Migrant workers and minimum wages: regulating the exploitation of agricultural labor in the United States / by Marc Linder.

Linder, Marc.

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Migrant Workers
and Minimum Wages
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Regulating the Exploitation of Agricultural Labor in the United States

Marc Linder

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Laws and government may be considered...in every case as a combination of the rich to oppress the poor.... The government and laws hinder the poor from ever acquiring the wealth by violence which they would otherwise exact on the rich; they tell them they must either continue poor or acquire wealth in the same manner as they have done....

**ADAM SMITH, LECTURES ON JURISPRUDENCE**

208-209 (R. Meek ed. 1982 [1763])

[A] good wage law must show so many effective teeth that its threat will be ever present to all whom it is meant to curb. [T]he administrative agency...should have a set of thumb-screws so assorted as to fit every unfairly grasping hand.

**Standing Comm. on Legal Aid Work, Am. Bar Ass'n,**

*First Draft of a Model Statute for Facilitating Enforcement of Wage Claims,*

52 A.B.A. REP. 324, 325 (1927)

The social invisibility of these migrant workers and their families, their insulation from the mainstream of industrial development...is perhaps the major reason why most Americans do not believe that their country's agricultural history has much to do with proletarianization.

**Gavin Wright, AMERICAN AGRICULTURE AND THE LABOR MARKET: WHAT HAPPENED TO PROLETARIANIZATION?**

62 AGRIC. HIST. 182, 209 (1988)

The capacity of our society to mangle people who lack the power to stand up for their own rights is virtually limitless.

**Migrant and Seasonal Farmworker Powerlessness: Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare,**


(statement of Sen. Mondale)
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In the few instances in which situations described in this book are not documented, the underlying facts have been gathered in the course of the author's representation of migrants at Texas Rural Legal Aid since 1983.

If, as that proto-deconstructionist Heine observed, "der Pfeil gehört nicht mehr dem Schützen, sobald er von der Sehne des Bogens fortfliegt,"¹ then Gail Hollander nocked this arrow before the archer even knew that it had been in his quiver.

Marc Linder

¹*Heinrich Heine, Zur Geschichte der Religion und Philosophie in Deutschland*, in 8 Heinrich Heine, Säkularausgabe 127 (Renate Francke ed. 1972 [1852]).
Preface

[T]he annual inundation of grain fields in harvest time, hop yards in the picking season, fruit picking in districts of extensive market orchards, and similar harvest seasons requiring large numbers of hands for a short time, has a demoralizing effect on farm labor. Such employments demand little skill. They constitute a low order of farm labor...and are excrescences upon its fair face.¹

A sizable segment of our population, through community and State neglect, has been robbed of so many normal American and human rights that it is almost unbelievable.²

Starr County, Texas, situated along the Rio Grande in the extreme southern part of the state, is, by many indicators, the poorest county in the United States. It has by far the lowest per capita personal income ($4,549), only one-quarter that of the national average. A greater proportion (forty-five per cent) of families living there have money incomes below the official poverty level than anywhere else. It also has the second highest unemployment rate (36.4 per cent).³ In the border town of Roma, whose 4,500 almost exclusively Mexican-American residents have the lowest per capita money income of any place in the country ($2,953),⁴ a large propor-


²FEDERAL INTERSTATE COMM. ON MIGRANT LABOR, MIGRANT LABOR...A HUMAN PROBLEM V (1947).

³5 U.S. BUREAU OF ECON. ANALYSIS, LOCAL AREA PERSONAL INCOME 1984-89, tab. 2 at 4 (1991) (data for 1989); U.S. BUREAU OF THE CENSUS [BOC], COUNTY AND CITY DATA BOOK, 1988, at 514, xxv (1988) (data for 1979 and 1986 respectively). The per capita income of the next poorest county, Shannon County, S. Dakota, where Pine Ridge Indian Reservation is located, was $5,294. Four of the five and six of the ten poorest counties, where many migrant farm workers reside, are also located in South Texas.

⁴Calculated according to 1 BOC, 1980 CENSUS OF POPULATION: CHARACTERISTICS
tion of the population must migrate north every summer. Most families wait until school is out so that their children can also work. The children's availability is crucial because the families earn the bulk of their annual income during the summer.

A faint reminder of the hundreds of thousands of Mexican workers who once migrated throughout Texas to pick cotton, a typical family of seven from Roma drives to West Texas every June to hoe weeds on cotton farms. "It is," a federal appeals court took notice, "a menial, unskilled task which requires no aptitude, no training, and no ability to reason. It is a work of drudgery which can be performed by persons ranging from very young to quite old...."

Although many farmers are legally obligated to pay $3.35 per hour, $2.50 is the going rate all over West Texas for chopping cotton

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6See Carey McWilliams, Ill Fares the Land: Migrants and Migratory Labor in the United States 230-40 (1942). At the beginning of the century a leading economic historian observed:

Cotton picking suits the Mexican for several reasons: It requires nimble fingers rather than physical strength, in which he cannot compete with the white man or the Negro; it employs his whole family; he can follow it from place to place, living out of doors, which seems to suit the half-nomadic instinct of a part of the Mexican race....

Victor Clark, Mexican Labor in the United States, in U.S. Bureau of Labor Statistics [BLS], Bull. No. 78, at 466, 482 (1908). It is unclear whether Clark was engaging in self-criticism when he added: "The race sentiment of Americans is, like most race sentiment, peculiar and illogical." Id. at 512.

7Castillo v. Givens, 704 F.2d 181, 183-84 (5th Cir. 1983).
toward the end of the 1980s. At the height of the season all seven members of the family work ten to fourteen hours a day, seven days a week, for several farmers. Even at $2.50 an hour, that works out to over $1,200 a week, which to a family with a cash income of only $6,000-7,000 a year is and seems like a large amount of money. With many other families and illegal aliens in the vicinity desperate for work at any wage, this family would not dare jeopardize its livelihood by complaining that the farmers are depriving them of $400-500 a week by paying eighty-five cents an hour below the minimum wage. But they are not even aware of their entitlement: they (mistakenly) believe that piece-rate work (por contrato) supersedes the minimum wage law. Moreover, having estimated the total income that they will need to survive the long spell of unemployment in the winter, their primary concern at this moment is not how many hours it will take them to earn that sum.

In August the family returns home in time for the children to begin school. The following January the father receives from each of the farmers, instead of IRS Form W-2 ("Wage and Tax Statement"), a Form 1099-MISC ("Statement for Recipients of Miscellaneous Income"). They unlawfully list him as the recipient of the entire income that all seven workers earned. Later the Internal Revenue Service sends the father "Proposed Changes" informing him that he owes self-employment social security tax on his "non-employee compensation." With interest and a late payment penalty tacked on, the IRS requests payment of almost a thousand dollars. In addition,
Until the workers pay, the Social Security Administration will not credit them with any coverage credits towards their old-age pensions or disability insurance payments. Finally, when the parents apply for unemployment compensation benefits, the farmers contest coverage on the ground that no employment relationship existed. The workers now must bear the burden of proving that they were employees rather than self-employed.

Migrant farm workers are the archetypical dependent employees, "selling nothing but their labor," whose location within the social division of labor systemically constructs them as a uniquely atomized and disempowered stratum. As used here, the term migrant farm workers is not restricted to those who travel long distances across state borders to pick fruits and vegetables. Instead, this synecdoche also includes the racial and ethnic minorities who

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1126 U.S.C. §§ 6051, 6041 (1989 & 1988); 26 U.S.C. § 73(a) (1988) (prohibiting imputation to parents of income earned by their children); 26 U.S.C. §§ 6601, 6651 (1989). If the employer properly files the W-2s, employees will receive social security credits regardless of whether the employer has actually paid in the employer’s and employees’ shares of the social security tax. This automatic mechanism does not apply to Form 1099: without actual payment, no credit will be recorded.


work as seasonal hand-harvesters or in packing sheds and may or may not migrate as well as those who engage in preparatory work such as weeding and thinning cotton, sugar beets, and soy beans, planting pine seedlings, and detasseling hybrid seed corn. Excluded, however, are persons such as the high-school-age children of white middle-class families in the Midwest who detassel corn (and are being displaced by Hispanic migrants) because they lack the marginality characteristic of the lifelong agricultural proletariat. This racial dichotomization in terms of attachment to the hired farm work force has finally become the received wisdom of agricultural labor economics.

When the New Deal excluded farm workers from its strategy of imposing national limits on the exploitation of the unorganized, "a conscious and articulated policy of exclusion replaced an unexpressed policy of general omission." Barring farm workers from the

14Latin American workers have been supplanting other groups to become the mainstay of the seasonal labor force. See 1 Monica Heppel & Sandra Amendola, Immigration Reform and Perishable Crop Agriculture: Compliance or Circumvention 23, 27, 65-74, 80 (1991). A recent study found that seventy-one per cent of seasonal agricultural workers are Hispanic. U.S. Dep't of Labor [DOL], Findings from the National Agricultural Workers Survey (NAWS) 1990: A Demographic and Employment Profile on Perishable Crop Farm Workers 16-19 (Office of Program Econ. Research Rep. No. 1, 1991). On the predominance of nonwhite workers on fruit and vegetable farms, see Marc Linder, Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal, 65 Tex. L. Rev. 1335, 1383-87 (1987). On the life circumstances of the dwindling number of white migrants, see Peter Kilborn, Days of Fruit's Painful Harvest Fade, N.Y. Times, July 14, 1990, at 1, col. 2 (nat. ed.).

15See, e.g., Leslie Whitener, A Statistical Portrait of Hired Farmworkers, MONTHLY LAB. REV., June 1984, 49, 51:

[T]here are two distinct groups of farmworkers. One is comprised of those who are engaged in hired farmwork on a casual or seasonal basis and use their earnings from farmwork to supplement family income; they are generally young and/or White; the majority are attending school or keeping house as their primary activity. The second group consists of persons who are more dependent on hired farmwork for their livelihood and family support.... They are more likely to be members of racial/ethnic minorities, and their agricultural dependence is partially due to the lack of alternatives to farmwork.... White workers were more likely than Hispanics and Blacks to move out of hired farmwork as they become older. This suggests that farmwork serves more as an entry level and/or supplemental job for Whites.

16Prominent among resurgent sweatshops during the Depression were fly-by-night employers that literally paid no wages at all by employing a succession of workers under the pretense of hiring "learners" for several weeks until they learned the business. See DOL, HANDBOOK OF LABOR STATISTICS 202-204 (Bull. No. 616, 1936).
National Labor Relations Act (NLRA), old-age pensions, unemployment insurance, and the minimum wage, overtime, and child labor provisions of the Fair Labor Standards Act (FLSA), left them exposed to the full brunt of employer overreaching well into the post-World War II period: "The policy of excluding farm labor from social and labor legislation was designed, in part, to assist farm employers by keeping them free of legislatively imposed, labor-connected costs. Such a policy necessarily involved unstated legislative decisions to perpetuate a low-income, disadvantaged farm labor force."

Yet paradoxically, although migrant farm workers have still not achieved statutory parity with the rest of the protected working class, they have nevertheless become the largest discrete subclass of paternalized workers in the United States. This tension between the lasting consequences of agricultural exceptionalism and state guardianship of migrants informs this book. Whatever truth ever inhered in the idyll of the family farm, whose employees needed no state protection, the imagery plays a particularly cruel hoax on migrant farm workers, who rarely work on idyllic farms. Rather, when not living in permanent poverty in shanty towns along the Rio Grande, they are driven seasonally to chase crops from one end of the continent to the other. Not the least of the ironies generated by prepotent agricultural myths is that such improbable farm families as Weyerhaeuser, International Paper, Campbell Soup, Upjohn, Procter & Gamble, and Sandoz are among the chief beneficiaries of the lawful and unlawful exploitation of migrants.

Scholarly writing on labor law and labor relations in the United States has displayed a decided bias in favor of the organized sector of the economy subject to the NLRA and similar statutory regimes, which establish procedural rather than substantive guidelines for resolving distributive conflicts. Sustained theoretical discussion of the economic, juridical, and philosophical principles

17Donald Pederson & Dale Dahl, Agricultural Employment Law and Policy: A Study of the Impact of Modern Social and Labor Relations Legislation on Agricultural Employment 1 (Minn. Agric. Experiment Station Bull. 526, 1981) (author's name misspelled; should read "Pedersen"). They were also excluded from state workers' compensation statutes as well as a raft of other protective legislation. Id. at 97-102.

18See infra ch. 1 § III.

underlying state intervention on behalf of the most vulnerable workers, however, has been lacking. This book begins to fill that gap in particular by illustrating both how political-economic power acquires the oppressive force of law and how circumscribed the law’s achievements on behalf of weak workers have been or arguably can ever be.\textsuperscript{20}

By creating formal legal equality, that is, by conferring legal capacity on individual workers whose socioeconomic dependence incapacitates them from taking advantage of their legal rights, the state either further divides the population between haves and have-nots or must intervene on the side of those who lack the power to enforce those rights.\textsuperscript{21} But even where migrants seek to vindicate statute-book entitlements through litigation, that act itself demonstrates their economic prostration because it signifies their inability to secure that end through concerted labor market action. Pleas for judicial intercession therefore typically symbolize either the failure of a statutory regime to institute a new environment of compliance or a breakdown of agency enforcement. Even where migrants appear as plaintiffs firmly in control of their litigation, they are merely defensively requesting a restoration of the paper status quo ante, which recalcitrant employers have unlawfully contested.\textsuperscript{22} Only in rare instances do migrants’ lawsuits seek let alone achieve outcomes for which legislatures have not already provided.

With the resurgence of market-oriented economic and legal thinking and policy in the 1970s and 1980s, state interference with the ‘natural’ operation of the labor market has come under strong attack.\textsuperscript{23} As representative of such intervention, FLSA is the focus


\textsuperscript{22}It is typical of agricultural exceptionalism that extension service economists see their mission as furnishing farm employers with information about the costs and benefits of complying with labor laws rather than as encouraging them to obey the law. See Jeffrey Alwang, David Wooddall-Gainey, & Thomas Johnson, Farm Labor Legislation: A Computer Program to Assist Growers, 73 Am. J. Agric. Econ. 1027, 1027-28 (1991).

\textsuperscript{23}For an argument that Chicago-school economics is the first attempt to supply a purely capitalist morality, see Alan Wolfe, Whose Keeper? Social Science and Moral Obligation ch. 1 (1989).
of this book. Pilloried by the *Wall Street Journal* as "one of the most destructive pieces of economic legislation ever devised," "[f]ew statutes have been so widely denounced by any group as minimum wage laws have been by economists," who contend that they perversely "intensify poverty and diminish the living standards of the poor." In the case of agriculture, some policy analysts have argued that "simple changes like minimum wage rates and regulated working conditions are not the answer—at least not the whole answer. Rising labor costs as compared to capital costs are what are making these workers obsolete in the first place." But where an overabundance of low-wage labor has thwarted the introduction of mechanized harvesting of some crops—in at least one case "an increase in the availability of hand labor" actually prompted "a major shift from mechanical back to hand harvesting"—supplanting sweatshop labor is precisely the function of a minimum wage. And despite Marx's riposte to

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27 D. Lenker, *Factors Limiting the Harvest Mechanization of Some Major Vegetable Crops in the United States*, in *FRUIT, NUT, AND VEGETABLE HARVESTING MECHANIZATION: PROCEEDINGS OF THE INTERNATIONAL SYMPOSIUM ON FRUIT, NUT, AND*
John Stuart Mill that it is not the purpose of capitalistically applied mechanical inventions to lighten any worker's toil, the elimination of some of the hardest labor in the First World should be welcomed. Strategies for breaching employers' monopoly of the initial private distribution of the gains generated by such increases in productivity in favor of well-planned and equitable retraining and reemployment of the redundant workers must be built into applied research programs.  

Finally, the regulation of migrant farm workers' wages inevitably raises the issue of the social construction of income distribution. Implicated are not only the equities as between labor and capital, producers and consumers, and rich and poor, but also the distribution of wages within the manual working class. That industrial

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workers whose work requires marginally higher levels of training and skill and arguably imposes less disutility receive hourly wages (including benefits) five or six times greater than those of migrants solely because they are employed by firms with a dominant market position and are members of strong unions, makes less and less economic or moral sense in an increasingly interdependent world in which the correlations between individual inputs and aggregate output have become tantalizingly tenuous.

Chapter 1 explains how the mechanisms of sweated labor have applied to migrant farm workers; how the system of labor contracting has imparted a peculiar shape and texture to agricultural sweatshops; and what role the State has played in this process. Chapter 2 constructs a theoretical foundation for evaluating FLSA and other state intervention on behalf of migrants; it situates the substantive analysis within the setting of modern welfare-state paternalism and establishes a framework for exploring the limits imposed on what the State can achieve on behalf of self-defenseless workers. Chapter 3 offers a policy analysis that breaks the current impasse in liberal-conservative debates by interpreting the minimum wage not as an antipoverty measure but as an instrument of macro-economic allocative efficiency, akin to the Swedish solidaristic wage policy, designed to eliminate sweatshops as a form of legitimate competition.  

Chapter 4 presents a new understanding of agricultural exceptionalism by uncovering the neglected historical roots of the current truncated protective scope of FLSA. This political-economic account of the exclusion of farm workers from the social legislation of the New Deal as a reflection of the unique strength of the southern plantation oligarchy stresses the continuity of race as an underlying determinant of agricultural labor-capital relations.

Chapter 5 is a theoretical analysis of the juridical manipulation of class relations designed to cast proletarians as hemi-demi-semi-entrepreneurs unprotected by labor laws. It focuses on the process by which the law permits agricultural employers to place the

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burden on workers who, more so than any others, are subject to authority that is overwhelmingly coercive (rather than remunerative or normative), to prove that they are in fact protected employees.30 Chapter 6, which concretizes the approach of the previous chapter, is a case study of litigation testing the employer-employee relationship among the marginalized. The need for this inquiry is underscored by the astonishing success with which agricultural employers have numbed the public into indifference to such tactics, in part by convincing even The New York Times that they are merely "new accounting practices."31

The last chapter proposes a program of self-liquidating weak paternalism designed to enable migrants to realize the free labor principle or perhaps even to transcend it.

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31 Jason DeParle, New Rows to Hoe in the 'Harvest of Shame,' N.Y. Times, July 28, 1991, § 4 at 3, col. 1. The harmful impact of ignorance about migrants' rights was further on display at the same congressional hearing covered by this article when a group of farm worker advocates submitted testimony stating that agricultural employers paying their workers on a piece-rate basis are exempt from FLSA. Farmworkers' High Mortality: Government Neglect? Hearing Before the House Select Comm. on Aging, 102d Cong., 1st Sess. 79 (1991) (Ass'n of Farmworker Opportunity Programs, Farmworkers and the Need for Increased Labor Standards Protection, Government Oversight, and Statistical Information). The same type of harmful ignorance is offered by a pro-migrant attorney, who sympathetically explains that the need to calculate the minimum wage for workers on a piece rate "creates an accounting nightmare for the grower." Antonio Maciel, "There's More to Pickle Pickers Than Picking Pickles": Reflections on the Migrant Experience in Wisconsin, 1991 Wis. Multi-Cultural L.J. 86, 93. Not only is there no difficulty in principle, but the calculation is made even easier in practice by the U.S. Department of Labor, which makes available to employers a wage statement form for this purpose.
The Pillars of an Inexhaustible Supply of Cheap Labor

The modern model of the employment contract, as a voluntary consensual relationship sanctioned by the civil law, is suffused with an individualism that ignores the economic reality behind the bargain. ... The question arises whether an employment contract on "sweated" terms dictated to a destitute worker by a take-it-or-leave-it employer would ever be seen as one induced by "economic duress."

I. Poverty-induced Mobility

The phrase "mobility of labour" is but a euphemism for the activity aroused by prospective starvation.2

Migrant farm workers in the United States have established an unsurpassed standard of mobility, availability, and fungibility.3 In

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1K. Wedderburn, The Worker and the Law 143 (3d ed. 1986 [1965]).
2Dep't of Agriculture & Technical Instruction for Ireland, Agricultural Statistics, Ireland, 1900: Migratory Agricultural Labourers 12 (Cd. 341, 1900) (discussing Irish migrant harvesters). See also Tamara Henry, Farmworkers Have Poor Health, Group Says, UPI, Apr. 6, 1989 (NEXIS) (discussing extent of hunger among migrants).
3An instructive comparison shows that migrancy per se is not the problem. The scarce skills of New Zealand sheep shearsers, who fly around the world following the seasons to the United States, England, Scotland, Norway, and Australia, account for their high piece-rate wages (resulting in daily income of more than $200). See Thomas Knudson, New Zealanders Thrive on U.S. Sheep Shearing, N.Y. Times, Apr. 26, 1987, at 24, col. 2.
the Rio Grande Valley of Texas—"the supply point for a majority of all seasonal migrant workers in the United States"\(^4\)—the members of this unique national and international labor force are, literally on a moment's notice,\(^5\) just as ready, willing, and able to be transported on a bus a few miles to harvest melons, broccoli, cabbage, citrus, onions, or lettuce as they are to go off with complete strangers who recruit them to harvest broccoli in northern Maine, asparagus in Washington and Missouri, citrus in Florida, pickling cucumbers in Ohio, Christmas trees in Michigan, strawberries in Oregon, watermelon in Arkansas, onions in Colorado, apples in Kansas,

\(^4\)John Thomas & H. Goodwin, Jr., Employment Compensation among Farm Workers in the Lower Rio Grande Valley, 68 SOC. SCI. Q. 620, 623 (1987). See also GOOD NEIGHBOR COMM'N OF TEXAS, TEXAS MIGRANT LABOR: A SPECIAL REPORT 17, fig. 1 at 19 (1977) (showing that Hidalgo and Cameron counties in the Lower Rio Grande Valley [LRGV] are the principal residential bases of migrants). See also COMM'N ON AGRICULTURAL WORKERS, HEARINGS 299 (West Palm Beach, Fl., Feb. 15, 1991) (testimony of Robert Williams, attorney, Flor. Rural Legal Serv.) ("the Texas Employment Service said that they could fill every farm work job in the country out of people from the Rio Grande Valley"). A recent study cautions against using the LRGV as a model of the migrant labor force. 1 ED KISSAM & DAVID GRIFFITH, FINAL REPORT: THE FARM LABOR SUPPLY STUDY: 1989-1990—FINDINGS AND RECOMMENDATIONS 5, 172 (1991). Although local labor markets surely differ from one another, this study is fundamentally flawed by the fact that it interviewed only workers resident in the LRGV, wholly ignoring the vast group of workers living on the Mexican side of the border (in and around Reynosa) who form a very significant proportion of the migrant labor market and whose socioeconomic and demographic characteristics approximate those of the workers studied in California and Florida. See 2 FINAL REPORT: THE FARM LABOR SUPPLY STUDY: 1989-1990—CASE STUDIES (Ed Kissam & David Griffith ed. 1991). The optimistic picture of migrant workers depicted in ELIZABETH BRIDY, HOUSEHOLD LABOR PATTERNS AMONG MEXICAN AMERICANS IN SOUTH TEXAS: BUSCANDO TRABAJO SEGURO (1989), results from the author's use of an unscientifically created and unrepresentative sample of workers affiliated with the United Farm Workers.

