Labor, Migrant Farmworkers: Pursuing Security in an Unstable Labor Market} 19 (1994).
\item \textsuperscript{172} \textit{Bureau of the Census, U.S. Dep't of Commerce; Census of Population: General Population Characteristics: United States} 3 tbl. 3 (1993) (tabulations by authors).
\item \textsuperscript{173} See NAWS 1989, supra note 22, at 1 n.1; Richard Mines et al., \textit{The Latinization of U.S. Farm Labor}, REP. ON AM., July 1992, at 40, 41; Telephone Interview with Beatriz Boccalandro, U.S. Dep't of Labor (Apr. 26, 1994); Telephone Interview with Richard Mines, U.S. Dep't of Labor (May 18, 1994).
\item \textsuperscript{174} The compulsory nature of the FUTA on the states ensures that these changes will be adopted at the state level. Because 90% of a state-imposed UI tax (up to 5.4% of covered wages) can be credited against the FUTA levy, states can enact a UI tax
in § 3306, distinguishing farm workers and their employment from all other industries, should be repealed.\textsuperscript{175} Second, to ensure that the equal coverage provided by this change will not be subverted by the use of crew leaders against whom reporting requirements are practically unenforceable,\textsuperscript{176} the special rule for crew leader use should be changed to place reporting and tax-paying responsibility on the grower. The amended provision should read:

**SPECIAL RULE IN CASE OF CERTAIN AGRICULTURAL WORKERS.**

**CREW LEADERS WHO PROVIDE AGRICULTURAL LABOR.** For purposes of this chapter, any individual who is a member of a crew furnished by a crew leader to perform agricultural labor for any other person shall be treated as an employee of such other person, unless substantially all the members of such crew operate or maintain tractors, mechanized harvesting or cropdusting equipment, or any other mechanized equipment, which is provided by such crew leader.

After sixty years of discrimination, these changes would finally bring farm workers into the UI system on the same basis as all other workers. Providing a stable source of income to these workers during periods of unemployment will help hundreds of thousands of workers and their families. It will correct decades of injustice and have very little impact on the cost of farm products. This impact can be determined by looking at states that currently cover farm workers. In such states, the average agricultural UI tax rates are in the four percent range of taxable wages, and less than four percent of total wages.\textsuperscript{177} For some of the most labor intensive crops, such as fruit and vegetable production, labor costs are twenty to thirty percent of the total value of farm products.\textsuperscript{178} Using

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on their employers and increase their revenues without increasing taxes. See 26 U.S.C. §§ 3301–3302 (1994).


\textsuperscript{176} See supra notes 51–52 and accompanying text.

\textsuperscript{177} In California, for example, the maximum UI tax rate was 5.4% in 1994. Phillip L. Martin, Immigration, Agriculture, and Unemployment Insurance 16 n.26 (Aug. 16, 1994) (unpublished manuscript, on file with the University of Michigan Journal of Law Reform). The average farm employer paid UI taxes of 2.5% of total wages paid. \textit{Id.} This was 4.3% of taxable wages, since all wages are not taxable for UI in California or in any other state. \textit{Id.}

\textsuperscript{178} \textit{Id.} at 4. These commodities have a total farm value of $25 billion annually and a labor cost of $5 to $8 billion annually. \textit{Id.}
these two figures, both of which are on the high side when used for the industry as a whole, the total increase in costs of farm products on farms not currently covered and paying UI resulting from coverage of farm workers is between 0.8% and 1.2%.

Thus, the cost to farmers, whom the current exclusion is now subsidizing, will be minimal—on the order of one percent of production costs in labor intensive crops. The largest farmers are now paying these costs, as are all farmers in states such as California and Washington that have essentially first dollar coverage for farm workers. A change in the FUTA will equalize competitive conditions for all farmers. If there are policy reasons to subsidize smaller farmers on the basis of size, then the subsidies should be direct and not imposed on the backs of destitute employees.

Placing UI reporting and taxpaying responsibility on growers, even when they use crew leaders as intermediaries, should add no additional costs, unless the crew leaders have unlawfully failed to report wages and pay taxes in the past. However, it may require growers to assume these responsibilities from compliant crew leaders and reduce such crew leaders' compensation accordingly.

The approach to this issue by the Advisory Council on Unemployment Compensation, making growers responsible only where taxes have not been paid, has been tried in Texas and does not work. The defect in this approach is as simple as it is fatal. The state cannot assess taxes against the grower, and cannot credit workers' wages for UI compensation purposes, unless it obtains records from the crew leader showing the wages paid to particular workers on the farm. Crew leaders who have failed to report and pay UI taxes seldom can be

179. See supra notes 32, 44-47 and accompanying text. Agriculture, like many other industries, does not pay enough in UI taxes to cover benefits paid to its workers. It is what is known as a "negative reserve industry." In California, agricultural employers paid in $70 million in 1992, but the state paid out $190 million. Martin, supra note 177, at 23. All states have maximum UI tax rates, causing lower-cost industries to subsidize higher-cost industries. The most subsidized industries in Washington during 1993 were commercial sports, manufacturing, commercial printing, operative builders, and real estate operators. Five additional industries received more subsidies than did agriculture. TASK FORCE ON UI, SOCIALIZED COSTS AND EXPERIENCE RATING ISSUES 10 (1993).

180. See supra notes 53, 55.

181. See ACUC, supra note 4, at 13 (recommending responsibility where crew leaders owe UI insurance). Its failure in Texas is the observation of author Larry Norton.
found with such incriminating records. As a result, this approach is not a solution to the "noncompliant crew leader" problem. The UI system is designed to function with accurate employer wage reporting. This reporting will occur in agriculture only if reporting responsibility is clearly placed on the person to whom the crew leader provides workers.

Current leaders in Washington, D.C. are Southerners from Arkansas and Georgia. Let them go down to Weslaco in the Rio Grande Valley and tell the thousands of migrant farm workers that they will end the racial injustice that has excluded these workers from UI, minimum wage, and overtime. Perhaps this is a "revolution" that can unite the New Age thinking of a Bill Clinton and a Newt Gingrich, sons of the South putting to rest another racist chapter in our nation's history.

182. Telephone Interview with Kristy Doss, Unemployment Tax Specialist and Supervisor of the Lubbock, Texas office (Mar. 10, 1995).