\(^5\)Given this hypermobility, it is curious for a government official to justify importation of workers from Mexico on the grounds that "[s]hortages in California for the tomato harvest lasts [sic] 3 or 4 months, maybe a little more. It would not be profitable for us to move an unemployed farmer from Georgia or Mississippi for this short period of work. You also have the problem of separation of families and this type of thing." HOUSE COMM. ON THE JUDICIARY, STUDY OF POPULATION AND IMMIGRATION PROBLEMS: ADMINISTRATIVE PRESENTATIONS (III): ADMISSION OF ALIENS INTO THE UNITED STATES FOR TEMPORARY EMPLOYMENT AND "COMMUTER WORKERS" 7 (Comm. Print, Spec. Ser. No. 11, 1963) (testimony of Jack Donnachie, Dep'y Dir., Off. Farm Labor Serv., DOL). When asked whether it would not be cheaper to move unemployed workers than foreign workers, the official indirectly confirmed that employers prefer the most vulnerable workers they can get: "we are limited in what we can require the growers to do voluntarily in order to attract the domestic workers." Id. at 20.
mushrooms in Pennsylvania, tobacco in Virginia, tomatoes in Indiana, lettuce in New Mexico and Arizona, bell peppers in California, and--believe it or not--pineapples in Hawaii; to detassel corn in Iowa; to hoe sugar beets in Wyoming and North Dakota; to work on sod farms in New York; to irrigate fields in Montana and Idaho; to weed soy beans in Nebraska; to plant pine trees in Louisiana and Alabama; to hoe cotton in West Texas; to inseminate turkeys and mow highway median strips in North Carolina; to process poultry in Minnesota; to work in canneries in Wisconsin and Illinois, cotton gins in Mississippi and South Carolina, fruit and vegetable packing sheds in Georgia, meat packing plants in Iowa and Nebraska, and plant nurseries in Maryland; to work on construction sites in Atlanta; and even to wield jackhammers to dismantle oil refineries for Marathon Oil/USX in Detroit.

The economic plight of migrant farm workers is largely a function of the incomplete and uneven process of industrialization of the agricultural operations in which they work. Whereas the mechanization of pre-harvest activities made possible the cultivation of huge tracts of land by family farmers, lagging mechanization of fruit and vegetable harvesting in tandem with a strong trend toward local geographic specialization and concentration of production created a situation in which the peak needs for seasonal harvesters exceeded the supply of the rural localities—at least at the wages farmers were offering. This gap created a need for migrancy, which

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6See Glenn Zepp, Roger Conway, and Frederic Hoff, Trade Patterns in Fruits and Vegetables, in Migrant Labor in Agriculture: An International Comparison 211, 212-14 (Philip Martin ed. n.d. [1984]). The same analysis applies, mutatis mutandis, to cotton, soy bean, and sugar beet hoeing, where harvesting has been fully mechanized but cultivating has not. For explicit recognition of mechanization of cultivation as having created the need for migrant cotton pickers and the spread of mechanical pickers as having made such workers superfluous in West Texas, see Richard Mason, The Cotton Kingdom and the City of Lubbock: South Plains Agriculture in the Postwar Era, in Lubbock: From Town to City 1 (Lawrence Graves ed. 1986). No other advanced capitalist country relies so heavily on migrant agricultural labor as the United States. Small farm-size and compact and dense population make it unnecessary in most of Western Europe. To some extent French agriculture uses seasonal migrants from Spain and North Africa. See Migrant Labor in Agriculture; Philip Martin, Migrant Labor in Agriculture: An International Comparison, 19 Int'l Migration Rev. 135 (1985). The use of migrant harvesters in Europe was greater in the nineteenth century, when large numbers of Irish worked in Britain, Belgians in France, Poles in Germany, and Italians in a number of countries. See Dept of Agric. & Technical Instruction for Ireland, Agricultural Statistics, Ireland, 1900 at 12; David Morgan, Harvesters and Harvesting 1840-1900: A Study of the Rural Proletariat 76-83 (1982).
the neediness of unskilled and severely underemployed farm laborers converted into a reality.7

Migrants' lack of bargaining power in the labor market is poignantly on display at the physical labor markets along the United States-Mexican border—the only place on earth where the First and Third Worlds confront each other directly. At the end of the twentieth century, when no other workers in the United States would even contemplate sacrificing fifteen to twenty hours of leisure for as little as ten dollars, this singular exploitation of "abject poverty" begins at a counterpart to the shape-up as it used to be conducted among longshore workers.8 There they are recruited by agricultural employers and their intermediaries and emissaries indiscriminately for all manner of local and long-distance migratory employment. Regardless of caveats that may be appropriate elsewhere,9 the labor

7MCWILLIAMS, ILL FARIES THE LAND, conducted his wide-ranging study of depression-era migrants within this analytical framework.


9ROBERT THOMAS, CITIZENSHIP, GENDER, AND WORK: SOCIAL ORGANIZATION OF INDUSTRIAL AGRICULTURE (1985), argues that the model of unskilled casual employment inadequately describes lettuce harvesting for large integrated agribusinesses in California and Arizona. To the extent that this thesis is accurate, it depends on the structural limitations imposed on sweating by significant capital investment in the operations in which harvesters are engaged. To the extent that sectors of agriculture in California have become heavily capitalized and industrialized and employment relations have passed beyond the sweating phase, workers employed
market" does exist here as a supply of and demand for homogeneous and undifferentiated labor.10

All these characteristics should, in theory, contribute powerfully to the creation of "a perfectly competitive labor market, in which workers would move about so freely among employers that all firms would be forced to pay the same wage rate for the same job. ... An employer who reduced his wages below the going rate would be deserted by his employees."11 If the mere propensity to move is theoretically sufficient to create a perfect labor market, in which other employers' bidding for a worker's services is at least as effective as unions in deterring the current employer from overreaching, why does the migrants' actual permanent mobility fail to achieve that beneficial result? It cannot be that they lack the freedom to quit, which is said to be "the only meaning which 'bargaining power' can have for the worker under nonunion conditions."12 For despite sporadic recurrences of physical and debt peonage, migrants can and do change employers frequently during

there have become more assimilated to the prevailing patterns of industrial capital-labor relations. See, e.g., Margaret FitzSimmons, The New Industrial Agriculture: The Regional Integration of Specialty Crop Production, 62 ECON. GEOGRAPHY 334 (1986); COMM'N ON AGRICULTURAL WORKERS, HEARINGS 113-29 (Visalia, Cal., Aug. 24, 1990) (testimony of managers of agribusiness). By the same token, to characterize as "highly skilled" workers who can acquire those skills in "a day or two" suggests a Pickwackian usage. Thomas, Citizenship, Gender, and Work at 102, 95-96. The same objection applies to the claim that lettuce harvesters who "burn out...have accumulated sufficient capital to move into another area of economic activity." William Friedland, Amy Barton, & Robert Thomas, Manufacturing Green Gold: Capital, Labor, and Technology in the Lettuce Industry 117 (1981).

10Clark Kerr, The Balkanization of Labor Markets, in idem, LABOR MARKETS AND WAGE DETERMINATION 21, 22-23 (1977 [1954]). S. Torok & Wallace Huffman, U.S.-Mexican Trade in Winter Vegetables and Illegal Immigration, 68 Am. J. AGRIC. ECON. 246, 248 (1986), model migrant agricultural labor as a "relatively homogenous [sic] low-skilled type." In order to persuade Congress to admit Third-World agricultural laborers, farmers from time to time have insisted that such workers are "skilled": "Any man can learn to be...a carpenter...or build buildings, but it is not every one who can learn to work beets." Seasonal Agricultural Laborers from Mexico: Hearing Before the House Comm. on Immigration and Naturalization, 69th Cong., 1st Sess. 93 (1926) (statement of I. O'Donnell, Montana sugar-beet farmer). Such advocates never explain why this supposedly scarce factor of production is so poorly compensated.


12Id. at 345; Paul Weiler, Governing the Workplace: The Future of Labor and Employment Law 18, 162-63 (1990).
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Why have the ethnic and racial minorities who hand-harvest fruits and vegetables been unable to take advantage of employers' vulnerability to delays in harvesting time-sensitive crops as, for example, the quarter-million migrant wheat harvesters regularly did in the latter part of the nineteenth and early twentieth centuries to secure higher wages? This comparison is all the more instructive because the spread of wheat combines at the end of the 1920s and the beginning of the 1930s, which put an end to mass migration to the wheat fields, suggests the prospects of today's migrants.\footnote{On the earlier development of labor-saving technology in wheat harvesting, see LEO ROGIN, \textit{The Introduction of Farm Machinery in its Relation to the Productivity of Labor in the Agriculture of the United States during the Nineteenth Century} 125-53 (1931). THOMAS, \textit{Citizenship, Gender, and Work} at 51-56, appears to suggest that the family farm, whose members were all "trained in the totality of production skills," was a viable alternative to the "strategy," developed by larger entities, of employing low-wage unskilled seasonal labor. The crucial event, however, was uneven mechanization; by enabling farm families to cultivate much larger areas of fruits and vegetables than they alone could harvest, it inexorably created a demand for such labor. Had fruit and vegetable harvesting been mechanized as quickly as was wheat, the migrant system would not exist today.}

The New Mexico chile industry will illustrate current labor market powerlessness. It is the most recent example of a phenomenon that has characterized agriculture in the United States since the nineteenth century: in expanding the area of cultivation and the volume of production, farmers have taken care "to plan to have a processor available to take the chile, and a market for it," but have not needed to give similar thought to the source of a seasonal work force because state intervention enables them to "get continued access to workers in a way that does not raise their costs and choke off the expansion."\footnote{COMM'N ON AGRICULTURAL WORKERS, \textit{Hearings} 5 (Las Cruces, N. M., Oct, 23, 1991) (statement of Comm'r Philip Martin); Memorandum from Comm'r Philip Martin to Comm'rs at 3 (Oct. 28, 1991).} What distinguishes New Mexico chile farming from earlier efforts to initiate mass production of crops in remote areas without a sufficient population base to meet peak seasonal needs for hand-harvesters is this: whereas farmers elsewhere forged a system of transcontinental migrancy, New Mexico chile farmers have chosen to exploit a source of labor located close enough to
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make it just barely physically possible for employers "to haul these people back and forth from the border" every night, even though it is not humanly possible for the harvesters to sustain the accompanying physical stress and strain.

Caught up in an employment system that has been called "the most barbaric and inhumane in the country," workers who live in Ciudad Juarez have to leave their homes before 10 p.m. in order to catch the last buses across the border to reach the shape-up in El Paso by midnight. If they succeed in fighting their way to a seat on an employer's bus, they leave for the fields, which are 2 to 3 hours away, at 2 a.m. By the time work begins at 6 a.m. the workers have already been on the move for as long as normal workers work. They then pick until 2 p.m. The employers' primitive payroll system forces the workers to wait another two hours every day to be paid. The crew leaders then deposit them in El Paso by 7 p.m. Because it would be senseless to go home to Juarez literally for a few minutes before beginning the cycle all over, hundreds of workers—who are otherwise not homeless--must spend the few hours that are even nominally theirs on the sidewalks of El Paso trying to preserve enough strength to prevail over their competitors at the next middle-of-the-night shape-up to gain a seat on the bus and thus employment for the next day.

The chile harvesters, who "live like zombies traveling most of the night and sleeping on a rickety school bus," have the worst of all worlds: the cattle-like treatment of day-haul workers; the separation from home typical of migrant workers; and the street existence of the homeless. Eighteen-hour days with three hours sleep on the street make workers so enfeebled that they are disabled

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16COMM'N ON AGRIC. WORKERS, HEARINGS at 6 (statement of Don Hackey, Chairman, N.M. Chile Comm'n)

17Suzanne Gamboa, Chili Pickers Want a Better Life, El Paso Herald-Post, Dec. 21, 1990, at B5. Until they were expelled in 1991, hundreds of these workers had been "sleeping under the interstate highway bridges...in...New Mexico." Louise Palmer, Border Union, TEX. OBSERVER, Feb. 8, 1991, at 4. The employers have thus given an unanticipated meaning to the characterization that Sen. Javits once gave of the purpose of protecting migrants under FLSA: "farm workers...are entitled to some very basic concrete floor under them...." 112 CONG. REC. 20,623 (1966).

18Lee Gemoets, Housing Troubling Migrant Workers, Sun-News (Las Cruces), Sept. 5, 1990, at 1A, at 2A col. 3 (quoting Rosa Garcia, exec. dir., Tierra Del Sol Housing Corp.).
from working every day. This grueling regime—fit for a chronicler with the stature of a Charles Dickens or an Upton Sinclair—has been successful because, while it exhausts the individual worker, it always has at its disposal an inexhaustible supply of impoverished laborers.

The principal reason that chile pickers have to spend as many as thirteen hours a day waiting and travelling and most of their free time sleeping on the sidewalks is that the chile industry refuses to provide housing despite the fact that amortization of the capital investment in typical migrant housing amounts to only 25 to 40 cents per worker-hour. The employers' argument—if the workers "are willing to accept a job in New Mexico, they ought to be willing to accept the wages they get and not demand payment for travel"—overlooks the fact that, unlike other employees, the chile pickers cannot move closer to their work. Not only are the farmers unwilling to finance housing, but even if the workers could pay for their own housing—which their subminimum wages preclude—growers refuse to pay higher taxes to finance the additional infrastructure (especially schools) that a resident permanent or even seasonal labor force would represent.

A near-monopoly in the national chile pepper market has made processors and growers prosper: year after year the New Mexico Agricultural Experiment Station reports that chile is "one of

19 Palmer, Border Union at 4; Alfredo Corchado, They're Shadows in Unfriendly Night, El Paso Herald-Post, Sept. 22, 1990, at B-5.

20 CHILE: DOMESTIC AGRICULTURAL IN-SEASON WAGE SURVEY REPORT 1990 (n.d.); COMM'N ON AGRIC. WORKERS, HEARINGS at 17 (statement of Robert Porter, acting V.P., N.M. Farm Bureau); 2 FINAL REPORT: THE FARM LABOR SUPPLY STUDY at 71-72. Although chile farmers complain that it is not practical to provide housing for harvesters of a crop with such a short season, the July through December harvest period is considerably longer than most seasons in the North where free housing is the norm for an obvious reason: minimum wage-migrants cannot afford to pay rent in addition to maintaining a permanent residence. 1 KISSAM & GRIFFITH, FINAL REPORT: THE FARM LABOR SUPPLY STUDY at 54, 104, 117 n.8 (1991); 2 id. at 32.

21 Amy Boardman, The New Mexico Chile Field Wars, TEX. LAWYER, June 3, 1991, at 1, 25, col. 5 (quoting Dan Byfield, Tex. Farm Bureau, farm labor coordinator).

22 TIERRA DEL SOL HOUSING CORP., DONA ANA COUNTY FARM LABOR HOUSING MARKET STUDY, App. C (1988) (farmer surveys); Memorandum from Comm'r Philip Martin at 3. Although workers view even a trailer near the fields as a marked improvement, on an annual income of $6,000 "even the most basic accommodations" are out of the question. Barbara Ferry, Chili Pepper Pickers Protest Poverty Pay, Guardian, May 1, 1991, at 5, col. 1-2.
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the big winners" and "profitable."\textsuperscript{23} With the net operating profit and acreage of chile farms rising strongly "New Mexico is churning out chiles as fast as the ground will yield them."\textsuperscript{24} The chief reason for the prosperity of the industry is that demand is increasing so rapidly that the market will bear price increases.\textsuperscript{25} In spite of this extraordinarily favorable market position, growers, who "rely on a ready supply of inexpensive Mexican farm labor," are not satisfied with the already existing massive oversupply of labor; they have therefore petitioned for permission to import workers from the interior of Mexico under federal auspices.\textsuperscript{26}

Because chile is the most labor-intensive crop in New Mexico, the industry has taken special measures to maintain its "supply of cheap labor."\textsuperscript{27} Just how "cheap" farmers have succeeded in making their labor can be seen from the fact that the average

\begin{itemize}
\item \textsuperscript{23}N.M. AGRIC. EXPERIMENT STATION, CROP COST AND RETURN ESTIMATES IN NEW MEXICO BY COUNTY AND BY CROP, 1985, at 23 (Research Rep. 612, 1987); \textit{idem}, CROP COST AND RETURN ESTIMATES IN NEW MEXICO BY COUNTY AND BY CROP, 1986, at 7 (Research Rep. 633, 1989); \textit{idem}, CROP COST AND RETURN ESTIMATES IN NEW MEXICO BY COUNTY AND BY CROP, 1987 (no pagination) (Research Rep. 648, 1990). "New Mexico...provides more than two-thirds of total chile production."
\item \textit{Harvest Labor Shortage: Report by the Agricultural Labor Committee to Senator Pete Domenici at 1 (1990).}
\item Robbins, \textit{Care for a Little Hellish Relish?} at 48-50. They sought special dispensation from the statutory requirements imposed on all agricultural importers of so-called H-2A workers to pay workers' compensation, provide housing, or guarantee workers employment for at least three-fourths of the workdays in the work contract. \textit{Harvest Labor Shortage} at 6.
\item Comm'n on Agric. Workers, \textit{Hearings} at 22 (statement of Comm'r Martin). Labor accounts for 27% of total operating costs. \textit{Id.} at 3 (statement of Russell Matthews, N.M. Dep't Agric); W. Harper, T. Clevenger, & S. Pereira, \textit{The Sensitivity of New Mexico's Irrigated Agriculture to Changes in the Farm Wage Rate} (N.M. Agric. Experiment Station Research Rep. 655, n.d. [ca. 1989]).
\end{itemize}
annual income of farm workers in Dona Ana County, the leading agricultural county in the state, is only $4,712.\textsuperscript{28} A potential problem for profitability, however, is competition from exports from Mexico with its "vast labor supplies at low wages" and a longer growing season. Although employers see mechanization--estimated to be five to ten years away--as the ultimate defense against imports, the process of displacing cheap hand-harvesters is a contradictory one.\textsuperscript{29} Thus the same major New Mexico chile producer who put chile harvesters on notice that only increased productivity could justify paying wages in excess of the five dollars a day prevailing in Honduras, also conceded that: "Back in the early '80s, harvest belts were used extensively in this area. And because of cheap labor since then, we stopped using them."\textsuperscript{30} As an interim strategy, employers have adopted a variety of unlawful employment practices designed to maintain profitability by keeping overall labor costs as low as possible.\textsuperscript{31}

Although farmers complain of a shortage of labor, unlike other commodities in short supply, this allegedly scarce good never seems to rise in price. Piece rates, which have scarcely risen in a decade and systematically generate subminimum wages, are so low that chile pickers find themselves forced to take children as young as ten to work "even though they earn only $10 a day": "It's really hard to make the children go, especially when it's so cold. But when they help, at least there's enough money for clothes." The employers' response captures the spirit of the whole system: "Why they feel they need a raise, I don't know. We aren't out there with machine

\textsuperscript{28} Tierra Del Sol Housing Corp., Dona Ana County Farm Labor Housing Market Study at 4; New Mexico Agricultural Statistics 1990 at 19.


\textsuperscript{30} Comm'n on Agric. Workers, Hearings at 19, 21 (statement of Dino Cervantes).

\textsuperscript{31} A recent investigation by the U.S. Department of Labor (DOL) found that 90% of them were violating federal labor laws. Suzanne Gamboa, Investigators Crack Down On Chili-Industry Violations, El Paso Herald Post, Nov. 3, 1990.
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guns, making them work. They're not indentured."

There is a purpose to this orneriness. The general practice has been for crew leaders to hire workers between midnight and 2:00 a.m. in El Paso and to drive them to Deming, N.M., where the drivers make phone calls to determine the location of the fields to be harvested that day. In the only instance of a collective labor agreement in the industry, the contract specified that the workers would not report to the meeting place in El Paso until 5:00 a.m. and "were guaranteed a job for the duration of the contract."33 Thus where a farmer knows in advance who his workers are and where they will be harvesting, he does not require a mobile crew and does not need a crew leader to provide one. Farmers who operate through crew leaders, in contrast, wish to heighten workers' anxiety of not being rehired each day because the fear of dismissal will cause workers to work even harder; they also wish to keep the workers mobile in order to retain the flexibility of sending them at the latest possible moment to the fields that the farmers want harvested.

These farmers have structured their operations in such a way as to receive the benefits of mobility, fungibility, and availability without having to compensate their workers for them.

The migrant wheat harvesters' labor market, in sharp contrast, is distinguished by several crucial characteristics. First, the fact that this army of single white males was largely unencumbered by families to support may well have raised their reservation wage even before some joined the International Workers of the World about the time of World War I.34 The following contemporaneous

32Palmer, Border Union at 4, 5 (quoting working parent and Don Hackey); Vega v. Gasper.

33Boardman, The New Mexico Chile Field Wars at 25, col. 6.

observations by a labor economist and an official of the U.S.
Employment Service on a group of 500 wheat harvesters passing
through Hutchinson, Kansas in the 1920s capture the image well:

"They're not hoboes, either, Harry. Look at their stride."
"No, those are the boys from Missouri, Arkansas and Oklahoma.
They come through here every year...." And fine boys they were,
straight, strong and bronzed; with a spring in their stride and a
laugh on their lips. Clad in clean overalls, some carrying bundles
or suitcases, but hundreds with only their working clothes on their
backs, the boys of the Southwest were coming to the harvest.35

Credulity is snapped by the effort to imagine an analogous
appreciation of Mexican-American, black, or Guatemalan migrants
on their way to cultivate the sugar beets or to harvest the apples,
onions, or cucumbers of a grateful midwestern farm community.

Second, migrant wheat harvesters did not rely exclusively on
this or any other crop. Many had other seasonal employment (such
as forestry, railroad, mining, and factory work) while others
temporarily abandoned jobs as skilled building mechanics to harvest
wheat. Railroads at the turn of the century, for example, had to
raise their daily wages to section crews to discourage them from
abandoning their work for the wheat harvest.36 A third crucial factor
was the extensive use of capital equipment; the pace of work set by

Wheat Harvest in Kansas, REVIEW OF REVIEWS, July 1903, at 193, speaks of the 28,000
harvesters in Kansas as "a force half as large as the standing army of the United
States." For an impressive narrative of the logistics of the labor process replete with
military rhetoric, see C. Coffin, Dakota Wheat Fields, 60 HARPER'S NEW MONTHLY
Mag. 529, 534 (1880). In 1920-21, ninety per cent of wheat harvesters were native-
born Americans and only eighteen per cent had families; even some of the latter,
however, did not support their families. DON LESCOHIER, SOURCES OF SUPPLY AND
CONDITIONS OF EMPLOYMENT OF HARVEST LABOR IN THE WHEAT BELT 3, tab. 5 at
8 (USDA Bull. No. 1211, 1923). Economically irrational racism may have underlain
the exclusion of nonwhites; a handbill advertising for wheat harvesters in Kansas in the
early 1920s specified: "Cannot use colored." Don Lescohier, Hands and Tools of the
Wheat Harvest, SURVEY, July 1, 1923, at 376, 378. Although many "unaccompanied
males" currently work as migrants, they are largely Latin Americans who are
supporting families and are among the most vulnerable farm workers. See 1 KISSAM
& GRIFFITH, FINAL REPORT: THE FARM LABOR SUPPLY STUDY at 47, 57, 100-101, 197.

35 Lescohier, Hands and Tools of the Wheat Harvest at 376.

36 Applen, Migratory Harvest Labor at 82-83; Don Lescohier, Harvesters and Hoboes
in the Wheat Fields, SURVEY, Aug. 1, 1923, at 482, 486-87; idem, Hands and Tools of
the Wheat Harvest at 381-82, 412; idem, SOURCES OF SUPPLY at 3-5 (five per cent were
farmers).
the machines created a customary capital-labor ratio that, in conjunction with the use of daily wage rates--piece rates would have been difficult to calculate--disciplined individual farmers not to overhire.37 Unlike hand-harvest fruit and vegetable workers, wheat harvesters "were looked upon as a necessary adjunct to the machines used in harvesting."38 Unlike other migrant agricultural employment, which was and remains disarticulated from other labor markets, wheat farming

was dependent upon the industrial labor supply for so large a portion of its seasonal labor that the state of employment in cities, and the wages, hours, and conditions of employment in urban occupations largely determine[d] the amount of labor available for farm work...and the price which the farmer must pay for it.39

Thus despite a chaotic labor market characterized by excess supply, "[t]he lure of the harvest fields at times resulted in labor shortages in cities located near the Wheat Belt."40 Consequently, wheat harvesters normally received hourly wages in excess not only of those of contemporary urban unskilled labor but also of those that migrant fruit and vegetable harvesters or sugar-beet workers would receive for decades.41

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39 Lescohier, SOURCES OF SUPPLY at 3.

40 Applen, Migratory Harvest Labor at 81.

41 See Don Lescohier, Harvest Labor Problems in the Wheat Belt 30-35 (USDA Bull. No. 1020, 1922); idem, Conditions Affecting the Demand for Harvest Labor in the Wheat Belt 32-37 (USDA Bull. No. 1230, 1924) (hourly wages ranged from twenty to ninety cents including the depression year of 1921); Draper, Solving the Labor Problem of the Wheat Belts 70 (harvesters in Kansas at turn-of-century paid $1.50 to $4.00 daily); George Holmes, Wages of Farm Labor tab. 17 at 36-37 (USDA Bureau of Statistics Bull. 99, 1912) (by 1906 daily wage rate for harvest labor without board exceeded three dollars in North Dakota). As early as 1873 Wisconsin farmers paid wheat harvesters two to three dollars per day. Merle Curti, The Making of an American Community: A Case Study of Democracy in a Frontier County 168 (1969 [1959]). Toward the end of the nineteenth century, even sack fillers on steam combines received considerably higher wage rates than hand-harvesters of vegetables. 2 U.S. COMM'R OF LABOR, THIRTEENTH ANNUAL REPORT,
In fruit and vegetable harvesting, in contrast, "there has been a perfectly elastic supply of low-wage Spanish-speaking foreign agricultural labor available in the United States" whose un-First-World-like permanent poverty compels them to operate virtually without a reservation wage.

Where would growers find domestic workers willing to migrate from harvest to harvest at substandard wages, working, and living conditions if there were not poverty and unemployment in the home areas of our migratory farm work force? ... If this pool of underprivileged workers were not available, American growers would have to compete on the open market for their labor. They, like industrial employers, would have to plan their production schedules in accordance with the labor market situation. [T]hey would be forced to raise employment standards in agriculture.

The disarticulation of the hand-harvest labor market from urban labor markets is strikingly illustrated by comparing the responses of migrant farm workers and local non-agricultural unemployed workers to offers of harvest jobs. The divergence in the extreme case leads to "the formation of a transnational labor market, almost completely disengaged from the local labor market." When the so-called bracero program, under which the federal government organized the importation of agricultural laborers from Mexico for two decades beginning with World War II, came under attack in the early 1960s, pickle processors and farmers from Michigan testified before Congress that they were unable to interest any of the thousands of unemployed General Motors and Ford workers in this

1898: HAND AND MACHINE LABOR 449-51, 468-69, 472-73 (1899). As late as 1950 the going rate for "stoop labor" in the Rio Grande Valley was twenty cents per hour. 3 & 4 PRESIDENT'S COMMISSION ON MIGRATORY LABOR, STENOGRAPHIC REPORT OF PROCEEDINGS HELD AT BROWNSVILLE, TEXAS 31 (July 31, 1950) (testimony of Mr. McElrath, grower, Cameron County).


The postwar program was created by Pub. L. No. 82-78, 65 Stat. 119 (1951). For further discussion, see infra § IV.
"hard, hot, dirty, backbreaking job" "irrespective of what rates of pay, within reason, at least, we offer...."46 The limit within reason turned out to be eighty-seven cents per hour.47 At a time when even janitors and other unskilled workers at GM and Ford were earning four times that amount, and the national statutory minimum wage was $1.15, the pickle employers wondered out loud how they could possibly compete with unemployment insurance.48 The answer, however, was clear: "[U]nless they are faced with the alternative of out-and-out starvation, I do not think we will ever be able to get a substantial number of domestics...."49 It was employers' good fortune that the exclusion of farm workers from unemployment insurance systems kept alive the "alternative of out-and-out starvation" for migrants.50

A more recent example involves the New York City area. The shortage of accessible labor for retail, service, and clerical employment in the surrounding counties led to "bringing in employees from as far away as" thirty-five miles; consequently, "the minimum wage of $3.35 an hour is meaningless; no one works for

46Extension of Mexican Farm Labor Program: Hearings Before the Subcomm. on Equipment, Supplies, and Manpower of the House Comm. on Agriculture, 87th Cong., 1st Sess. 185, 182 (1961) (testimony of Herbert Turner, farmer). The representative of the National Pickle Growers Ass'n allowed that not even for $2 per hour was it possible to recruit "Detroit style Americans" to pick pickles. Extension of Mexican Farm Labor Program: Hearings Before A Subcomm. of the Senate Comm. on Agriculture and Forestry, 87th Cong., 1st Sess. 126-27 (1961) (Extension of Mexican Farm Labor Program (Senate)) (testimony of Robert Ford). In fact, non-bracero workers were easily found after the program was terminated. See infra ch. 6; Donald Wise, The Effect of the Bracero on Agricultural Production in California, 12 ECON. INQUIRY 547 (1974).

47Extension of Mexican Farm Labor Program at 179 (testimony of Robert Ford, Nat'l Pickle Growers Ass'n). Even this amount was not a guaranteed hourly rate, but merely the sum to which the piece rate worked out for the braceros. That the employers had aggregate data on hours and earnings to the penny is implausible.

48See ROBERT MACDONALD, COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY: A STUDY OF WAGE STRUCTURE AND COMPETITIVE RELATIONS tab. 13 at 142 and tab. 14 at 144 (1963); Extension of Mexican Farm Labor Program at 197 (testimony of H. Turner). See also Extension of Mexican Farm Labor Program (Senate) at 124-25 (testimony of A. Hildebrand, Heinz Growers Employment Comm'n) (competition with such crops as cherries, blueberries, and tomatoes "that are more glamorous and are easy to pick").

49Extension of Mexican Farm Labor Program at 185 (testimony of R. Ford).

50See infra ch. 6 on the large number of "domestic" migrants now picking pickles.
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less than $5 an hour. At the same time, in Orange County, fifty miles from New York City, onion and sod farmers have no trouble finding migrants from South Texas willing to travel 2,000 miles to work for $3.35 an hour; at sixty hours weekly, the workers consider six months of minimum-wage employment a good job. The availability of a vast permanent reserve army of impoverished yet nationally mobile unemployed farm workers functions as such a massive depressant that even significant surges in demand do not result in higher wage rates.

In urging Congress to make even larger numbers of Third-World workers available to agricultural employers, an agribusiness representative unabashedly extolled the one-sided advantages of the migrant system for employers:

This migration has been very effective in meeting the production needs of the growers and represents the product of an intelligence system that has developed and directs migrant workers to those farms where the need exists for a particular crop at a particular time.

The system is unstructured but it is highly effective in providing the necessary manpower to harvest a large number and variety of crops that ripen in rapid succession, and which are highly susceptible to changes in weather conditions. The fact that the system is so effective should not be surprising because what it does, in simplest terms, is employ the basic principles of a free market system—supply and demand. When the demand for workers is there, even when it is an emergency requiring help within hours, the free market system as now exists is flexible enough to supply those workers in time to harvest the crops.

And despite the fact that "[t]he mass importation of Mexican

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nationals...ha[d] made the law of supply and demand inoperative,"\textsuperscript{54} Congress vindicated the employers' position by amending the immigration laws so as to throw even more penurious workers onto the farm labor market.\textsuperscript{55}

This 'willingness' to work for wages otherwise unacceptable in the United States undermines another indispensable prerequisite of the so-called perfect labor market: informational rationality. With individual firms and the entire industry aware that they have at their disposal an inexhaustible supply of labor living on the margin--one farm employer in the Rio Grande Valley glowingly described the 1.5 million inhabitants of the Reynosa-Matamoros area as having an "infinitesimal" per capita income--employers are often under no compulsion to reveal truthful or even any information about wage rates.\textsuperscript{56} Many workers do not ask how much they will be paid; the intrepid ones who do are frequently told that they will find out when they get to fields--whether they are two or 2,000 thousand miles away. Others who cannot repress their curiosity as to how much they will be paid may be told that they will find out when they are paid at the end of the week.

The flimsiest of 'safety nets' constantly depresses the reservation wage of Texas migrants. Texas offers the third lowest Aid to Families with Dependent Children monthly grant in the country--$184 for a family of three and $284 for a family of six--amounting to a mere twenty-one per cent of the official poverty threshold. Even when food stamps are included, the income of an AFDC recipient-family in Texas rises to only fifty-three per cent of the poverty level. And unlike the two states (Alabama and Mississippi) with even lower AFDC grants, Texas lacks a general


\textsuperscript{55}H. REP. NO. 682 PT. 1: IMMIGRATION CONTROL AND LEGALIZATION AMENDMENTS ACT OF 1986, 99th Cong., 2d Sess. 84 (1986) ("Most consistent with the objective of creating a free-market atmosphere within the sphere of agricultural employment...is to permit any workers who now or in the future may be allowed to perform perishable agricultural labor in the United States to become lawful permanent resident aliens...").

\textsuperscript{56}JOHN McBRIDE, VANISHING BRACERO: VALLEY REVOLUTION 1 (1963). McBride was a cotton farmer who published his complaints about having been caught by the DOL falsifying wage and hour records of braceros. His description of the strategy that his lawyer, a partner in the principal defense firm representing farm employers in South Texas, used in a lawsuit they filed against the DOL is extraordinarily revealing.
assistance program for adults without children.\(^5\) Reinforced by such meager income security, the effective absence of a reservation wage exacerbates the migrants' labor market position by causing them to respond 'irrationally' to market cues. Many incumbents of low-income jobs, such as spouses working to supplement family earnings or youth living at home and "working for pin money to finance leisure-time activities," are said to be so-called target earners. Because they are seeking to earn a certain fixed amount of money, they create a perverse labor-supply curve insofar as they offer more of their labor as wage rates decline.\(^5\)

Empirically, migrant farm workers in the United States do not fit this model in the sense that they are not working to finance the purchase of a car or other consumer durable.\(^5\) By the same token, however, because the known customary limits on the aggregate annual wages that a migrant family can piece together are far below the prevailing consumption norms even for low-income families, the


\(^{58}\) Michael Piore, Birds of Passage: Migrant Labor and Industrial Societies 95-96, 95-99 (1979). Paul Samuelson, Economics 579 n.2 (10th ed. 1976), concedes this possibility: "The labor force sometimes tends to grow in recessions: when a husband is thrown out of work, his wife and children may seek work."

\(^{59}\) But see Leslie Whitener, The Migrant Farm Work Force: Differences in Attachment to Work, 50 Rural Sociology 163 (1985), who identifies one segment of migrants as supplementing nonfarm income. Her findings result in part from concentrating on white workers and in part from the severe defects in the Hired Farm Working Force Survey. See supra Preface. Piore's model of "the pocket money wage earner" seems better adapted to the turn-of-the-century urban sweatshops in the industrialized economies:

> A girl may wish to have a little work to do although she may possibly live in a very comfortable home. Wages with her are not the primary consideration. She simply wants to supplement her income, and she is not particular as to the rate of wages that she may get. Thus we have the paradox that the same result is achieved by the ignorant whim of the comparatively well-to-do person and of the dire necessity of the starving. Both accept work at sweated rates, and the result is sweated trade.

Inexhaustible Supply of Cheap Labor

Drive for subsistence requires migrants to engage in the perpetual "forced sale" of their labor. In this sense, a reduction of wage-rates leaves families with little choice but to increase their supply of labor by working longer hours or seasons or pressing still younger members of the family into service.

Although farmers may be embarrassed to concede publicly that they benefit from this 'irrational' supply mechanism, they frequently confirm its existence by reference to its operation in the other direction. The personnel manager of the monopoly sugar cane producer in Florida justified the United States Sugar Corporation's opposition to an increase in the statutorily mandated wage rate for cane cutters in these terms:

[If we were to pay 1 cent more to these men it would be disastrous to the laborers. Now that sounds funny coming from me, being a Northerner and used to high wages...but if you were to give the 'nigger' more money than he gets now he would leave 2 months sooner because he has too much money to spend.]

Ironically, however, in the case of migrants, this backward-bending (upward-sloping) supply curve does not exist. The reason lies in the flexible scope of subsistence. A family knows from experience that it must earn (say) $8,000 annually to survive. This target income creates the necessity of working longer hours to compensate for a decline in wage rates. By the same token, however, the family would very much like to earn more income;

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604 Parl. Deb., H.C. (5th ser.) 382 (1909) (Mr. Balfour); Robert Hale, Minimum Wages and the Constitution, 36 Colum. L. Rev. 629, 630 (1936).


62 National Defense Migration: Hearings Before the Select House Comm. Investigating National Defense Migration, 77th Cong., 2d Sess., pt. 33 at 12,969 (1942) (statement of M. Von Mach at hearing at Clewiston, Fla., Dec. 4, 1937, at 76). Similarly, a South Texas cotton farmer told Congress: "[T]he Negroes and the Mexicans...would never add much as a class...to the material goods of this world by an increase in wages, because as soon as they get an increase of wages, they simply work fewer days...." Temporary Admission of Illiterate Mexican Laborers: Hearings Before the House Comm. on Immigration and Naturalization, 66th Cong., 2d Sess. 94 (1920) (testimony of Fred Roberts).


64 For contradictory speculations on this point, see Lloyd Fisher, The Harvest Labor Market in California 16-19 (1953).
therefore, even if wage rates rose, it would work the same or even additional hours because its income never reaches a level at which it would choose to substitute leisure--which chronic unemployment and underemployment always keep in abundant supply--for potential additional income.65

II. Agricultural Sweatshops

[A]n attorney representing the U.S. Department of Labor meeting with pickle growers...stated that it would be necessary for growers to continue to raise the hourly rate until workers could be found who would do stoop labor. It was stated that, if picking pickles was considered difficult, we must realize that the job of a sandhog in a tunnel job was also difficult and that the latter was a job paying $7 or more an hour. It was implied that the sky was the limit.66

Although hand-harvesting of fruits and vegetables by migrants has not traditionally been seen as sweatshop labor,67

65See John Mason, The Aftermath of the Bracero: A Study of the Economic Impact on the Agricultural Hired Labor Market of Michigan from the Termination of Public Law 78 at 65-68 (Ph.D. diss. Mich. State U. 1969) (arguing against the existence of a backward-bending supply curve of low-paid agricultural labor). In the canonical case, a theoretically indeterminate conflict emerges when a worker is offered a wage-rate increase and can also choose how many hours he will work:

You are torn two different ways: One the one hand, you are tempted to work some extra hours because now each hour of work is better paid. Each hour of leisure has become more expensive--hence you are tempted to substitute extra work for leisure. But acting against this so-called "substitution-effect" is an opposing "income-effect." With the higher wage, you are, in effect a richer man. Being richer...you will tend also to buy more leisure! Now you can afford to take Saturday off, have a week’s vacation....

SAMUELSON, ECONOMICS at 580. Because migrants do not become significantly "richer men," they do not reach the point on the curve at which they react to a wage-rate increase by reducing the amount of labor they offer. For the example of foreign migrants in France wishing to maximize their income by working more hours at lower rates, see Jean-Pierre Berlan, Labor in Southern French Agriculture, in MIGRANT LABOR IN AGRICULTURE at 61, 64.

66Importation of Foreign Agricultural Workers: Hearings Before the Senate Comm. on Agriculture and Forestry, 89th Cong., 1st Sess. 352 (1965) (statement of Paul Wolff, Sec’y, Nat’l Pickle Growers Ass’n).

67Its use has largely been rhetorical; see, e.g., Jean Begeman, Sweatshops on the Farm, NEW REPUBLIC, July 30, 1951, at 16; Raymond Britton, Open Sky Sweatshops,
Inexhaustible Supply of Cheap Labor

economic analysis suggests that that framework is appropriate.

What is the sweat shop? For the people who work in it, who compete with it...the sweat-shop has always meant a single thing. ... When pressed to specify it more exactly... they have generated a list of defining characteristics. These include abysmally low wages, long hours, piece rates, special charges for electricity, rent, and equipment, child labor, crowded shops or work at home, fire hazards, threats to safety and health, filth and decay, unscrupulous, penny pinching employers and so on. ... It seems doubtful...that sweated labor could be cured by removing any single element.68

Common to all of these variants of the sweatshop is a distinct technique of production that makes it possible to convert all production costs into variable costs.69 Sweating, therefore, is feasible where capital investment is relatively low70 or can be shifted to the workers. But one further element is deemed necessary:

Whenever payment is at least partially on a time basis, labor is, during that time period, a fixed factor of production and the

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1 Houston L. Rev. 131 (1963); The Blue-Sky Sweatshop, AM. FEDERATIONIST, June 1964, at 7; Ronald Taylor, Sweatshops in the Sun: Child Labor on the Farm (1973); Thomas, Citizenship, Gender, and Work at 4-5.


70 See William Willoughby, Regulation of the Sweating System 4 (1900). In contrast to the situation in agriculture, employers in the sweated clothing trades could avoid fixed investment in buildings and equipment by requiring workers to operate their own sewing machines in their own apartments. See Paul Boyaval, La lutte contre le Sweating-System: Le Minimum Légal de Salaire, le Exemple de L'Australasie et de L'Angleterre 39-40 (1911). For the distinct case of cutthroat competition in industries (such as cotton textiles) with significant capital investment (and excess capacity) that is sustained by an above-average degree of exploitation, see Lloyd Reynolds, Cutthroat Competition, 30 Am. Econ. Rev. 736 (1940).
employer has an incentive to get as much work out of his labor force during the payment period as possible. When payment is by the piece, however, and plant and equipment costs are trivial or are shifted to the worker..., the employer has no incentive to worry about efficiency. His costs are the same, no matter how much or how little is produced per hour. ... The key factor is that...hourly productivity is low because...nobody is concerned about hourly productivity. Because hourly productivity is low, wages are low. Hours are long because, given payment by the piece, the incentive...to economize on hours is missing. The sweat-shop is associated with an inordinate amount of child labor because once payment is by the piece, an incentive to avoid workers with a low hourly productivity like children is removed.71

These fundamental prerequisites of sweated labor, especially the conversion of all costs into variable ones, are all given in the hand labor that migrant farm workers perform.72 If agricultural employers, unencumbered by capital investment in hand-harvesting, increase the number of workers beyond that necessary to harvest the crop, the total wage bill may remain unchanged, but the average wage of the larger work force declines. "But the grower, in contrast to the worker, is in consequence better off with too many workers rather than too few,"73 insofar as "more workers will get the job done

71Bailey & Piore, Defending the Minimum Wage at 19.

72See Berlan, Labor in Southern French Agriculture at 64. “Workers employed in hand harvest of most fruits, berries, many vegetables...and in the hand thinning and weeding of many vegetable and field crops are still performing their jobs in about the same way they were done many years, even decades ago.” Extension of Mexican Farm Labor Program (Senate) at 9 (testimony of Matt Triggs, Am. Farm Bureau Fed’n). As Elizabeth Brandeis, Migratory Labor in Wisconsin, in LABOR, MANAGEMENT, AND SOCIAL POLICY: ESSAYS IN THE JOHN R. COMMONS TRADITION 197, 223 (Gerald Somers ed. 1963), noted: “If the fruit and vegetable fields resemble factories, it is the factories of the very early 1800’s, not of the twentieth century.” Although agricultural employers of migrants may have significant capital investments, migrants typically do not work in those phases of the operation. Significantly, the principal federal legislation protecting migrants excludes those working in certain mechanized operations. 29 U.S.C. § 1803(a)(3)(E) (1985).

73Migratory Labor: Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess., pt. 1 at 201 (1960) (prepared statement of Lloyd Gallardo, Dept Econ., Mich. State U.). Because “[p]iece rates ensure that wage costs per unit of output are constant, regardless of how many workers are employed or the speed at which they work...wage costs do not impose a constraint on recruiting decisions.” Howard Leftwich, The Migratory Harvest Labor Market: An Illinois Case Study 111 (Ph.D. diss. U. Ill. 1965). In explaining why Congress should have permitted farm employers to pay piece rates that would not have guaranteed all workers the minimum wage, Senator Prouty asserted that the
faster and minimize weather risks."74 This built-in incentive to overrecruit thus systemically shifts risk to the workers while leaving unit labor costs independent of labor productivity.75

In theory, "[t]he sweatshop system begins to disappear as soon as one introduces a minimum hourly rate which is high enough to create an employer concern with productivity...[which] also forces the employer to reorganize the shop in order to gain control over the pace of work...."76 In fact, however, the peculiar defects of the "unstructured" market for migrant labor77 make it possible for employers to sweat even hourly paid employees.78 Given the exploitation of piece-rate workers in industrial sweatshops was irrelevant because they were associated with assembly lines which forced all workers to work at the same fast pace, whereas in farming "[t]he earnings of one worker are in no way dependent upon the production of any other worker...." 112 CONG. REC. 22,653 (1966). The latter claim is wrong: since there is a finite acreage, faster workers can increase their wages by taking away acreage from their slower co-workers. More importantly, the capital embodied in mechanically driven assembly lines disciplines industrial employers with regard to the size of the work force and productivity. In order to show that "the agricultural work process changed...as rapidly as in any of the most advanced industries," Valdés refers to "classic speed-up tactics...that pushed...pickers." That this claim understates the fundamental difference between agricultural sweatshops and industrial methods of relative surplus value production emerges when Valdés notes that the pickle-picking "system was so lax that growers and corporations seldom knew how long workers spent in the fields." DENNIS VALDÉS, AL NORTE: AGRICULTURAL WORKERS IN THE GREAT LAKES REGION, 1917-1970, at viii, 142, 145 (1991).

74Philip Martin, Introduction, in MIGRANT LABOR IN AGRICULTURE at 1, 4.


77FISHER, THE HARVEST LABOR MARKET IN CALIFORNIA at 7-9, defines an unstructured labor market by reference to five characteristics: 1. the absence of unions; 2. impersonal employer-employee relationships; 3. an unskilled and unspecialized labor force; 4. piece-rate compensation making the employees' competence irrelevant (at least in the period before the applicability of a mandatory minimum wage); and 5. little or no capital investment in machines, which would impose a structure on the number of workers required.

78It nevertheless remains the case that "[w]here they are paid by the piece, there the interest which the workman has in the value of his work supersedes the use of coercion, and of every expedient calculated to give force to it." JEREMY BENTHAM, PANOPTICON; OR THE INSPECTION-HOUSE, in 4 THE WORKS OF JEREMY BENTHAM 60 (John Bowring ed. 1843 [1791]).
enormous overhang of supply, the desperate economic situation of
the reserve army of the underemployed, and the extreme at-will day-
to-day tenure, employers can, at little or no cost of supervision,
slough off the least productive workers at the end of the day or even
of an hour. The workers' urgent need for any amount of income
and the inveterate practice of overrecruiting will still insure that the
requisite output will be forthcoming. Finally, weak enforcement of
the statutory minimum may in effect restore the piece-rate system.

The typical macroeconomic consequence of the sweatshop is
particularly prominent in agriculture: the employer avoids
internalizing the full social costs of the labor it employs by
externalizing a part onto taxpayers at large in the form of welfare
payments, medicaid, food stamps, and housing allowances—or, as
Walter Lippmann once phrased it, onto the workers themselves "in
slow starvation." Under sweatshop conditions, "agricultural wage
labor...is simply an auxiliary to a system of public poor relief."

The unpaid labor is in part family and especially child
labor—a feature which almost uniquely links farm work to old-
fashioned tenement sweatshops. Significantly, the agricultural
family sweatshop is not restricted to (migrant) wage laborers: the
massive use of unpaid spousal and child labor by juridically self-

79 But when asked why cotton farmers did not pay pickers hourly or daily wages,
one farmer replied that "that would call for supervision and foremen to keep them at
work." Temporary Admission of Illiterate Mexican Laborers at 92 (testimony by Fred

80 The foregoing scenario should be contrasted with the following sanitized model:

Workers voluntarily undertake to be supervised; a certain amount
of compulsion will be characteristic of competitive equilibrium. ... They
submit to being compelled to work harder than direct incentives provide
for, because the consequence is a higher expected utility. Although each
worker may resent this compulsion and feel it is unnecessary on his own
part, he prefers to work for firms which use this compulsion, recognizing
that without it, some of his colleagues will slough on the job, and thus
firms which employ some degree of compulsion are able to pay higher

Joseph Stiglitz, Incentives, Risk, and Information: Notes Toward a Theory of Hierarchy,
6 Bell J. Econ. 552, 571-72 (1975). See also Steven Cheung, The Contractual Nature
of the Firm, 26 J. Law & Econ. 1, 8 (1983) (riverboat-pullers in pre-1949 China
"actually agreed to the hiring of a monitor to whip them").

81 Walter Lippmann, The Campaign Against Sweating, New Republic, Mar. 27,
1915, Supp., at 1; 88 Cong. Rec. 8327 (1941) (Sen. La Follette) (explaining the need
for comprehensive regulation of the farm labor market).

82 See, e.g., McWilliams, Ill Fares the Land at 243-47.
employed farm operators underwrites agricultural sweating at large.\textsuperscript{83} Most dramatically this paternal and self-exploitation manifests itself in sub-minimum-wage income returns to family farm labor. Legislators opposed to FLSA have used this trope repeatedly to highlight an inconsistency in the law. At the time of the original enactment in the 1930s, southern congressmen urged the unfairness of mandating forty-cent hourly wages for industrial workers while cotton farmers received eight to eleven cents an hour for their labor. And when Congress debated extending the minimum wage to farm workers in 1966, one legislator declared that "when you take into account all the hours that a farmer works and then take into account the dollar amount of his investment, many are working to end up with something like 42 or 45 cents per hour...."\textsuperscript{84}

Although small farm employers remained exempt from minimum-wage obligations even after the 1966 amendments to FLSA covered agricultural employment for the first time, some legislators sought to soften their potential ideological resistance to any coverage by asserting that a FLSA that restricted coverage to

\textsuperscript{83}The failure to secure ratification of the federal child labor amendment in the 1920s and 1930s in part reflected farmers' success in keeping parental exploitation of children a private matter. See Proposed Child-Labor Amendments to the Constitution of the United States: Hearings Before the House Comm. on the Judiciary, 68th Cong., 1st Sess. 34-35 (1924) (statement of Grace Abbott, Chief, Children's Bureau). This enclave of exploitation has been rigorously and expansively preserved in FLSA so that family labor does not even count toward the threshold level of nonfamily labor that triggers coverage. 29 U.S.C. §§ 203(e)(3) & (u) and § 213(a)(6)(B) (1978 & Supp. 1991). During the postwar period, as farms became fewer but larger, hired labor as a share of all farm labor has risen. VICTOR OLIVEIRA, TRENDS IN THE HIRED FARM WORK FORCE, 1945-87 tab. 1 at 1, tab. 2 at 2 (ERS, Agric. Infor. Bull. No. 561, 1989). Because unpaid family workers—as contradistinguished from the farm operator—are counted only if they work fifteen hours or more during the survey week, the data are understated. See USDA, AGRICULTURAL STATISTICS 1989, tab. 551 at 388 n.2 (1989). Thus recent data implausibly show that there is only one unpaid family worker in agriculture for every fourteen self-employed farm operators. EMPLOYMENT & EARNINGS, Jan. 1991, tab. 23 at 191. In 1969, the ratio was almost one to three. Id., Jan. 1970, tab. A-18 at 116. Although the exclusion of children under sixteen from data collection also understates the number of unpaid family workers, the fact that only 10,000 sixteen and seventeen year-old farm boys were returned as unpaid family workers in 1990 suggests that the data are flawed. See generally, Patricia Daly, Unpaid Family Workers: Long-Term Decline Continues, MONTHLY LAB. REV., Oct. 1982, at 3; DOL, FARM LABOR FACT BOOK 55-64 (n.d. [1959]).

\textsuperscript{84}82 CONG. REC. 1099 (1937) (Rep. Dies); 83 CONG. REC. 7404 (Rep. Rankin); id. at 7426 (Rep. McClellan); 112 CONG. REC. 11,381 (1966) (Rep. Stratton). See also 95 CONG. REC. A3560-61 (1949) (Rep. Murray). For calculations suggesting that these figures are roughly accurate, see infra Appendix.
"large agri-business enterprises" was a "bill of rights for the family farmer." Lobbyists for small farmers enthusiastically welcomed the imposition of a statutory minimum wage on large farms in order to deprive the latter of access to "labor at sweatshop and sub-sweatshop wages." This position, however, doubly inverts the economic causality. First, it is the state-subsidized family sweatshop farm that sustains agriculture as a low-wage sector. And second, by freeing family farmers from the obligation of paying minimum wages to their employees, the state reinforces the vicious circle: "Self-exploitation by the farmer of himself and his family...has become the basis for the farmer's claim to the right to exploit his labor force."

\[85\] H.R. REP. NO. 1366: FAIR LABOR STANDARDS AMENDMENTS OF 1966, 89th Cong., 2d Sess. 31 (1966); 112 CONG. REC. 22,655 (1966) (Sen. Yarborough) (chief sponsor of bill). See also H.R. REP. NO. 1366 at 32 (imposing a minimum wage on the largest agribusinesses would mean that "[t]he imputed wage for the family farm operator and his family would no longer be so drastically undermined by the tragic wages of workers on the largest farms"); Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Comm. on Labor, 79th Cong., 1st Sess. 722 (1945) (statement of Russ Smith, Legis. Sec'y, Nat'l Farmers Union [NFU]); Fair Labor Standards Amendments of 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources, 95th Cong., 1st Sess. 570-71 (statement of Mack Lyons, Dir., Leg. Dept', UFW); Comm'n on Agricultural Workers, Workshop—Whether and How Foreign Workers Should Be Admitted 22-23 (Mar. 13, 1991) (statement of Rudy Oswald, Dir., Econ. Research, AFL-CIO). By the 1960s, the NFU opposed the bracero program on the ground that the low wages paid those workers by large farms lowered the price level for farm products and thus reduced the net earnings of farm operator families. Extension of Mexican Farm Labor Program (Senate) at 243 (statement of Richard Shipman, Ass't Dir. Legis. Services, NFU). See also Importation of Foreign Agricultural Workers at 100-103 (statement of Reuben Johnson, Dir. Legis. Services, NFU).

\[86\] "Low average per capita income in agriculture is a result of the willingness of farm people to offer their labor for a low return. ... So long as farm people have few alternative opportunities and compete keenly with one another in the supplying of labor..., they will drive down the return to the farm operator." DON PAARLBerg, AMERICAN FARM POLICY: A CASE STUDY OF DECENTRALIZED DECISION-MAKING 60, 62 (1964). See also ANNA ROCHESTER, WHY FARMERS ARE POOR (1940).

\[87\] JOHN GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 71 (1975 [1973]). Exploitation and self-exploitation in the agricultural sector, which undergird the so-called cheap food policy—which has expressed itself in a secular decline in the share of budgets devoted to food—serve to depress the aggregate value of labor power, thus in effect subsidizing non-agricultural employers. For articulation of the policy, see Comm'n on Agricultural Workers, Workshop—Whether and How Foreign Workers Should Be Admitted 22 (Mar. 13, 1991) (statement of Comm'r Clarence Martin). Even for urban wage and clerical consumer units, food as a share of consumption expenditures has declined monotonically from 43.0 per cent in 1901 to 18.8 per cent in 1988-89. BLS, CONSUMER EXPENDITURE SURVEY, 1988-89, text tab. 3 at

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III. Labor Catchers

We cannot agree with Punch's representation of him [the middleman] as a spider devouring healthy flies. If we must describe him as a noxious insect we should picture him much more truly as the maggot that appears in meat after decay has set in.  

I do not wish the reader to imagine that I deny the existence of the sweater in the sweated industries. But I deny that the sweater is necessarily or usually a sub-contractor or employing middleman. The sweater is, in fact, the whole nation.

The unorganized and disorganized migrant labor market has made possible a phenomenon shared by few other industries: the labor contracting system, which does not involve subcontracting production, but inserts a layer of parasitic exploitation conditioned by and mediating cultural barriers between the employer and employees. "In no other industry...do those who finally utilize labor rely as extensively upon a middleman to hire, transport, and, in many instances, house, feed, and pay their workers." In agriculture...
today, as at the turn of the century in the clothing industry, "[t]he contractor holds his own mainly because of his ability to get cheap labor, and is in reality merely the agent of the manufacturer for that purpose." The sweating system, however, as the previous section showed, does not necessarily presuppose an intermediary; it also flourishes where agricultural employers engage workers directly.

While the physical conditions of outdoor sweatshops differ from those of tenement workers, migrant farm workers, as the largest subclass of sweated workers in the United States, are caught in the same web of exploitation that Congress pilloried a century ago: "[T]he compensation of the contractor is the margin between the price he receives and the price he pays...which margin, in the vernacular, is said to be 'sweated' from the compensation of his employés." And as with the padrone who took advantage of his Italian-immigrant compatriots a century ago, the size of that margin still "depends largely upon the number of ways in which he can mulct the families in his charge of a portion of their meager wages."

The labor contractor system arose--and has continued to flourish in agriculture--under specific economic, labor-market, and cultural conditions.

The basic explanation for the ubiquity and persistence of the labor contractor is to be found in the character of the farm labor market. If stable and direct employment relations had developed in harvest work, as they have in manufacturing industry, there would be no place for the contractor. If harvest laborers in general were managed and allocated by inclusive employer associations, as are the legally imported laborers, the services of the contractor could be dispensed with. Or if they were organized and deployed by labor unions, as are the workers in the equally casual longshore and construction industries, again the contractor would

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9215 REPORTS OF THE INDUSTRIAL COMMISSION ON IMMIGRATION, H.R. DOC. NO. 184, 57th Cong., 1st Sess. 321 (1901). The section on sweating was written by John Commons and was reprinted as J. Commons, The Sweating System in the Clothing Trade, in TRADE UNIONISM AND LABOR PROBLEMS 316 (J. Commons ed. 1905).

93H. Rep. No. 2309: REPORT OF THE COMM. ON MANUFACTURES ON THE SWEATING SYSTEM, 52d Cong., 2d Sess. vi (1893). Earlier Marx had noted that the hallmark of the sweating system was the intervention of "parasites" between the capitalist and the worker, which was facilitated by piece-rate compensation. 1 KARL MARX, DAS KAPITAL, in 23 KARL MARX [&] FRIEDRICH ENGELS, WERKE 577 (1962 [1867]).

94KATHARINE LUMPKIN & DOROTHY DOUGLAS, CHILD WORKERS IN AMERICA 70 (1937). See also Charles Chute, The Cost of the Cranberry Sauce, 27 SURVEY 1281 (1911-12).
Public acceptance of agricultural exceptionalism has underwritten this regime, which enables farm employers "to attach a very special meaning to the concept of an adequate labor supply. The term may connote a supply large enough that every grower could harvest simultaneously without having to worry about lack of labor, even though growers may be harvesting only 2 or 3 days a week." Today's early post-industrial era is continuous with the Great Depression in imposing a unique set of consequences on migrants:

Although ineffective in rationalizing the labor market, the contractor system is a highly effective device for transferring the risks of agricultural employment to the workers. ... Anyone familiar with urban industrial relations would suppose, for example, that employers would have some responsibility for workers who are brought to a work situation and held there for several weeks although no work is furnished to them. In agriculture, however, it frequently happens that workers are brought into a grower's camp, upon specific instructions of the grower, several weeks before they are needed, and remain entirely on their own until work begins....

An important truth inheres in the insight that "[a]griculture is perhaps unique for its substantial number of middlemen whose raison d' etre is reducing labor costs by violating labor laws." By the same token, however, labor catchers are "more a symptom than a basic cause of the difficulty. The basic cause is the conjunction of substandard labor supply with irregular labor demand." These

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intermediaries would become superfluous if labor demand were regularized or labor supply normalized "so that distressed worker groups willing to accept the hardships and inequities of a labor broker system would be minimized." For it is precisely the "uprooted, unprotected, underprivileged" status of the "Mexican Americans, Puerto Ricans, West Indians, and native born black Americans" who constitute "the bulk of the migrant workforce" that enables the crew leader to exploit his position.58

Two examples of the labor contracting system in settings not widely known to the public may illuminate its typical contemporary operation. These are the brief summer corn detasseling season in the Midwest and the winter-long planting of pine tree seedlings in the South. The employers are not small farmers but very large multinational corporations that have adopted the system intact from fruit and vegetable harvesting. The fact that these agro-industrial users have generated exactly the same unlawful and exploitative results for migrants suggests that sweating can reproduce itself in the backward interstices of modern sectors of production based on the technologies of genetic manipulation.99

Firms producing hybrid seed corn use labor catchers to recruit migrants to detassel corn and to police them while they are engaged in this horticultural castration (that is, removal of the tassel of the female parent before it sheds pollen).100 The production of


99The seed corn companies by and large do not own the land on which they grow seed corn. Instead they contract with farmers. The control or supervision that the companies exercise over these farmers varies greatly from company to company. Whether the contract-farmer is a joint employer of the detasslers does not appear to have been litigated. Timber companies, on the other hand, generally do own the forests in which migrants plant trees.

hybrid seed corn, which is associated with higher yields than open-pollinated varieties, has become an extraordinarily profitable oligopoly controlled by six to eight companies, most of which have been acquired by multinational pharmaceutical, petroleum, and chemical companies.\textsuperscript{101} This time-sensitive and labor-intensive activity, which employs 70,000 to 140,000 workers for approximately one month in the Midwest, has been characterized as "at the best...strenuous and at the worst...one of the most disagreeable kinds of work."\textsuperscript{102} Historically, local school-age children and college students have constituted the bulk of this labor force. Recently, however, the seed companies have both become dissatisfied with the quality of work performed by local workers and found it increasingly difficult to recruit the requisite numbers--at the wages they are willing to offer (about the minimum wage). Consequently, these firms have become increasingly reliant on migrants whom they

\textsuperscript{101}Pioneer Hi-Bred, which is the major independent seed producer not yet acquired by a firm outside the industry, wondered in 1978 whether the high profit margins (forty per cent of the sales price) would "foment resentment." Harvard Business School, Pioneer Hi-Bred International, Inc. 11 (Case Study 4-579-125, 1978). Pioneer Hi-Bred alone controls thirty-seven per cent of the market followed by DeKalb (nine per cent), and Northrup King (4.5 per cent). Barnaby Feder, \emph{Wonder Seeds Now Yielding Profits}, N.Y. Times, Aug. 17, 1991, at 15, col. 3 (nat. ed.); H. Murphy, \emph{New DeKalb-Pfizer Seed Chief to Harvest R&D Breakthroughs}, CRAIN'S CHICAGO BUS., May 7, 1990, at 38 (NEXIS); ROBERT LEIBENLUFT, \emph{COMPETITION IN FARM OUTPUTS: AN EXAMINATION OF FOUR INDUSTRIES} 111-13 (Office of Pol'y Planning, Fed. Trade Comm'n, 1981); KLOPPENBURG, \emph{FIRST THE SEED} at 147-49; DAN MORGAN, \emph{MERCHANTS OF GRAIN} 313-14 (1980).

\textsuperscript{102}A. CRABB, \emph{THE HYBRID CORN-MAKERS: PROPHETS OF PLENTY} 269 (1947). Detasseling accounts for ten to fourteen per cent of the cost of production of hybrid seed corn. Goldman, Sachs & Co., \emph{The Hybrid Seed Corn Industry: Implications of a Changing Environment, reprinted in} Harvard Business School, Pioneer Hi-Bred International, Inc. 29, 37 (Case Study 4-375-109, 1978). Firms are estimated to spend $75,000,000 to $120,000,000 annually on detasseling. Robert Cooke, \emph{A New Growth Industry for Crops; Genetically Engineered Corn: Breakthrough Brings Market Closer}, \emph{GENETIC TECHNOLOGY NEWS}, Oct. 1990, at 8 (NEXIS). Pioneer Hi-Bred International, "the world's largest developer of seed corn," alone is estimated to employ 42,000 to 80,000 detasslers. Keith Schneider, \emph{Scientific Advances Lead to Era of Food Advances Around World}, N.Y. Times, Sept. 9, 1986, at 19, col. 3, at 20 col. 1 (nat. ed.); Bob Secter, \emph{American Album: Summer Jobs Still Sprout in a Fertile Field}, L.A. Times, July 29, 1991, at A5, col. 1 (NEXIS); Nancy Dailey, \emph{Pioneer Hi-Bred: Tipton's Amazing Employer}, \emph{INDIANA BUS.}, Nov. 1985, at 44 (NEXIS); information provided by Pioneer Hi-Bred. On the origins of Pioneer Hi-Bred in the 1920s and the key role played by the future Secretary of Agriculture, Henry A. Wallace, see CRABB, \emph{THE HYBRID CORN-MAKERS} at 140-66. PAUL MANGELSDORF, \emph{CORN} 239 (1974), cites an estimate of a peak of 125,000.
recruit in Texas, California, Arizona, and Florida. This shift may be associated with employers' perceptions that whereas students complain about everything, migrants "don't complain. They don't complain about anything." Plodding down endless rows, reaching up to yank thousands of resistant tassels carefully off corn plants forms one small but vital part of a scientifically and technologically sophisticated process of genetic engineering which the seed companies control from beginning to end and in which they have invested significant amounts of capital. As part of their organization and control of the entire production process these firms rely in part on labor contractors to recruit and assemble detasslers. Crew leaders may also act as first-line foremen, making sure that the detasslers work. The seed companies oversee this operation with their own payroll supervisors-technicians, whose agronomic learning enables them to control quality. Often they pay the labor contractor varying amounts per

103 For a self-serving account by a corn farmer-labor contractor of the employment of migrants to detassel, see MARILYN DAVIS, MEXICAN VOICES/AMERICAN DREAMS: AN ORAL HISTORY OF MEXICAN IMMIGRATION TO THE UNITED STATES 77-93 (1990). During World War II adult women performed much of the detasseling. CRABB, THE HYBRID CORN-MAKERS at 268-69. Some Hispanic migrant farm workers detasseled in Indiana and Ohio before World War II. See VALDÉS, AL NORTE at 62. Migrants working for grower-canners detasseled in Illinois until the development of a male-sterile plant eliminated the need for detasseling in the beginning of the 1960s. Leftwich, The Migratory Harvest Labor Market at 146-47. Personnel and production managers at Pioneer Hi-Bred, Garst Seed, and Asgrow Seed also claim that the demographic decline of rural Midwest has contributed to the dearth of available labor.


105 For an introduction to the science of detasseling, see John Airy, CURRENT PROBLEMS OF DETASSELING, in AM. SEED TRADE ASS'N, IMPROVED TECHNIQUES IN HYBRID SEED CORN PRODUCTION 7, 11-17 (1951). Just as genetic engineering created the need for a labor force to detassel, it may also do away with it. "[P]ublic agricultural science provided the hybrid corn industry with a genetic solution to its labor problem" by incorporating "cytoplasmic male sterility...into female parent lines" thus making them sterile and "eliminating the need for manual detasseling." KLOPPENBURG, FIRST THE SEED at 113. The narrow genetic base of the germplasm used in this process, however, made it highly vulnerable to an epidemic of corn blight in 1970, leading to the resumption of the use of normal cytoplasm and manual detasseling. Id. at 122. The blight resulted in a massive class action by farmers against seed companies; Lucas v. Pioneer, Inc., 256 N.W.2d 167 (Iowa 1977). Pioneer Hi-Bred expects that renewed research will eliminate the need for detasseling by the end of the century.
Inexhaustible Supply of Cheap Labor

acre, leaving it to them to manage the payroll. At this point it is a matter of indifference to the companies how much, when, or even whether the labor recruiters pay the workers. With virtually nothing but labor costs, the labor catcher can obviously maximize his income by minimizing his payments to the workers. At the most egregious extreme, he absconds with the payroll.

The geography of the forestry industry in the United States has been transformed during the past several decades by a massive shift of landholding and operations from the North to the South. Pulp and paper manufacturing firms have been attracted by the lower wage levels and less restrictive environmental regulations associated with large nongovernment owned forests. One of the keys to enhanced profitability has been the development of systematic, scientific sustained-yield reforestation. As with hybrid seed corn, the genetic manipulation of loblolly pine plantations, which has resulted in significantly higher yields, rests on a premodern labor base: the hand-planting of the genetically engineered seedlings.

106The highest acreage rates are paid for "full-pull," that is, for fields that the seed company has not previously machine-detasseled. Where such machines, which can pull 25%-80% of the tassels, are used, the acreage rates for hand-detasseling are reduced. In order to avoid selfing, which would frustrate the production of hybrid seeds, 99.5% of the tassels must be pulled. In order to achieve this standard and to be paid, workers must detassel a field several times. Given the urgent need for detasselers, the seed companies may offer individual workers--both local students and migrants--working alone or in very small groups, the same full acreage rate that they pay crew leaders in the same fields.

107Pioneer Hi-Bred may be a major exception insofar as it purports, as a result of litigation and the desire to avoid litigation, to have adopted the practice of placing all detasselers and crew leaders on its payroll as employees. See Martinez v. Pioneer Hi-Bred Int'l, Inc., No. B-79-98 (S.D. Tx. filed Apr. 27, 1979).

Like the seed companies, the large integrated forestry-products companies performed the bulk of this work until recently with seasonal payroll crews of local workers paid by the hour. As with detasseling, the timber firms' refusal to pay hand-planters more than the minimum wage created the appearance of an exhaustion of local labor reserves. The call therefore went out for migrant farm workers. In order to insure that migrants would cost no more than locals, the companies 'contracted out' the hand-planting. For the same reasons as in detasseling, the planting contractors cannot offer and the timber companies would not accept turnkey service contracts. Such arm's length dealing is not possible because the forestry firms have themselves generated or acquired all known scientific-technical knowledge about forestry practices, whereas planting contractors are merely first-line supervisors of menial-manual workers who have been incorporated into one small but vital "part of the integrated unit of production." The companies must therefore contractually specify a great many details about inputs, compliance with which is monitored and rewarded. Thus these firms control all of the following aspects of the work: genetic engineering of many varieties of seedlings dedicated to various types of soil and terrain, which the contractor is unable to distinguish; designation of the tracts where each variety is to be planted; specification of how and where seedlings are to be stored, transported and handled; specification of spacing, configuration, and directionality of seedlings; and specification of how seedlings are and are not to be planted in such detail that effectively no discretion is left to contractors or planters.109


110In forestry, then, even more than on cucumber farms, it is the case that:

The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker incentives rather than direct supervision. It thereby retains all necessary control over...simple manual labor which can be performed in only one correct way. ... It is the simplicity of the work, not the harvesters' superior expertise, which makes detailed supervision and discipline unnecessary.

Inexhaustible Supply of Cheap Labor

The key to understanding why even a large labor contracting entity economically speaking has not become and legally should not be considered the sole employer of the migrant planters is that its growth has been purely quantitative; the labor performed by the contractor's planters remains unchanged—namely, unskilled and without significant physical capital. Precisely because the contractor has failed to transform the nature of the work process, for example, by creating or appropriating a new technology, planting has not become a new specialty business in a new product market but has remained a core segment—and therefore under the control—of the forestry company. Consequently, no matter how large the contractor may become, at the worksite it and its employees remain subject to control by the forestry company. The mere fact that the contractors, who are ex-planters, have recruited so many 'helpers' that they themselves no longer need to plant and can live on the compensation they receive for furnishing and supervising labor does not fundamentally alter the relationship between the forestry companies and the laborers. The insertion of additional layers of supervisors and middlemen into the chain of command does not undermine the control ultimately exercised by the forestry companies over all those integrated into their business.

In this primitive sub-segment of an otherwise technologically advanced production process, migrants planting pine seedlings for the largest paper and timber companies throughout the South have been victimized by some or all of the following unlawful acts. At

111In other words, at the worksite little has changed vis-à-vis the time when the present owners of the planting entity themselves personally planted trees for the forestry companies. Whatever relationship obtained between them then is now replicated between the planting entity and the new generation of planters. "What better situation can his employé occupy? Is his position higher than that of his employer would have been, had he been standing in the shoes of the former...? Can a stream rise higher than its source?" Knicely v. West Virginia Midland R.R., 64 W. Va. 278, 61 S.E. 811, 812 (1908).

112The need to exercise control in order to contain costs led one timber company to treat its loggers as "dependent contractors," i.e., as "piecework employees." William Darwin, Logging Cost Control with Dependent Logging Contractors, in COST CONTROL IN SOUTHERN FORESTRY 125, 126-27, 130-31 (Robert McDermid ed. 1964).

113See, e.g., Bracamontes v. Weyerhaeuser Co., 840 F.2d 271 (5th Cir. 1988); Jane Juffer, Peonage in the Pines, THE PROGRESSIVE, Nov. 1987, at 24; Ted Kenney, Migrants in the Forests, THE WEEKLY (Seattle), Jan. 20-26, 1988, at 21. Forestry firms engage in the same practices in the Northwest. See Bresgal v. Brock, 833 F.2d 763 (9th Cir. 1987). Polish migrant farm workers in Germany at the turn of the century were subject to the same abuses. See JOHANNES NICHTWEB, DIE AUSLÄNDISCHEN
the time of recruitment, the company's labor catchers fraudulently induce the workers to sign up by misinforming them that they will be paid $25 per 1000 seedlings when in fact they will be paid only $15. Once at the worksite, the employer issues packets containing 1200-1300 seedlings, which are deemed to contain the standard piece unit of 1000. The contractors then falsify the number of hours worked in order to avoid payment of the minimum wage or any overtime. Although the recruiters promise free housing, weekly deductions are made to defray the cost of the (often substandard) housing. In some cases, withholdings for social security taxes may be feloniously embezzled. Finally, the most flagrant violators abscond without having paid their workers for the last pay period or perhaps at all.

Frequently agricultural employers use such intermediaries precisely in order to secure the advantages accruing from unlawful acts without appearing liable for their commission. This set piece then includes a solemn disavowal of any knowledge of, let alone responsibility for, the allegedly unauthorized actions taken by the crew leader, who in turn denies the allegation, disappears, or has no money to satisfy a court judgment. In an alternative scenario, the employer may resort to "a species of law evasion, known all over the world where social legislation exists, viz., the dodging of the legal protection given to an employee by making him appear as an independent contractor...." These structural characteristics coalesce in the case of employers who share the proceeds of exploitation with largely judgment-proof labor contractors in

Saisonarbeiter in der Landwirtschaft der östlichen und mittleren Gebiete des Deutschen Reiches: Ein Beitrag zur Geschichte der preußisch-deutschen Politik von 1890 bis 1914, at 77-78, 216-24 (1959). Consideration of the possibility that the exploitation of racially or ethnically 'alien' migrant workers may be systemic is prompted by Max Weber's observation that the barracks used to house these Polish workers were functionally the money-economy analog of slave barracks in antiquity. Max Weber, Entwicklungstendenzen in der Lage der ostelbischen Landarbeiter, in Max Weber, Gesammelte Aufsätze zur Sozial- und Wirtschaftsgeschichte 470, 492 (1924 [1894]).


"Part of the reason for the increased use of farm labor contractors seems to be an attempt by farmers (growers) to shift liability for using illegal workers to individuals or businesses that have few real resources on average." Wallace Huffman, Costs and Returns: A Perspective on Estimating Costs of Human Capital Services and More at 19, n. 9.

exchange for the latter's willingness to accept civil (and even criminal) liability.\textsuperscript{117}

In an important socioeconomic sense, then, the most prominent characteristic of migrant farm workers’ employment relationships is that they are built on extra-legal measures that fall below the standards immanent to a mature capitalist economy.\textsuperscript{118} General Motors, IBM, and thousands of much smaller entities do not accumulate capital by stealing social security taxes, tampering with time cards, or absconding with the payroll. But a labor market overpopulated by workers with virtually no reservation wage apparently represents an irresistible temptation even to large employers to commit outright fraud and knowing violation of statutory minima.\textsuperscript{119} Some of the largest multinational firms, which are too fastidious to risk engaging in such practices with payroll employees, have no compunctions about hiring labor catchers to do it for them in the pre-modern enclaves of their technologically sophisticated production processes.\textsuperscript{120} Thus in detasseling and forestry, two of the world’s largest pharmaceutical firms, Sandoz (Northrup King) and Upjohn (Asgrow Seed), one of the largest chemical firms, Imperial Chemical Industries (Garst Seed), and one of the largest grain firms, Cargill, "the world’s largest papermaking organization," International Paper, the wealthiest industrial woodland owner in the United States, Weyerhaeuser, Procter & Gamble as well as the United States Government all profit from such practices.\textsuperscript{121}


\textsuperscript{118}Marx referred to the framework of ideal-typical capitalist exploitation as "the mute compulsion of economic relations," which no longer needed to rely on extra-legal measures. 1 Marx, \textit{Das Kapital} at 765.

\textsuperscript{119}See, e.g., E. Brown, \textit{The Growth of British Industrial Relations: A Study from the Standpoint of 1906-14}, at 198 (1974 [1959]).

\textsuperscript{120}While Pioneer Hi-Bred, for example, is busy testing 7,000 new inbred lines and 15,000 new experimental hybrids yearly, labor catchers are "managing high school kids." Tobin Beck, \textit{Football Coach Finds Management Niche in Cornfields: Company Thrives on "Hassling with Detasseling"}, UPI, July 23, 1989 (NEXIS); Dailey, \textit{Pioneer Hi-Bred}.

\textsuperscript{121}BLS, \textit{Wage Chronology: International Paper Co., Southern Kraft Division December 1937–May 1973}, at 1 (Bull. No. 1788, 1973); Grant Sharpe, \textit{Introduction to Forestry} 484-85 (5th ed. 1986); Buckeye (or, as it is now called, Procter & Gamble) Cellulose, a wholly owned subsidiary of Procter & Gamble,
In so doing they are merely emulating the large firms in the highly concentrated canning industry such as Green Giant, Libby, Campbell, Del Monte, Heinz, Beatrice, and Stokely-Van Camp, which since the 1940s have themselves engaged in and promoted exactly the same overreaching by labor catchers and farmers in the Midwest vis-à-vis migrants harvesting asparagus, peas, corn, string beans, and tomatoes. Not coincidentally, it was these same firms, which employ armies of tax lawyers to drill loopholes in the thousands of pages of the Internal Revenue Code, that lobbied against a very short federal migrant statute on the ground that its rules—such as posting wage rates—were "so detailed that compliance is often difficult."123

The National Farmers Union corroborated the links in this structural relationship in its testimony before Congress that "large commercial agricultural organizations" profit from the "vicious system" of exploitation and "the contractor's way of keeping the labor in line."124 Such commentary eerily echoes Marx's observations on produces the fiber for Pampers from the trees which migrants plant on the firm's vast land holdings in the South. See Ross v. Buckeye Cellulose Corp., 733 F. Supp. 344, 347 (M.D. Ga. 1989). The U.S. Forest Service lets bids to plant trees on thousands of acres of national forests annually. See generally, Richard Guldin, The Silviculture Contractor, J. FORESTRY, Jan. 1984, at 28. These "contractors," whose employees it refuses to acknowledge as its own, engage in the same practices as other crew leaders. These workers do, however, enjoy one protection not available to other migrants: under the Service Contract Labor Standards Act, the Secretary of Labor can, if the contractor fails to pay the workers their wages, withhold the necessary amounts from accrued payments due on the contract and pay the workers directly. 41 U.S.C. § 352(a) (1987).


the English crew leaders of the 1860s, whose income also depended on their ability to extract as much labor from their crew members as possible. Marx, too, emphasized that the gang system existed for the enrichment of the large farmers, for whom there could be no more ingenious system to depress workers' wages below the normal level while extracting as much labor as possible.125 In combining these additional aspects of sweating, employers of migrant agricultural workers have become a uniquely lawless atavism.126 The whole pathos with which the liberal urban middle class has invested the plight of migrants is rooted precisely in the sense of horror at indignities otherwise thought to belong to a long bygone era.127

IV. The State

Just as the steel industry established "captive mines" from which to get their coal, so now do canners turn to "captive farms" for their vegetables. To get the labor needed to operate their large plantings of vegetables, these canners turn to Government, and Government assists them in getting a supply of foreign workers.128

125 Marx, Das Kapital at 723-25.
126 But see Union Accuses Grocery Chain Of Profiting by Free Overtime, N.Y. Times, Sept. 12, 1991, at A8, col. 6 (nat. ed.) (Food Lion, Inc. alleged to derive more than a third of its profits from unlawfully forcing employees to work overtime without pay).
127 "It's difficult to believe these types of abuses occur in this day and age." Neil Roland, Homeless, Turned Migrants, Find Abuse, Legal Times, Sept. 16, 1991, at 2, col. 1, 4 (quoting DOL official on peach pickers in South Carolina who received as little as forty cents per hour). Employers of migrants are often even unencumbered by the straightforward methods of nineteenth-century statutory self-help for piece-rate workers, which, for example, authorized coal miners to check the weights for which they were credited and prohibited owners from screening out smaller pieces of coal before weighing a miner's output. 1883 Pa. Laws Pub. L. No. 46, § 3 at 52; 1897 Pa. Laws Pub. L. No. 224 at 286. In a stereotypical example of class-biased formalism, this latter act was held unconstitutional as interfering with the workers' right to contract not to receive compensation for their full production as an incentive to work more carefully and to mine only larger pieces of coal. Commonwealth v. Brown, 8 Pa. Super. 339 (1898). Other state statutes were upheld. See, e.g., McLean v. Arkansas, 211 U.S. 539 (1909). For a survey of the comparable nineteenth-century legislation in Iowa, see E. Downey, History of Labor Legislation in Iowa 63-66 (1910). For a sampling of opinion by miners and owners, see 12 Rep. of the Indus. Comm'n on the Relations and Conditions of Capital and Labor Employed in the Mining Industry, H.R. Doc. No. 181, 57th Cong., 1st Sess. 34, 48, 115 (1901).
128 President's Comm’n on Migratory Labor, Migratory Labor in American Agriculture 23 (1951).
As the structural-functional descendants of a racially segregated plantation labor force, migrants still suffer from the failure of Reconstruction to vindicate the free labor principle for that sector of the working class. Indeed, their hypermobility has not subverted their status as a quasi-captive labor force. When confronted with an unfavorable supply and demand, twentieth-century agricultural employers, like former slave masters vis-à-vis postbellum freedmen, have been in a position to treat migrants as a proprietary resource not subject to the normal workings of the labor market. Competitors seeking to hire them at higher wages have been denounced as "steal[ing] our labor." Once familiar images of chattel are easily resurrected when employers matter-of-factly refer to "[v]ery large shipments" of labor. Thus the Texas farmer typically "resented the influence of supply and demand" and "was not willing to pay wages...which would keep somebody else from competing with him in the labor market." Nor did he have to. As one cotton farmer testified in the course of urging a congressional committee to open the border to Mexican laborers: he was not above "borrow[ing] the Mexican's shoes and pants until morning." "You have got to hold 50 or 75 Mexicans costing you $600, to hold them over from week to week. What would you do? ... You would

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not let the Mexicans leave."132

Where self-help has proved ineffective,133 farm employers have successfully requested state and federal intervention to suppress out-migration and to promote in-migration of low-paid workers. When, for example, the use of violence by Texas farmers134 failed to prevent out-of-state sugar-beet companies from "taking them [Mexican laborers] away from us" in the 1920s,135 the State of Texas, like the southern states that sought to restrain black sharecroppers in pursuit of higher wages out-of-state, promptly responded by criminalizing the act of "go[ing] on the premises or plantation of any citizen of the State, in the night time, or between sunset and sunrise, and mov[ing]...any laborer...without the consent of the owner...." In order to deter those who managed to "entice" laborers without entering the master's plantation, the Texas legislature then imposed a $7,500 license fee on agents seeking to recruit laborers to work outside of Texas.136 Even after World War II complaints continued

132Temporary Admission of Illiterate Mexican Laborers at 249 (Rep. Vaile, Colo.); id. at 59 (testimony of Fred Roberts, cotton farmer, Corpus Christi). Rep. Raker asked the farmer: "Do they make that sort of departure without their clothes? When you have taken away their trousers they do not vamoose." "No, sir; they stay then." Id. at 63.

133An outraged strawberry farmer in California stated after the termination of the bracero program: "They want us to go to Los Angeles and screen scum." Who'll Pick the Strawberries? TIME, June 4, 1965, at 19.


135S e a s o n a l  A g r i c u l t u r a l  L a b o r e r s  f r o m  M e x i c o  at 4 2 (testimony of S. Nixon, cotton farmer, Robstown).

to be voiced in the North that the Texas statute permitted the "wealth of relatively cheap...Mexican workers...[to be] jealously guarded by growers from the possibility of excessive out-of-state emigration."\textsuperscript{137}

So deeply root\red{ed} is the rhetoric of state-enforced agricultural exceptionalism that even liberal economists unthinkingly embrace it. Thus when the Mexican bracero program was terminated, a panel charged with making recommendations concerning labor needs during the transition from a legally to a merely economically captive labor force revealed that:

One pickle grower reported...that this year's Texans were much harder to handle than the braceros; the Texans all had cars, the grower said, and if you spoke sharply to them they just drove away. This complaint suggests that past reliance on braceros may have impeded or made unnecessary in this industry the development of supervisory practices that are appropriate for dealing with American citizens. [B]raceros were forbidden by law to perform any work than that for which they were brought into the country. Thus, their mobility and their alternatives were sharply limited, and individual growers had little need to engage in the usual tasks of supervision.\textsuperscript{138}

Rather than suggesting that a significantly higher wage might be necessary to attract free labor to perform hard work previously dominated by workers with Third-World living standards, the panel, implicitly accepting the traditional structure of agricultural sweatshops, was content to stress public relations and discipline.\textsuperscript{139}

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\textsuperscript{137}Z. Rowe & J. Kohlmeier, \textit{Migrant Farm Labor in Indiana} 28 (Purdue U. Agric. Experiment Station Bull. 543, 1949).

\textsuperscript{138}Final Report of the Michigan Farm Labor Panel to the Secretary of Labor, December 30, 1965, in DOL, \textit{Year of Transition: Seasonal Farm Labor 1965}, A Report from the Secretary of Labor, appendix J-32 (n.d. [1966]). The chairman of the panel was Charles Killingsworth. One of the other panelists was Daniel Fusfeld, a longtime advocate of high minimum wages as a tool of industrial policy. See \textit{e.g.}, Daniel Fusfeld, \textit{A Living Wage}, \textit{Annals of the Am. Acad. Pol. & Soc. Sci.}, Sept. 1973, at 34.

\textsuperscript{139}The panel found that the minimum wage of $1.25 that the Secretary of Labor had set for domestic employees of agricultural employers that desired to apply for H-2 workers had "submerged...completely" the incentive that had existed under the piece-rate system. \textit{Final Report of the Michigan Farm Labor Panel} at J-33.
The debates in the 1980s and 1990s over "immigration reform and control," the latest in a long historical series extending back to World War I, are ideologically repetitive.\footnote{Robert Thomas, The Mythology of Agricultural Exceptionalism: Some Comments, in 9 In Defense of the Alien 17 (Lydio Tomasi ed. 1987). Using the doubtful authority of the newly enacted immigration statute, the Secretary of Labor issued orders authorizing the temporary entry of otherwise inadmissible aliens to engage only in agricultural labor. See Act of Feb. 5, 1917, ch. 29, § 3, 9th proviso, 39 Stat. 874, 878 (1917); Departmental documents reproduced in Emergency Immigration Legislation: Hearings Before the Senate Comm. on Immigration, 66th Cong., 3d Sess. 696-710 (1921). See generally, Otey Scruggs, The First Mexican Farm Labor Program, 2 Arizona & THE WEST 319 (1960).} Now, as then, they center on demands by a relatively small number of labor-intensive agribusinesses\footnote{Even at the height of the bracero program, fewer than 50,000 farms employed imported Mexican workers, who worked chiefly in Texas and California harvesting lettuce, cucumbers, and tomatoes, and cotton, and hoeing sugar beets in other states. See House Comm. on the Judiciary, Admission of Aliens Into the United States for Temporary Employment and "Commuter Workers" tab. 3-13 at 44-48. Some smaller employers, for example, cotton farmers in Arkansas and sugar beet and processed vegetable growers in the Midwest and Rocky Mountain states, also employed braceros. See Extension of Mexican Farm Labor Program (Senate) at 302-305 (testimony of Harvey Adams, Exec. vice pres., Agric. Council of Ark.), 352-53 (testimony of Charles Creuzinger, pres., Veg. Growers Ass'n of Am.).} for a captive but disposable supply of cheap seasonal harvest laborers from Latin America to be quarantined from competing labor markets and even from other farm employers.\footnote{See Cong. Research Service, Temporary Worker Programs: Background and Issues, 96th Cong., 2d Sess. 117 (Comm. Print 1980). The whole point of the so-called H-2A worker program is that these imported "nonimmigrants" are admitted "temporarily" solely "to perform agricultural labor." 8 U.S.C. § 1101(a)(15)(H)(ii)(a) (Supp. 1991). Because H-2A workers are admitted to the United States to work for an identified employer, they can be deported for being enticed to a higher-paying one.} Whereas firms in other industries increase their capital intensity in order to deal with rising wages when the demand for workers exceeds supply, when exceptionalist agriculture is "forced" by labor shortages "into a bidding war" requiring it to pay detasselers five dollars an hour, it successfully induces the federal government to open the borders to noncombatants from Latin America.\footnote{See Sean Means, Idaho Farmers Happy with Easing of Immigration Rules, UPI, June 30, 1987 (NEXIS).}
only their frankness has diminished. In the 1920s, farm employers, instead of bemoaning the alleged fact that no American citizen would do the kind of work in question, purposed to be very solicitous of their racial brethren:

[T]here is not a white man of any intelligence in our country that will work an acre of beets. I do not want to see the condition arise again when white men who are reared and educated in our schools have got to bend their backs and skin their fingers to pull those little beets. But you can do one of two things: You can let us have the only class of labor that do the work, or close the beet factories, because our people will not do it, and I will say frankly I do not want them to do it.\(^{145}\)

Members of the House Immigration and Naturalization Committee, concerned primarily about the dangers they perceived in large cities teeming with aliens, sought to engage the farmers' racial pride. Representative Bacon of New York confided to a Texas cotton farmer that "I am in favor of keeping Texas white." And Representative Box of Texas told the farmers straightforwardly that their demands would "not be helping the country at large." In response to farmers' suggestions that Mexican laborers be admitted exclusively to work in agriculture and then be sent back to Mexico, committee members recalled "that this is America, and you can not put men under serfdom now." Such a radical step was unnecessary, protested the employers: "The Mexican is a child, naturally. Some children need a good deal of discipline."\(^{146}\)

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\(^{144}\)Many U.S. workers prefer not to take jobs which are physically demanding, may be temporary and may require travelling long distances to the place of employment." Immigration Reform and Control Act of 1985: Hearings Before the Subcomm. on Immigration and Refugee Policy at 511 (statement of R. Keeney, V.P., United Fresh Fruit & Vegetable Ass'n). Congress heard abundant testimony to the effect that farm employers, who prefer intimidated "guestworkers," use various ploys to reject non-guestworker applicants. See Temporary Workers: Hearings on a New Temporary Worker Program with Mexico Before the Subcomm. on Immigration and Refugee Policy of the Senate Comm. on the Judiciary, 97th Cong., 1st Sess. 178-86 (1981) (statement of Garry Geffert, attorney, W. Va. Legal Serv.) (discussing apple pickers); Immigration Reform and Control Act of 1983: Hearing Before the House Comm. on Agriculture 79-81, 280-85 (1983) (statement of Garry Geffert) (discussing apple pickers).

\(^{145}\)Seasonal Agricultural Laborers from Mexico at 62 (testimony of Fred Cummings, sugar-beet farmer from Colorado). The chairman of the committee was unimpressed, noting that "[i]t makes no one shed any tears" in France and Belgium to see women and children do that work. Id. (Rep. Albert Johnson, Dem. Wash.).

\(^{146}\)Id. at 46, 66, 49 (testimony of S. Nixon), 49 (Rep. Bacon), 107 (testimony of J.
The role of the state in the political construction of an enclave of sweated agricultural labor has, at least since the incipient incorporation of farm workers into labor-protective legislation, been self-contradictory. Although the avowed purpose of FLSA is to combat sweating, not until 1966 were any farm workers protected by it. Even today, when fewer than two-fifths of agricultural employees are covered, those most vulnerable to sweating—including many children, piece-rate workers, and employees of small employers—are expressly excluded. Moreover, in certain areas, such as the Rio Grande Valley, enforcement agencies appear to have a tacit understanding with employers that they will provide merely token administration of labor laws in order to sustain enclaves capable of competing with the Third World.

The state has, perhaps even more importantly, intervened at crucial junctures to insure the relatively restricted stratum of employing farmers, who have succeeded in shaping public policy based on the assumption that "they cannot and need not compete for workers in the general labor market," an overabundant supply of wage-depressing Third-World, particularly Mexican, labor. By the mid-1950s, the federal government was facilitating the importation

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147 See Thomas, Citizenship, Gender, and Work at 103, 116.
150 Dorothy Nelkin, On the Season: Aspects of the Migrant Labor System 9 (1970). James Holt, Labor Market Policies and Institutions in an Industrializing Agriculture, 64 Am. J. Agric. Econ. 999 (1982), distorts the active pro-employer role played by the state. On the one hand he argues that the two goals of agricultural labor market policy have been improving workers' bargaining power "by reducing the wage-depressing effects of surplus labor" and protecting workers from abusive employers. Id. at 999. On the other hand, he claims that the failure of policy "has been due to largely fortuitous access to successive sources of readily available labor over the decades." Id. at 1004. As the discussion below shows, state-sponsored importation of wage-depressing foreign labor has been a direct response to requests by certain groups of farm employers.

Years ago the English economist, Ricardo, defined what he called the natural rate of wages, as being "that price which is necessary to enable the laborer, one with another, to subsist and perpetuate their race without increase or diminution" and thereby be able to serve the owners or producers. This is the basis of the class system theory of the 19th century liberal economists.... We have rejected the theory...that laborers compose a special race somewhat akin to the "workers" of the bee and ant families. .... Yet, in American agriculture, we still have proponents of the Ricardo school of economics. These growers tell us that if American workers are not available at the prevailing rate--the modern substitute for Ricardo's natural rate of wages--we must recruit workers from the poor of foreign countries. Presumably, these growers believe that there will always be a sufficient amount of poverty in the world to provide workers who are willing to perform jobs that higher class people will not accept. This theory is based, of course, on placing a very low economic and social value on those jobs associated with the harvest.\footnote{107 Cong. Rec. 7187 (1961) (Rep. Coad, Iowa).}
By virtue of its promotion of worker-import programs that have overwhelmed the agricultural labor market with hundreds of thousands of impoverished workers from Mexico (and the Caribbean), the federal government bears major responsibility for locking farm workers into a state of market powerlessness. Local workers in the surplus labor regions, where the inexhaustible reservoirs of the Mexican hinterlands constitute a permanent overhang of supply, "are forced to migrate" northward, taking with them their even further depressed wage standards as a point of comparison. "Wage levels in the low-wage farm areas thus have a central, and pervasive, influence on the level of the wage structure for hired farm labor." The circle of government-enforced powerlessness is completed by the role played by local governments in their "conscientious efforts...to manipulate local labor markets...to guarantee that agricultural employers will have an oversupply of workers with little choice but to work on farms. Economic development strategies that will disrupt agricultural labor markets are consistently avoided."

The approach that even the relatively pro-labor Roosevelt administration adopted underscores the continuity of policy. When the United States entered World War II, the Farm Security Administration (FSA) within the Department of Agriculture was assigned responsibility for reducing agricultural labor shortages. It proceeded to carry out this charge by regulating the recruitment,

\(153\) See THOMAS, CITIZENSHIP, GENDER, AND WORK.

\(154\) According to the then-Secretary of Labor, the importation of 130,000 braceros into Texas forced 90,000 Texas migrants to look for seasonal work out of state. Extension of Mexican Farm Labor Program (Senate) at 226 (statement of Arthur Goldberg). See also BRUCE MEADOR, "WETBACK" LABOR IN THE LOWER RIO GRANDE VALLEY (1951); JOHN ELAC, THE EMPLOYMENT OF MEXICAN WORKERS IN U.S. AGRICULTURE, 1900-1960: A BINATIONAL ANALYSIS 115 (1972 [1961]). On the impact of so-called border commuters, see Note, Commuters, Illegals, and American Farmworkers: The Need for a Broader Approach to Domestic Farm Labor Problems, 48 N.Y.U.L. REV. 439 (1973).

\(155\) HARRY KANTOR, PROBLEMS INVOLVED IN APPLYING A FEDERAL MINIMUM WAGE TO AGRICULTURAL WORKERS 81 (DOL 1959).


transportation, employment, and wages and conditions of domestic and Mexican workers. Among other terms, it imposed a requirement that farmers for whom the federal government recruited workers pay the latter a minimum wage of thirty cents per hour and "a minimum subsistence allowance" of three dollars per day for at least seventy-five per cent of the workdays of the term of the contract. The Secretary of Agriculture explained this subsistence guarantee with the following anti-exceptionalist argument: "Because...with people trying to earn a living, it would be very unsatisfactory to them to transport them and let them stay there 2 or 3 weeks before they were given any work or only given work intermittently."

The objective of giving mandatory effect to the feeling that "people...ought to be given some assurance before they are going to be willing to move" proved completely unacceptable to agricultural employers. Speaking on behalf of the major farm organizations, Ezra Benson, himself a future Secretary of Agriculture, informed Congress that "[u]nder the guise of the war effort, a social revolution is being perpetrated upon the American people." Congress apparently agreed that suppression of such employment practices as overrecruitment or luring workers to farms weeks before the harvest began to insure their presence when needed did amount to undesirable "social reforms." It promptly acceded to farm employers' request that such legal norms be eliminated.


159 Farm Labor Program, 1943 (House) at 49 (USDA–FSA "Cooperative Employment Agerement").

160 Id. at 169 (statement of Claude Wickard).


162 Farm Labor Program, 1943 (House) at 88. The Farm Bureau correctly intuited that the FSA was seeking an opening wedge in the regulation of farm labor. See GRANT MCCONNELL, THE DECLINE OF AGRARIAN DEMOCRACY 93 (1953); Otey Scruggs, The Bracero Program under the Farm Security Administration 1942-1943, 3 LAB. HIST. 149 (1962).

163 S. REP. NO. 157, 78th Cong., 1st Sess. 5 (1943); Farm Labor Program, 1943
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Prior diplomatic commitments to the Mexican government, however, persuaded Congress to exempt the imported Mexican workers from this prohibition. Indeed, over and above the aforementioned seventy-five per cent guarantee, the Mexican government negotiated an amended agreement in 1943 requiring farmers to provide free lodging and subsistence for the remaining twenty-five per cent of the days as well. And despite farm employers' protests to the effect that they were being forced to assume liability for unemployment caused by bad weather, the federal government imposed the condition. Consequently, to this day, agricultural laborers imported under the auspices of the federal government are theoretically entitled to protection denied domestic workers--except, ironically, where the latter are brought under that protection by virtue of being employed together with such imported workers.

164 S. REP. NO. 157 at 4; H.J. RES. 96, § 4(b), 57 Stat. 70, 72 (1943); RASMUSSEN, A HISTORY OF THE EMERGENCY FARM LABOR SUPPLY PROGRAM at 41-46.

165 RASMUSSEN, A HISTORY OF THE FARM LABOR SUPPLY PROGRAM at 207-209.

Even at the height of the bracero program in the 1950s, the Mexican government succeeded in incorporating into the agreement and standard work contract a provision securing Mexican workers "the right to elect their own representatives to maintain contact between themselves and the Employers, and the latter must recognize them as such...." Migrant Labor Agreement of 1951, Aug. 11, 1951, United States-Mexico, T.I.A.S. No. 2331, (§ 17, Standard Work Contract, at 1994).

166 See 20 C.F.R. §§ 655.102(a) & (b)(6) (1991). Secretary of Agriculture Wickard noted the irony. Farm Labor Program, 1943 (House) at 161. The Farm Bureau opposed conditioning the bracero program on extending the full panoply of protection to domestic migrant workers employed by farmers who imported braceros on the ground that only a captive labor force needed protection against overreaching. See Extension of Mexican Farm Labor Program (Senate) at 15 (statement of Matt Triggs). For a description of the dismal lack of enforcement during the bracero program, see ERNESTO GALARZA, STRANGERS IN OUR FIELDS (2d ed. 1956); idem, MERCHANTS OF LABOR: THE MEXICAN BRACERO STORY (1964); ERASMO GAMBOA, MEXICAN LABOR AND WORLD WAR II: BRACEROS IN THE PACIFIC NORTHWEST, 1942-1947 (1990). For an optimistic contemporary portrait, see ROBERT JONES, MEXICAN WAR WORKERS IN THE UNITED STATES: THE MEXICAN-UNITED STATES RECRUITING PROGRAM AND ITS OPERATION 1-26 (1945). When the bracero program was terminated, Secretary of Labor Wirtz amended the regulation governing the importation of temporary agricultural (H-2) workers so that no employer could be certified to import H-2 workers unless it offered domestic workers specified hourly wage rates (ranging between $1.15 and $1.25) as well as the guarantees to which braceros had been entitled. 20 C.F.R. § 602.10(c) (1965). Some agricultural employers and legislators argued unsuccessfully that Congress had not authorized the Secretary of Labor to
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The unilaterally pro-employer function of these importation programs has shown remarkable continuity. The state has stood ready to underwrite precipitous decisions by agricultural employers to force production of commodities in remote locations not densely populated enough to support a labor supply adequate for peak harvesting periods, thus necessitating large-scale importations. Only at rare moments has any official asked whether it "would...not be best if these holdings were reduced so that the farmers could do their work, with occasional help." The history of mobilizing and maintaining a "perpetually cheap" seasonal labor force in the sugar-beet industry that "boost[ed] the income and diminish[ed] the manual labor of the farmer and his family" while "exclud[ing] the poorest class...from the Anglo comity" is crucial to understanding the role of the state in the formation of an agricultural proletariat in the United States. And although the cultivation of sugar beets may not, as its promoters' puffery boasted, have been "work that has to be done or civilization will cease," it impose a minimum wage except under the Sugar Act, but the regulation remained in force. See Importation of Foreign Agricultural Workers at 97 (Sen. Holland), 196 (Matt Triggs, Ass't Legis. Dir., Am. Farm Bureau Fed'n).


169Temporary Admission of Illiterate Mexican Laborers at 94 (Rep. Raker). The congressman's interlocutor, a South Texas cotton farmer, admitted that the answer would be Yes--if the South diversifed and were not dependent on one crop. Id. at 94-95.


171Seasonal Agricultural Laborers from Mexico at 72 (testimony of Fred Cummings, Colorado sugar-beet farmer).
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contributed powerfully to the rise of the modern ethnic minority and alien migrant farm labor system in the United States (and--not coincidentally--in Germany as well).172

Because, at the beginning of the twentieth century, sugar beet production required considerably more labor than any other farm product, no farmer could perform more than a small part himself.173

As one congressman described the work to his colleagues:

How would any of you, gentlemen or your sons, like to undertake the job of getting down on your hands and knees, thinning out the beets in a row to one beet to every 12 inches, 5,280 in a mile, and 211,200 in 40 miles, and pulling out all the weeds around and between each remaining beet, and hoeing that row backward and forward; a row of beets 40 miles long...and then pulling them up in the fall, knocking the dirt off of them, and cutting off the tops and piling them up?174

In fact, the degree of labor intensity was "so out of proportion with what [wa]s usually necessary in growing other crops" that "[i]t require[d] all the fortitude of a community in establishing a beet-sugar factory to meet the first shock when the revelation of the amount of labor to be performed...first dawn[ed] upon them."175

In the early period of sugar beet growing, around the turn of the century, the contemporary configuration of the state of

172 In Germany the labor-intensive cultivation of sugar beets gave rise to a largely Polish and female migrant labor force at the end of the nineteenth century. See NIchTWeiB, DIE AUSLÄNDISCHEN SAISONARBEITER at 11, 30-33; Richard Krzymowski, GESCHICHTE DER DEUTSCHEN LANDWIRTSCHAFT UNTER BESONDERER BERÜCKSICHTIGUNG DER TECHNISCHEN ENTWICKLUNG DER LANDWIRTSCHAFT BIS ZUM AUSBRUCH DES 2. WELTKRIEGS 1939, at 382-86 (1961); Frieda Wunderlich, FARM LABOR IN GERMANY 1810-1945, at 63 (1961). Germany also witnessed an oligopolization of the refining industry. See John Perkins, The Organisation of German Industry, 1850-1930: The Case of Beet-Sugar Production, 19 J. EUR. ECON. HIST. 549 (1990).

173 More than ten times as much hand labor is required to raise an acre of beets as to raise an acre of wheat...." F. Harris, THE SUGAR-BEET IN AMERICA 45 (1919); USDA, SPECIAL REPORT ON THE SUGAR-BEET INDUSTRY IN THE UNITED STATES 170 (1898). On the secular diminution in labor inputs, see Vladimir Timoshenko & Boris Swerling, THE WORLD'S SUGAR 90-124 (1957); Wayne Rasmussen, Technological Change in Western Sugar Beet Production, 41 AGRIC. HIST. 31 (1967).

174 Seasonal Agricultural Laborers from Mexico at 266 (Rep. Taylor, Col.).

175 USDA, SPECIAL REPORT ON THE SUGAR-BEET INDUSTRY IN THE UNITED STATES 204 (1898).
technology elevated field labor into a major concern. The fruits of science and its application that potentially could eliminate hand labor operations during the seasonal cycle of plant growth were maturing very unevenly. Mechanization of ground preparation, planting, and cultivating was well advanced. Already performance of these operations on whatever scale the growth of the industry might require had been brought within the capacity of the local supply of workers. But the other operations necessary to production of sugar beets had not. ... If beet-growing was to be expanded without delay, large numbers of hand laborers from outside the community would be needed to "block and thin" with hoes and fingers in the spring, and again to "top" beets with heavy knives in the fall—given, of course, (1) the existing farm and population structures of most Western farm communities and (2) a determination by enterprise to make beet-growing and beet sugar manufacture into an industry promptly.176

At the turn of the century, when the production process required four to five field laborers—in addition to the farmers—for every sugar factory worker, "the great problem that confronted capitalists contemplating the building of factories and the managements of factories actually established was: 'Where are we going to secure the labor to grow the beets?' It certainly was the hardest problem they had to solve." Since "[t]hinning and weeding by hand while on one's knees is not a work or a posture agreeable to the average American farmer," "it seem[ed] miraculous at times where they [laborers] all c[a]me from." The owners, however, could count on the state to insure the sequential importation of laborers from Eastern Europe, Asia, and Latin America: "There is a class of labor accustomed to and inclined to do this hand work. They take it in preference to any other kind of work. As a rule they have been reared to do it. It is the work they...apparently...desire most to do. ... It is a calling with them." The use of one racial or ethnic group to compete with and even to break the strikes of others was a conscious element of the plan.177 Hence the origin of the


177USDA, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1904, Sen. Doc. No. 160, 58th Cong., 3d Sess. 36-37, 103 (Rep. No. 80, 1904); idem, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1906, H. Doc. No. 799, 59th Cong., 2d Sess. 24 (Rep. No. 84, 1907); idem, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1907, at 20-25 (Rep. No. 86, 1908). The author of a how-to treatise stated matter-of-factly that "the labor problem is solved by hiring foreigners...." HARRIS, THE SUGAR-BEET IN AMERICA at 46. For a self-celebratory paean to the virtues of sugar-beet labor (including child labor) that verged
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involvement of generations of Mexican and Mexican-American migrants (including young children) in the sugar-beet industry in the West and Midwest, where they were caught in a web of exploitative practices that constituted them as a quasi-captive labor force: "the wages of the Mexicans were kept so low to prevent them from accumulating any capital to buy farms."179

178 The author of a practical treatise praised child labor: "children often can thin beets better and more rapidly than their parents." HARRIS, THE SUGAR-BEET IN AMERICA at 255. See also USDA, PROGRESS OF THE BEET-SUGAR INDUSTRY IN THE UNITED STATES IN 1904 at 39 (beet labor "removes the boy from the temptation of idleness and the school of vicious habits"). The hypocrisy was more obvious still in the claim that while farmers did "not like to get down on their knees, "it was sort of a picnic for the boys" paid five to twelve cents an hour. 10 REP. OF THE INDUS. COMM'N ON AGRIC. & AGRIC. LABOR, H.R. DOC. NO. 179, 57TH CONG., 1ST SES. 555-56 (1901) (testimony of Julius Rogers, Pres., Binghamton Beet Sugar Co.). See also LEONARD ARRINGTON, BEET SUGAR IN THE WEST: A HISTORY OF THE UTAH-IDAHO SUGAR COMPANY, 1891-1966, at 134 (1966) ("[N]o one questions that thinning and topping were backbreaking and wearisome, whether performed by husky Hispanics or earth-loving Mormons"). On the widespread labor by children of other ethnic groups (especially German-Russians), see CHILD LABOR AND THE WORK OF MOTHERS IN THE BEET FIELDS OF COLORADO AND MICHIGAN (U.S. Children's Bureau, Pub. No. 115, 1923). Cultivation of sugar beets was by no means the only example of hired child labor in agriculture before World War II. The parents of thousands of largely Italian children in Philadelphia removed them from school as early as February to work with them on truck farms in Pennsylvania, Delaware, and New Jersey harvesting asparagus, strawberries, tomatoes, raspberries, blackberries, peas, beans, cranberries, and potatoes. Owen Loveloy, The Cost of the Cranberry Sauce, 26 SURVEY 605 (1910-11); Farm Work and City School Attendance, MONTHLY LAB. REV., Dec. 1922, at 150. Perhaps the highest child labor force participation rate was found in the Rio Grande Valley in the early 1940s, where among farm worker families one-sixth of the six and seven-year-boys and more than one-half of the eight and nine-year-olds worked. AMBER WARBURTON, HELEN WOOD, & MARIAN CRANE, THE WORK AND WELFARE OF CHILDREN OF AGRICULTURAL LABORERS IN HIDALGO COUNTY, TEXAS tab. 6 at 20 (U.S. Children's Bureau Pub. No. 298, 1943).

The migrant agricultural wage policy that underlay the aforementioned self-fulfilling racist prophecy led to early predominance by Mexican workers in the sugar-beet labor force. Because the employing firms adopted "a wage level based on family labor," the whole family was constrained to work. Even before the large-scale use of Mexican laborers, promoters of the new industry praised its receptivity to family labor. "Germans, French, Russians, Hollanders, Austrians, Bohemians...naturally sought this new avenue of employment [which] appealed to them" because:

in the beet fields they could find work for their whole families. In this respect it differed from other lines of work. The head of the house could go out and dig in the trenches of the city, or work on the sections of the railroad, or in excavations and other kinds of employment under a contractor. The women and children of the family could not do this.

During the Depression, the Great Western Sugar Company explicitly

(1989); idem, Settlers, Sojourners, and Proletarians: Social Formation in the Great Plains Sugar Beet Industry, 1890-1940, 10 GREAT PLAINS Q. 110 (1990); idem, AL NORTE. Until the expiration of the bracero program in 1964, large numbers of Mexican workers were imported to cultivate sugar beets. See S. REP. NO. 1549: THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES, 89th Cong., 2d Sess. 9 (1966). In 1962, for example, they accounted for twenty-four per cent of all seasonal sugar-beet workers in the United States. HOUSE COMM. ON THE JUDICIARY, ADMISSION OF ALIENs INTO THE UNITED STATES FOR TEMPORARY EMPLOYMENT AND "COMMUTER WORKERS" tab. 12 at 48. On the considerably lower wages paid "Mexican" "contract labor" (vis-à-vis "regular labor") for thinning and topping, see ROY BLAKEY, THE UNITED STATES BEET-SUGAR INDUSTRY AND THE TARIFF tab. LIII at 268 and LIV at 269 (1912); CHARLES MEYERS, THE MEXICAN PROBLEM IN MASON CITY, 27 IOWA J. HIST. & POL. 227, 233-34 (1929); MAY, THE GREAT WESTERN SUGARLANDS at 415-17.

180"[T]he only fellow we can keep under our feet is the Mexican or the negro...." Temporary Admission of Illiterate Mexican Laborers at 94 (testimony of Fred Roberts, South Texas cotton farmer).

181By 1927, three-quarters of sugar-beet laborers in Ohio, Michigan, Minnesota, and North Dakota were Mexican; in 1939, 53,929 (56.8 per cent) of 93,109 beet workers nationally were said to be Mexican. NATIONAL DEFENSE MIGRATION pt. 19 at 7873, 7874.

182Johnson Wages, Employment Conditions, and Welfare of Sugar-Beet Laborers at 327. A family wage based on the labor of the whole family was not unique to migrant farm work. See, e.g., HERBERT LAHNE, THE COTTON MILL WORKER 129-36 (1944). For the nineteenth-century British context, see Jane Mark-Lawson & Anne Witz, FROM "FAMILY LABOUR" TO "FAMILY WAGE"? The Case of Women's Labour in Nineteenth-Century Coalmining, 13 SOC. HIST. 151 (1988).

183USDA, PROGRESS OF THE BEET-SUGAR INDUSTRY OF THE UNITED STATES IN 1904 at 37.
advertised that beet work was very "convenient" for families because they would not have to rely exclusively on the father's wages. This enforced incorporation of small children working "very long hours at strenuous labor" had, in turn, a "depressing effect on wage rates." By contracting only with the father, however, employers could make it appear that the parents, not they, were responsible for widespread child labor.184

The New Deal, ostensibly animated by the glaring inequities associated with the subsidies that taxpayers and consumers provided to the oligopolistic sugar refiners,185 which were joint employers with the farmers,186 purported to impose limits on the exploitation of beet


185 See generally, McWilliams, Ill Fares the Land at 122-27. The Secretary of the Interior confided to his diary in 1934 that for precisely these reasons Pres. Roosevelt was considering phasing out the high tariff over a twenty year period. The Secret Diary of Harold L. Ickes: The First Thousand Days 1933-1936, at 147 (1953). For a different view, see Leonard Arrington, Science, Government, and Enterprise in Economic Development: The Western Sugar Beet Industry, 41 Agric. Hist. 1 (1967). Vis-à-vis the farmers, the sugar refiners were often monopsonists since the bulkiness and perishability of the beets limited their sale to the local plant. On the origins of the oligopoly, see Alfred Eichner, The Emergence of Oligopoly: Sugar Refining as a Case Study (1969). On the early history, location, and government support of the sugar beet industry, see FTC, Report on the Beet Sugar Industry in the United States 2-16 (1917). In the 1920 and 1930s, the Great Western Sugar Co. alone produced 30-40% of the sugar in the United States. Seasonal Agricultural Laborers from Mexico at 245 (statement of C. Maddaux, Labor Comm'r, Great Western Sugar Co.); Abbott, Report for the Committee on Labor Conditions in the Growing of Sugar Beets at 24.

186 In Michigan, for example, sugar companies paid the workers directly, deducting the wages from the crop payments to the farmers. J. Thaden, Migratory Beet Workers in Michigan 29 (Mich. State Coll. Agric. Experiment Station Spec. Bull. 319, 1942). See also Johnson, Wages, Employment Conditions, and Welfare of Sugar-Beet Laborers at 324-27; Seasonal Agricultural Laborers from Mexico: Hearing Before the House Comm. on Immigration and Naturalization at 121 (statement of J. Breakenridge, Iowa sugar beet farmer). The triangular contracts—refinery and grower/refinery and laborer/grower and laborer—suggest in addition that the farmers may also have been employees of the manufacturers. See the sample contracts in 24:2 U.S. Immigration Comm'n, Immigrants in Industries: Recent Immigrants in Agriculture, S. Doc. No. 633, 61st Cong., 2d Sess. 573-75 (1911); Harris, The Sugar-Beet in
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laborers. The result was the first--and until the 1960s the only--federal legislation designed to protect domestic agricultural workers. Its administration and enforcement revealed the same ambivalence and half-heartedness that was to characterize all later regulation of agricultural sweatshops.

The Sugar Act of 1937 did not establish a minimum wage laying an absolute floor under workers' earnings; instead, it conditioned receipt by farmers of government subsidies on their refraining from employing children under fourteen and on their contracting with workers at "fair and reasonable" wage rates to be determined by the Secretary of Agriculture after holding public hearings. Since beet workers had little or no representation at these hearings, however, and the Department of Agriculture unabashedly administered the program to benefit its agricultural-employer constituents, the minimum rates tended to become a

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Notes:


188 Sugar Act of 1937, ch. 898, § 301, 50 Stat. 903, 909-10 (1937), as amended by Sugar Act of 1948, ch. 519, § 301(c)(1), 61 Stat. 922, 930 (1947) (codified at 7 U.S.C. § 1131(c)(1) (1973)). The short-lived Jones-Costigan Act authorized but did not require the Secretary of Agriculture to condition payments on compliance with child labor and minimum wage regulations. § 4, 48 Stat. at 674. During World War I Britain created a precedent for such regulation by imposing a minimum wage for agricultural workers in connection with guaranteeing farmers a minimum price for wheat and oats. Corn Production Act, 1917, 7 & 8 Geo. 5, ch. 46. By the mid-1920s it was replaced by the Agricultural Wages (Regulation) Act, 1924, 14 & Geo. 5, ch. 37, which regulated agricultural wages generally through agricultural wages boards.

189 Workers were unrepresented because the USDA chose to hold public hearings in the beet-growing areas during the winter after the migrants had already returned home. This situation was not corrected until 1964, when the USDA began holding hearings in South Texas. See 29 Fed. Reg. 4871-72 (1964). Even then the USDA remained unresponsive to workers' demands. See, e.g., Wage-Setting Procedures under the Sugar Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 92d Cong., 2d Sess. (1972); Angel v. Butz, 487 F.2d 260 (10th Cir. 1973). On the short shrift given the few worker representatives at the very first hearings in 1937 and 1938, see VALDES, AL NORTE at 44.

190 See Kent Hendrickson, The Sugar-Beet Laborer and the Federal Government: An
maximum, which employers could then justify as a government mandate not subject to further negotiation. To the extent that the Secretary's determination merely mirrored and perpetuated the historical relationship between workers' wages per acre and farmers' gross income per acre, which resulted from the extreme disparity in power between employees and employers (including the sugar oligopolies), this New Deal innovation did nothing but "place the stamp of legitimate authority upon the private agreements of employers."192

Because the Sugar Act never addressed the issue of the family labor/wage system, compliance with the minimum wage provision was scarcely enforcible.193 The wage-rate determinations

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193 Where it is common for a family of migrant laborers to work as a group, and the wages for the family are paid to the head of the family, there may be some difficulty in ascertaining compliance with a minimum wage required by law. This problem is apparently handled under the Sugar Act by an attestation by the head of the family that each member's compensation is not less than the minimum wage requirement.
by the Secretary of Agriculture actually reinforced that system by permitting farmers to pay piece (acreage) rates in lieu of the prescribed hourly rates, which largely remained a dead letter. Moreover, even if payment of the hourly minimum wage had been widespread, the procedure by which workers were entitled to submit wage claims was preposterously biased: the tribunal adjudicating the dispute consisted exclusively of local farmers. The pre-modern character of this quasi-protective statute is seen most clearly in a 1940 amendment that effectively offered amnesty to those who had violated the child labor provision from 1937 through 1939 by retroactively reducing the penalty from total loss of the subsidy to a mere ten dollars per child-day of violations. The final speech in the debates captured the spirit of the legislation: "I suppose the gentlewoman from Massachusetts would have us penalize a farming operative $50,000 or $100,000 or $300,000 for violating some crazy law that Congress enacted...?" And finally, the Department of Agriculture undermined wage standards by authorizing payment of only two-thirds of the mandatory rate to "workers between 14 and 16 years of age." The inevitable consequence was the massive

1 Kantor, Problems Involved in Applying a Federal Minimum Wage to Agricultural Workers at 192-93. Simulating compliance with federally mandated hourly wages by "including an entire family's earnings on one pay slip" was commonplace among employers in the sugar-beet industry. Valdés, Al Norte at 102. Current experience confirms that migrants typically are economically coerced into signing such statements, have internalized the compulsion and need no prompting, or are unaware of their entitlement to the minimum wage when they are working on a piece rate.


subsidization of agricultural employers through public relief of its underpaid workers.197

Since the termination of the Sugar Act in 1974, migrant families hoeing sugar beets have frequently been without any legal recourse vis-à-vis employers, many of whom treat them as independent contractors.198 Because many of the farms employ no other hired labor, they do not reach the threshold for coverage under FLSA.199 Where state minimum wage laws exclude "any individual employed in agriculture,"200 the workers can seek no

197See, e.g., 23 Fed. Reg. 2093 (1958); Johnson, Wages, Employment Conditions, and Welfare of Sugar-Beet Laborers at 337-38. In Michigan, shortly before U.S. entry into World War II, the state relief agency was not supposed to make relief payments so as to subsidize an industry that did not pay a living wage. And despite the (ironic) complaint by sugar-beet farmers that offering such relief to sugar-beet workers would create a labor shortage, the agency at times determined that workers were eligible in part because their wages were so low and in part because they were not paid at all while employed. See National Defense Migration at 7886-87. Employers frequently held back part of the acreage rate for springtime thinning in order to discourage workers from not returning for the fall topping. Id. at 7881-82.


199The minimum wage provision of FLSA does not apply to "any employee employed in agriculture...if such employee is employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor." 29 U.S.C. § 213(a)(6)(A) (Supp. 1991). In the Rocky Mountain states, for example, sugar-beets farmers employ on the average only three seasonal workers. Extension of Mexican Farm Labor Program at 165 (testimony of Fred Holmes, labor comm'r, Great Western Sugar Co.). The Migrant & Seasonal Agricultural Worker Protection Act (AWPA) adopts as its small business exemption for agricultural employers the FLSA 500-man-day standard. 29 U.S.C. § 1803(a)(2) (1985).

200See, e.g., Neb. REV. STAT. § 48-1202(4) (1987). The minimum wage laws in most states in which migrant beet laborers work do not cover agricultural employees. See, e.g., IDAHO CODE § 1504 (Supp. 1991); WYO. STAT. § 27-4-201(a)(iv)(A) (1987). The minimum wage law in Montana covers farm workers, but permits farmers to pay piece rate workers a minimum of $635 per month (minus housing), which, given the hours that migrants work at the height of the sugar-beet season, would work out to far less than the state minimum wage. MONT. CODE. ANN. § 39-3-404(2)(b) (1991). Although
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protection there. Because the sugar-beet farmers largely recruit workers directly without the use of farm labor contractors, state laws regulating agricultural labor contractors also provide no remedy. Thus so long as the farmer pays the workers the agreed-upon acreage piece rate, even if it worked out to ten cents per hour, the farmer would have done nothing actionable.201

For decades agricultural employers throughout the Midwest and West have failed to offer wages high enough to induce local workers to perform the very hard and unpleasant labor that thinning sugar beets, detasseling corn, and weeding soybeans require. Consequently, these industries, which are vital to the economy of many midwestern states, would, as the general counsel for the Great Western Sugar Co. once told Congress, "probably be very hard put to remain viable" without importing Mexican and Mexican-American migrants from Texas202--and paying them wages unacceptable to local workers.

These permanently substandard conditions under which agricultural firms have been able to employ migrants--and which are merely illustrative of migrant labor standards generally--have in large part been made possible by state intervention. The next chapter examines the structure and consequences of state intervention on behalf of the workers themselves.

the statutes in North Dakota and Colorado authorize the state labor commissioner to prescribe a wage standard for agricultural employees, no such standards have been adopted. See Federal and State Employment Standards and U.S. Farm Labor: A Reference Guide to Labor Protective Laws and Their Applicability in the Agricultural Workplace 127-28, 553 (Brian Craddock ed. 1988).

201See, e.g., Nebraska Farm Labor Contractors Act, Neb. Rev. Stat. §§ 48-1701-1714 (1988). A former migrant beet worker from the Rio Grande Valley, who had long since become a white-collar worker, discovered that his relatives thinning beets for the Great Western Sugar Co. in Colorado in the 1980s were being paid eighteen dollars per acre—only two dollars more than he had received thirty years earlier. When a reporter interviewed the company, its first line of defense was that "independent farmers" paid the workers. Dianna Solis, On the Move: From Farm to Farm, Migrant Workers Struggle to Survive: Texans and Illegal Hispanics Vie for Jobs Paying Below Minimum Wage, Wall St. J., May 15, 1985, at 1, col. 1, at 18, col. 1.

Appendix:
Hourly Wage Equivalents for Farm Family Labor

The argument in this chapter included the claim that migrants' low wages are in part accounted for by the low incomes and underemployment of farm family labor. The analogy extends also to the fact that, in spite of the rationality models underlying econometric studies, farm families, like migrants, are probably unaware of "the marginal value" of their farm work hours because they do not think in those terms, but rather in terms of the total income necessary to maintain a customary standard of living. Remarkably little research appears to have been done on the issue of calculating such hourly wage equivalents.

The 1964 Census of Agriculture collected a unique set of data (for the period March 1965-March 1966) on the annual hours worked by all members of the farm household (including the operator), which makes possible a rough estimate of family labor compensation. Unpaid family workers (including children ten to thirteen years old) recorded 7,951,565,000 hours of labor (or about 2,404 hours per farm) for the year. The returns to operators (including returns to management, labor, and equity capital) in

204 Conversations with agricultural economists at the Economic Research Service (ERS) of the USDA revealed that those in charge of collecting the underlying data neither made such calculations nor knew of studies that had, although one speculated that farm family members probably earned no more than the minimum wage. The data in this appendix should not be confused with statistical or econometric studies in which "unpaid labor is assumed to be worth the equivalent of the hired wage rate." ERS, 12 MAJOR STATISTICAL SERIES OF THE U.S. DEPARTMENT OF AGRICULTURE: COSTS OF PRODUCTION 4 (Agric. Handbook No. 671, 1987). See also Wallace Huffman, The Productive Value of Human Time in U.S. Agriculture, 58 AM. J. AGRIC. ECON. 672, 676 (1976).
205 Calculated according to data in 3 BOC, 1964 CENSUS OF AGRICULTURE, PT. 2: FARM LABOR 11, 60-61 (1967).
206 These returns are "calculated as the residual income after all nonfactor payments and payments to other factors of production are made." ERS, ECONOMIC INDICATORS OF THE FARM SECTOR: NATIONAL FINANCIAL SUMMARY, 1985, at 4 (1986).
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1965 amounted to $11,832,000,000. This income translates into an hourly wage of $1.49. The minimum wage at the time was $1.25, while the average wage in manufacturing was $2.61. A somewhat higher wage equivalent ($1.62) results from using the broader category of net farm income (which includes noncash income from home consumption of farm products and the imputed rental value of dwellings).

This aggregate average figure is misleading because the smaller the farm, the greater the amount of family labor—itsel itself an indicator of the greater intensity of self-exploitation on small farms. Thus, for example, on the 506,000 class IV farms, the largest class of commercial farms (with sales valued at between $5,000 and $9,999), unpaid family members (including 10-13 year-olds) worked 3,564 hours in 1965. Even using the broad category of net farm income (which averaged $3,211 per class IV farm), for the almost 900,000 such workers, who accounted for more than one-quarter of all unpaid family workers, the hourly income amounted to only $0.90. The significantly larger number of hours of farm family labor found in a survey conducted by the USDA the following year would result in even lower calculated hourly incomes.

These equivalent hourly rates comport with a USDA series (discontinued in the 1960s) showing that, for most types of farms, returns per hour to operator and family labor were "lower than wage rates for hired labor" on such farms. Some of the low returns were

210Calculated according to data in 3 BOC, 1964 CENSUS OF AGRICULTURE, PT. 2: FARM LABOR 11, tab. 1 at 13, tab. 2 at 14, tab. 6 at 68; ERS, ECONOMIC INDICATORS OF THE FARM SECTOR: NATIONAL FINANCIAL SUMMARY, 1985, tab. 34 at 49 (1986). Hourly family labor incomes also differed significantly according to the crop produced. Thus although vegetable and fruit farms were by far the most labor intensive (10,203 and 7,576 total hours annually respectively), the share performed by unpaid family members was also by far the lowest (17.5 and 19.2 per cent respectively compared with an aggregate average of 71.6 per cent). 3 BOC, 1964 CENSUS OF AGRICULTURE, PT. 2: FARM LABOR at 11.
attributed "to the lack of alternative employment for other members of the operator's family."\textsuperscript{212} Despite the different data base used, these hourly wage equivalents are also consistent with findings that in 1960 only ten per cent of farm family workers--those on the largest farms in terms of value of sales--"received average labor incomes on a full par with factory worker earnings."\textsuperscript{213} Had off-farm and nonmoney income been excluded, only three per cent of family workers would have received factory-worker-like earnings.\textsuperscript{213}

Such calculated equivalent hourly wages are, finally, also consistent with the following conclusion of another study using the same 1964 Census of Agriculture data: "Being self-employed or working as an 'unpaid' family worker are ways [sic] of circumventing the unemployment effects of minimum wage legislation."\textsuperscript{214}


\textsuperscript{213}Luther Tweeten, \textit{The Income Structure of Farms by Economic Class}, 47 \textit{J. Farm Econ.} 207, 213 (1965). Even this figure is an overstatement since Tweeten assumed the same number of family workers (1.2) per farm. \textit{See also Theodore Schultz, Agriculture in an Unstable Economy} 108 (1945); D. Johnson, \textit{Functioning of the Labor Market}, 33 \textit{J. Farm Econ.} 75, 77-78 (1951).

\textsuperscript{214}Wallace Huffman, \textit{The Value of the Productive Times of Farm Wives: Iowa, North Carolina, and Oklahoma}, 58 \textit{Am. J. Agric. Econ.} 836, 841 (1976). The ERS has synthesized an unpublished series of aggregate hours data which, when set in relation to the aforementioned returns to operators data, reveal that from the end of World War II until approximately the end of the postwar international food order (marked by the Soviet grain deal of 1973), the aggregate average hourly wage equivalent hovered in the vicinity of the federal minimum wage. Despite some sharp fluctuations, the hourly equivalents significantly exceeded the minimum wage by the end of the 1980s. These later wage equivalents may result from defects in the construction of the hours data leading to considerable understatement of the hours. In 1989, for example, when there were at least two million farms, the hours data were based on an estimate of only 1,200,000 operators and unpaid family workers. The hours data (for 1947-89) were made available by Eldon Ball, Resources & Technology Div., ERS. The returns to operators data are taken from ERS, \textit{Economic Indicators of the Farm Sector: National Financial Summary}, 1985, tab. 1 at 12; unpublished data furnished by Linda Farmer, ERS, Agric. & Rural Economy Div. (1987-90). On the break in the trend line in 1973, see Harriet Friedmann, \textit{The Political Economy of Food: The Rise and Fall of the Postwar International Food Order}, in \textit{Marxist Inquiries: Studies of Labor, Class, and States} S248 (Michael Burawoy & Theda Skocpol ed. 1982) (= 88 \textit{Am. J. Soc. Supp.} 1982).
The Limits of Welfare-State Paternalism

Where labour is weak—and its strength or weakness depends largely on factors outside the control of law—Acts of Parliament, however well intentioned and well designed...cannot do much to modify the power relation between labour and management. The law has important functions in labour relations, but they are secondary if compared with the impact of the labour market (supply and demand) and...with the spontaneous creation of a social power on the workers' side to balance that of management.1

I. Weak Workers and State Intervention

Can legislatures and courts enable workers with little or no economic power to bypass disadvantageous labor-market forces long enough to create a breathing space in which to forge such power? Or are "[t]he laws of trade...stronger than the laws of men"?2 Despite the fact that The Road to Serfdom3 has been definitively

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3Friedrich Hayek, The Road to Serfdom (1944 [1976]). Even--or precisely—Hayek has acknowledged that: "We must face the fact that the preservation of individual freedom is incompatible with a full satisfaction of our views of distributive justice." Friedrich Hayek, Individualism and Economic Order 22 (1980 [1948]). Although Hayek has in mind an aspect of collective rationality, one way of dealing with it would be centralized decision-making based on the collectivity's superior overview of the current economic framework and of the long-run effects of current decisions on
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paved in the advanced capitalist societies, debate still surrounds the issues of the extent to which individuals need to be protected against disruptive-anarchic market forces and of the superior competence of the state to make decisions on behalf of individuals. More poignant still is the perennially unresolved dilemma of how to empower marginalized groups without frustrating the emergence of their autonomy by that very act of state benevolence.

In his internationally oriented discussion of the late-nineteenth-century working class, Eric Hobsbawm argues that the state unified the class, since increasingly any social group had to pursue its political aims by exerting pressure on the national government, in favour of or against the legislation and administration of national laws. No class had a more consistent and continuous need for positive state action on economic and social matters, to compensate for the inadequacies of their unaided collective action....

In this context it is crucial to distinguish between two different modes of interaction between the working class and the state. On

the realizability of individuals’ goals. This is essentially the same issue that ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 160-64 (1974), analyzes as the Wilt Chamberlain problem (consenting adults engaging in so-called clean acts of accumulation will inevitably create inequalities). Even Analytic Marxism leans in this direction. See G. Cohen, Are Freedom and Equality Compatibile? in ALTERNATIVES TO CAPITALISM 113, 125-26 (J. Elster & K. Moene ed. 1989).


For the view that the debate has never even been properly joined, see GEORGE STIGLER, THE CITIZEN AND THE STATE 3-13 (1975).


Dicey’s notion of “collectivism” subsumes both of these types by combining anti-laissez faire policies with those based on a belief in the superior capacity of the government to protect individuals even where it interferes with their individual liberty. A. DICEY, LECTURES ON THE relation between LAW & PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 259-301 (1905).
the one hand, that class may use the state apparatus as a convenient
mechanism for imposing uniform working conditions or social
benefits that it has been able to extract from the employing class
through concerted effort on a local or industrial basis. Here it has
etatized collective self-help. On the other hand, the working class
(or various of its fractions) may be compelled to resort to
influencing the state politically in order to bring about economic
conditions that it is not strong enough to win on its own for the bulk
of workers. In some instances, it may engage in a "civil war" against
the whole class of employers in order to enforce shorter working
hours, while at the same time coercing individual workers to submit
to class-wide standards. In other historical situations, the working
class may be so weak that "middle class reformers" constitute the
driving force behind state imposition of such conditions on the
employing and employed classes. In other words, "voluntarism,"
that is, trade-union self-sufficiency and abstentionism vis-à-vis state

9 In an interesting variant, in the late 1940s and early 1950s, the United Auto
Workers, having been out-lobbied by the large automobile companies in its effort to
secure increased old-age social security pensions from Congress, succeeded in securing
improved private pensions from those companies through industrial action and
collective bargaining. Once the companies had the inducement of reducing their
private pension costs and increasing those of other employers, the UAW succeeded in
persuading them to join in renewed congressional lobbying. JILL QUADAGNO, THE
TRANSFORMATION OF OLD AGE SECURITY: CLASS AND POLITICS IN THE AMERICAN
WELFARE STATE 159-68 (1988).

10 On the complicated character of such struggles, see 1 MARX, DAS KAPITAL ch.
10 §§ 6-7; CHRIS NYLAND, REDUCED WORKTIME AND THE MANAGEMENT OF
PRODUCTION 11-16 and passim (1989). At the extreme, it has been argued that the
claim that

[Law] is bound to serve...the class responsible for social production...holds
true even if, within the ruling class, there are no groups which are both
willing and able to enforce the general interests of a capitalist society
against individual capitalists, so that the pressure necessary to have the law
enacted must be exercised by the [workers] themselves.

RUDOLF SCHLESINGER, SOVIET LEGAL THEORY: ITS SOCIAL BACKGROUND AND
DEVELOPMENT 19-20 (2d ed. 1951 [1945]). A major gap in this approach is its failure
to provide an account of the political filtration and decision-making processes that
would inexorably generate the result most functional to capital.

11 If those who wish to use state regulation as a means of raising the plane of
competition are primarily middle class reformers, then this method is likely to be
restricted to the most sweatied industries or classes.” PAUL DOUGLAS, THE ECONOMIC
THEORY OF WAGE REGULATION, 5 U. CHI. L. REV. 184, 194 (1938). For a nineteenth-
century example, see J. HAMMOND & BARBARA HAMMOND, LORD SHAFTESBURY 83-
146, 162-74 (1939 [1923]).
intervention,12 "is as weak or as strong as the social, not the legal, conditions allow; for it rests to a significant extent upon autonomous union bargaining strength."13

Distinguishing between these two fundamentally different types of working-class recourse to the state helps make prominent the fact that a significant component of state intervention as embodied in labor law is continuous with an older, pre-industrial, and in part pre-capitalist tradition of poor-law relief.14 Yet a policy bordering on the philanthropic-humanitarian, solidaristic, or even coercive--such as outlawing wages below a certain level where neither the forces of the labor market nor the bargaining strength of the workers involved can sustain such a level--should not be analyzed as if it were the result of programmatically confrontational class conflict even where the ruling classes are largely motivated by the fear of the disorder that might follow widespread material privation.15 Instead it is crucial to differentiate between two related but nevertheless distinct constellations of labor market forces. One refers to the general relationship between supply and demand while the other involves the opportunity afforded employers to take advantage of individual workers' extraordinary need in order to press the wage below its customary minimum level. Unions in effect

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14See Spiros Simitis, Zur Verrechtlichung der Arbeitsbeziehungen, in VERRECHTLICHUNG VON WIRTSCHAFT, ARBEIT UND SOZIALER SOLIDARITÄT 73, 86-87 (F. Kühler ed. 1985); QUADAGNO, TRANSFORMATION OF OLD AGE SECURITY at 6, 24-27.

15See, e.g., IMMANUEL WALLERSTEIN, THE MODERN WORLD-SYSTEM III: THE SECOND ERA OF GREAT EXPANSION OF THE CAPITALIST WORLD-ECONOMY, 1730-1840s, at 120 (1988). The rates-in-aid-of-wages regime that existed in Britain between the 1790s and the inception of the New Poor Law in 1834 (that is, the so-called Speenhamland system), functioned, contrary to Wallerstein's view, not only as a minimum wage but also as a maximum wage. See KARL POLANYI, THE GREAT TRANSFORMATION 77-102 (1944); E. HOBSBAWM & GEORGE RUDÉ, CAPTAIN SWING 49-51 (1975 [1968]); RAYMOND COWHERD, POLITICAL ECONOMISTS AND THE ENGLISH POOR LAWS 117 (1977). See generally, 7 SIDNEY WEBB & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: ENGLISH POOR LAW HISTORY, pt. I: THE OLD POOR LAW 168-89 (1927). Supplementing a minimum wage with an earned income tax credit differentiated according to family size is the functional equivalent of the principle of less-eligibility, which guided able-bodied relief under the New Poor Law and still underlies welfare policy in the United States. See infra ch. 3.
operate as "insurance societies" to prevent the latter possibility.\footnote{Karl Marx, \textit{Das Kapital (Ökonomisches Manuskript 1863-1865)}, in II:4 Marx \& Engels, Gesamtausgabe (MEGA) at 11-12 (1988).}

The aforementioned two modes of interaction between the working class and the state correspond to these two labor market situations.\footnote{Paul Rubin, \textit{Business Firms and the Common Law: The Evolution of Efficient Rules} 31 (1983), envisions a third situation: if class actions were generally allowed, then we would expect the same types of agents to litigate as now lobby for statutes. That is, to the extent that the legal system allows class interests to litigate, then the common law system approaches the statutory system and the sort of inefficient legislation that has been statutorily established in recent years would occur instead through common law means. For example, if unions filed \textit{amici} briefs for some low-paid workers, the issue of wages could have been litigated by arguing that wages below some minimum were "unconscionable" and hence, a minimum wage law would have passed by litigation rather than by statute.}

Where that class merely seeks state ratification of an existing de facto minimum wage secured through market forces and negotiation, legislation appears more as an extension of the private collective ordering of the labor market than as state intervention. In contrast, the second scenario, in which the state imposes a minimum on the parties, invites analysis as paternalism.

\section*{II. The Structure of Paternalism}

Caution is called for in structuring historical understanding through the use of a category such as paternalism because it is a loose descriptive term. It has considerably less historical specificity than such terms as feudalism or capitalism.\footnote{See \textit{Restatement (Second) of Contracts} \S\ 208 (1981 & App. 1986, & Supp. 1988); C. Macpherson, \textit{The Rise and Fall of Economic Justice} 18-19 (1987 [1985]). Kahn-Freund, \textit{Labour and the Law} at 23, found no British labor "case in which a court invalidated a contract by reason of gross exploitation." A Westlaw/Lexis search also revealed no case involving an unconscionably low wage. \textit{See infra} ch. 7.}
much and as little value as other generalized descriptive terms—authoritarian, democratic, egalitarian—which cannot in themselves, and without substantial additions, be brought to characterize a system of social relations. No thoughtful historian should characterize a whole society as paternalist or patriarchal. But paternalism can, as in Tsarist Russia, in Meiji Japan, or in certain slaveholding societies, be a profoundly important component not only of ideology but of the actual institutional mediation of social relations.\textsuperscript{18}

These snare of ahistoricity do not imperil its use here, which invokes no such totalizing macrosocial analysis. Instead, paternalism will be confined to a heuristic examination of the consequences for workers without labor-market power of the protection that the state confers on them. The following methodological admonition is valid in this setting as well as in studying earlier paternalist agents such as pre-liberal authoritarian states, eighteenth-century Tory-patricians, slaveowners, or capitalist employers:\textsuperscript{19}

Comparisons...have some validity, so long as they are restricted to the psychological model of the family as the universal prototype for the exercise of authority. ... Paternalism does not exist indiscriminately across time and place. Specific paternalisms


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represent specific social and cultural bridges across the gap of ultimately irreconcilable interests. They afford a measure of maximizing the decency and self-respect with which the powerful and the unarmed can share the same territory.20

The socioeconomic paternalism that constitutes a key aspect of the modern labor-protective welfare state appears in a form qualitatively different from that of any of these historical predecessors.21 For unlike other paternalisms, this (quasi-authorized) agent neither expects nor demands reciprocity or willing obedience from the beneficiaries. As the first formal-democratic paternalist, it purports to have no ulterior motive in implementing the will not only of the majority but of the majority of the paternalized.22

Insofar as the welfare state serves to reproduce the working population in a form specifically functional to capital by modifying the reproduction of labor power, that function and the basic social-welfare needs of the working class become so fused in reality and consciousness that in the amalgam of elements constituting income security programs it is difficult to disengage capitalist social control


21Indeed, Genovese takes the position that "[t]he subordination...of the people of any country to a welfare state does not constitute a paternalistic order in any historically meaningful sense." GENOVESE, ROLL, JORDAN, ROLL at 611. But see L. MOREAU DE BELLAING, L'ÉTAT ET SON AUTORITÉ: IDEOLOGIE PATERNELISTE (1976).

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from the working-class agenda. Unlike other paternalisms, labor-protective regimes are in conflict with the self-regulating mechanisms of market-mediated capital accumulation while protecting capitalism from self-destruction. In this sense alone it may be said that "[m]orality arises from market failure."24

The underlying principle of such paternalism is

that it is justified to restrict a person's liberty of choice, without his consent, even when the person's action would affect himself only, when the person is not considered to be in a position to know his best interests and the behavior imposed is believed to be in those best interests.25

Although John Stuart Mill is the modern philosophical fountainhead of deontological prohibitions on community interference with the self-regarding decisions of competent adults,26 he also furnished

[Footnotes]


24 David Gauthier, Morals by Agreement 84 (1987 [1986]). Gauthier can reach this conclusion only by way of a whimsical argument to the effect that "wage slavery" is incompatible with competitive markets. Id. at 97, 111-12.

25 Steven Kelman, Regulation and Paternalism, 29 PUB. POL’Y 219, 220 (1981). Donald VanDeVeer, Paternalistic Intervention: The Moral Bounds of Benevolence 22 (1986), offers this somewhat different description of paternalism: A deliberately does X, believing that doing X is contrary to S's operative preference, intention, or disposition at the time A does X; and A does X with the primary or sole purpose of promoting a benefit for S which A believes would not accrue to S in the absence of A's doing it. Andreas Papandreou, Paternalistic Capitalism 6, 166 (1972), uses paternalistic in a deviant sense to apply to non-benevolent autocratic command economies.

26 J. Mill, On Liberty ch. 1 & 4 (1859). Donald Regan, Justifications for Paternalism, 15 NOMOS 189, 189 (J. Pennock & J. Chapman ed. 1974), finds no "influential philosophical discussion" after Mill. For general philosophical discussions,
powerful act-utilitarian underpinning for the view that state prescription, for example, of (premium pay for) maximum hours may not be paternalistic. For such "interference of law is required, not to overrule the judgment of individuals respecting their own interest, but to give effect to that judgment: they being unable to give effect to it except by concert, which concert again cannot be effectual unless it receives validity and sanction from the law."27

Here Mill was alluding to a variation of the free rider problem. In the canonical case, some members of the class have an incentive to desert their fellow workers because they can secure the benefits of class action without bearing any of the associated costs.28

For however beneficial the observance of the regulation might be to the class collectively, the immediate interest of every individual would lie in violating it.... If nearly all restricted themselves to nine hours, those who chose to work for ten would gain all the advantages of the restriction, together with the profit of infringing it; they would get ten hours' wages for nine hours' work, and an hour's wages beside. ... Probably...so many would prefer the ten hours' work on the improved terms, that the limitation could not be maintained as a general practice: what some did from choice, others would soon be obliged to do so from necessity, and those who had chosen long hours for the sake of increased wages, would be forced in the end to work long hours for no greater wages than before. ... [S]uch an enactment...serves to exemplify the manner in which classes of persons may need the assistance of law to give effect to their deliberate collective opinion of their own interest, by affording to every individual a guarantee that his competitors will pursue the same course, without which he cannot safely adopt it himself.29

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see JOHN KLEINIG, PATERNALISM (1984); VANDEVEER, PATERNALISTIC INTERVENTION; JOEL FEINBERG, HARM TO SELF (1986); Dan Brock, PATERNALISM AND AUTONOMY, 98 ETHICS 550 (1988). Mill did not believe "that every individual has an equal claim to control over the government of other people." In effect shifting paternalism one step backward, Mill proposed an education-based electoral hierarchy that would insure that those who possessed the qualifications for exercising power over others "beneficially" would receive multiple votes. John Stuart Mill, Thoughts on Parliamentary Reform, in 4 JOHN STUART MILL, DISSERTATIONS AND DISCUSSIONS: POLITICAL, PHILOSOPHICAL, AND HISTORICAL 22, 23-27 (1867 [1859]).

27JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY 963 (7th ed. W. Ashley ed. 1936 [1848]).


29MILL, PRINCIPLES OF POLITICAL ECONOMY at 964-65.
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In the case posited by Mill, the problem is not that some workers will reap the benefits that others have sown, but rather that, unless all workers agree to resist working longer hours, the force of competition will deprive all workers of the shorter workday. Where, as here, state intervention serves to solve the free rider problem, Gerald Dworkin has argued that it is no longer paternalistic because "compulsion is not used to achieve some benefit which is not recognized to be a benefit by those concerned, but rather because it is the only feasible means of achieving some benefit which is recognized as such by all concerned."30 This view rests on the definitional proposition that where it is necessary to substitute state action for class action not because of cognitive failings but because the class is not strong, organized, or cohesive enough to achieve its ends, "one should not talk about paternalism."31 Paternalism on this view would be implicated only where the state confers 'benefits' on individuals irrespective of their preferences.

No cognitive obstacle prevents low-paid workers from forming a preference for a statutory minimum wage of $4.25 per hour over a contractual wage of $3.00. In practice, however, some workers may acquiesce in the lower wage because they believe that, with job seekers far outnumbering jobs, a willingness to accept such wages will increase their chances of securing employment. Consequently, confining paternalism to the imposition of values to the exclusion of the enforcement of preferences that a class or person holds but is on its or his own unable to implement, appears

31 Jon Elster, Ulysses and the Sirens: Studies in Rationality and Irrationality 84 (rev. ed. 1986 [1979]). Arneson takes a similar position in characterizing certain kinds of intervention—such as usury laws—as nonpaternalistic if enacted not because legislators suppose that someone might "make a foolish bargain if left to his own devices," but because "the eventual bargain struck is likely to be highly unfavorable" as a result of the person's "weak bargaining position." Richard Arneson, Mill versus Paternalism, 90 Ethics 470, 472 (1980). Russell Hardin, Morality Within the Limits of Reason 143, 147 (1980), in contrast, sees such state intervention as not paternalistic "in any but perhaps the very strongest sense." Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 572-73 (1982), adopting an individualistic perspective, arrives at the same conclusion; he thereby fails to see the paternalistic implications of what he refers to as "distributive motives."
Limits of Welfare-State Paternalism

A more fruitful approach would distinguish between strong paternalism—the state's acting in a person's best interest in spite of or without regard to his stated preferences—and weak paternalism—the state's furnishing its will and/or power where a person or class lacks either or both to achieve his or its goals. Such a position also appears to accord more closely with the original familial context of paternalism.

Thus a parent may substitute her judgment for her child's by interfering with the child's preference for candy over spinach. Here substituted judgment and (attempted) coercion go hand-in-hand. But what of the scenario in which the parent substitutes his abilities for the child's in order to promote attainment of a good formulated by the child? The child may, for example, like to eat apples and the parent may agree that apples are good for the child to eat. Unfortunately, the child is neither tall nor agile enough to reach the apples growing on a nearby tree. Is it paternalistic for the parent to use his adult height to secure them? Since lack of apples is not life-threatening, a parent might take the position that substituting her abilities for the child's discourages the child's development—depriving her, for example, of the incentive she needs to learn how to climb.

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32 See Gerald Dworkin, Paternalism: Some Second Thoughts, in Paternalism 105, 106-107 (R. Sartorius ed. 1983). David Luban, Paternalism and the Legal Profession, 1981 Wis. L. Rev. 454, 472-74, schematically analyzes paternalistic intervention as encompassing: values over values; values over wants; interests over values; and interests over wants. Analysis of paternalism presupposes ideal conditions in which the formation and formulation of "true" preferences are not systemically thwarted by macrosocial processes. For discussion of the impact of the political process on individual preference formation, see Charles Lindblom, The Market As Prison, 44 J. Pol. 324, 335 (1982). For a broader discussion of the endogeneity—as contrasted to autonomy—of preferences, see Jon Elster, Sour Grapes: Studies in the Subversion of Rationality ch. 3 (1987 [1983]). P. Atiyah, Promises, Morals, and Law 215 (1981), uses paternalism capaciously to refer to judicial imposition of contractual terms on both parties even where one side lacked not so much the power as the foresight to assert the terms. Similarly, Daniel Boorstin, The Americans: The Democratic Experience 290 (1974), speaks of "the paternalism of the marketplace" to refer to producers' offering consumers what they did not have the foresight to know they wanted.

33 John Rawls, A Theory of Justice 249 (1971), recognizes paternalism as encompassing protection of persons "against the weaknesses and infirmities of their reason and will in society." In a different pairing, Kleing, Paternalism at 14, distinguishes between strong paternalism, which does not consider the person's capacity to choose the imposed good for himself, and weak paternalism, which is based on the person's incapacity to make that decision.

34 Genetic paternalism is by far the most important form of sincerely cooperative
Analogously, if the state intervenes to secure the minimum wage for workers, they may begin to regard themselves as wards instead of developing the social-psychological wherewithal needed to organize and to sustain successful collective action.35 "In other words, we may think there is an important difference between Smith's goals being achieved and Smith's achieving them."36 Indeed, paradoxically, unless paternalists succeed in realizing their hidden agenda or meta-goal of educating their beneficiaries to become autonomous masters of generalized problem-solving, the latter's first-order goals may never be enduringly secured.37

Here a distinction must also be drawn between state interference such as mandatory minimum wages and mandatory contributory old-age pensions. The latter can be interpreted as an instance of precommitment in which dependent workers, knowing that they do not have the willpower to abstain from current consumption in order to postpone some consumption for their postworking years, bind themselves to an involuntary savings plan, by which they irrevocably authorize the state to prevent them from opting out.38 To the extent that the deferred gratification is imposed

35As the Supreme Court summarized the argument of an opponent of social security: "Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings." Helvering v. Davis, 301 U.S. 619, 644-45 (1937).

36Donald Regan, Paternalism, Freedom, Identity, and Commitment, in PATERNALISM 113, 116 (R. Sartorius ed. 1983). The president of the AFL expressed a similar thought when he testified before Congress that he "would rather preserve the principle of industrial democracy than to yield a right to the Board to interfere in the free exercise of collective bargaining" where a labor union agreed to wages lower than those stipulated by law. Fair Labor Standards Act of 1937: Joint Hearings Before the Senate Comm. on Education and Labor and the House Comm. on Labor, 75th Cong., 1st Sess. 226 (1937) [FLSA Hearings] (testimony of William Green).

37"Unfortunately, a paternalistic intervention that will maximize opportunities for choice in the long run may also interfere with the development of the ability to choose." Donald Regan, Paternalism, Freedom, Identity, and Commitment at 121. For a clear statement of the potentially "progressively self-liquidating...character" of a certain kind of entrepreneurial paternalism, see HERBERT LAHNE, THE COTTON MILL WORKER 66 (1944).

38Such systems satisfy all five criteria of self-binding adduced by ELSTER, ULYSSES AND THE SIRENS at 39-46.
rather than self-imposed, this interpretation becomes less and paternalism more plausible. Introduction of a minimum wage, in contrast, does not hinge on temporal self-denial: the root problem is not a lack of individual rationality or will, but of individual and collective power. Or as one of the supporters of the original FLSA phrased it: "Social justice means that we as legislators should extend to the unfortunate human beings those social rights which they could demand if they had the power of unity of action.

The final operative distinction pertains to the spectrum of individual and collective involvement in contractual relationships. It arises between state intervention that directly restricts the freedom of the beneficiary and that which also impinges on third parties. In the case of direct or "pure paternalism," "the class of persons whose freedom is restricted is identical with the class of persons whose benefit is intended to be promoted by such restrictions." Indirect or "impure paternalism," in contrast, "will involve restricting the freedom of other persons besides those who are benefitted." The

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39This interpretation makes sense only if workers empirically have a margin of current savings on which they can draw. If old-age pensions are based on redistributive subsidies or other collective mechanisms, then the Ulysses-Sirens analogy would not apply. In fact, most workers in the U.S. in the 1930s had no savings. See Helvering v. Davis, 301 U.S. at 642-43. HARDIN, MORALITY WITHIN THE LIMITS OF REASON at 199, fails to distinguish between these two possibilities in his characterization of social security legislation as a mode of dealing with akrasia.

40If workers had the will to strike, that is, to accept a reduction of current consumption, they could force their employers to pay higher wages (i.e., a collectively bargained minimum wage). If such workers are unable to subsist without income, then, again, it is not a question of weakness of will, and paternalism reasserts itself as the solution. Even if the workers could survive a strike and it were a matter of akrasia, the relevant act of self-binding would not be a mandatory minimum wage but an implausible state-enforced lockout to prevent the workers from working for less than the minimum wage. To the extent that established unions of the skilled and better-paid workers exclude the unskilled and the latter's employers gain access to even cheaper sources of labor (immigrants), a de facto lockout occurs without any of the positive educative effects. For a broad historical interpretation consistent with this scenario, see GWENDOLYN MINK, OLD LABOR AND NEW IMMIGRANTS IN AMERICAN POLITICAL DEVELOPMENT: UNION, PARTY, AND STATE, 1875-1920 (1986). For empirical analysis, see STANLEY LIEBERSON, A PIECE OF THE PIE: BLACKS AND WHITE IMMIGRANTS SINCE 1880 (1980); PETER SHERGOLD, WORKING-CLASS LIFE: THE "AMERICAN STANDARD" IN COMPARATIVE PERSPECTIVE, 1899-1913, at 53-55 (1982).

4181 CONG. REC. 7886 (1937) (statement of Sen. Walsh).

42For discussion of contractual paternalism, see Anthony Kronman, PATERNALISM AND THE LAW OF CONTRACTS, 92 YALE L.J. 763 (1983).

43Dworkin, PATERNALISM at 111.
latter intervention may require stronger justification insofar as those whose liberty is infringed are not being interfered with in their own interest. Whereas pure paternalism appears generally implausible in bilateral, voluntary contractual relations, even impure paternalism does not describe intervention such as a minimum wage in a uniformly accurate way; for it may or may not benefit the employers whose economic freedom to exploit it restricts while benefitting other employers whose substantive freedom to contract is not affected.44

III. A Statutory Minimum Wage

State intervention into the wage relationship is more complicated than that adumbrated by the Mill-Dworkin approach to the regulation of hours.45 On the one hand a statutory minimum wage is enforced for the good of the individual employee and the class of employees46 as well as for that of the sub-class of employers who wish to be protected against what President Roosevelt and the New Deal Congress called wage-"chiseling" competitors, who engaged in unscrupulous corner-cutting designed to lengthen hours and lower wages.47 On the other hand, the only deviant motivation that might

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44Although it may be possible, by construing external effects everywhere, ultimately to dissolve all pure paternalism into the impure variety, rhetoric rather than logic undergirds the denial, for example, that forcing people against their will and judgment to save for their old age is paternalistic. Kelman, Regulation and Paternalism at 244. Abstracting from the aspect of redistribution, even such a staunch libertarian as Hayek does not object to such programs despite the element of paternalistic coercion. See FRIEDRICH HAYEK, THE CONSTITUTION OF LIBERTY 286 (1960); HAYEK, THE ROAD TO SERFDOM at 120-21.

45In one sense this is obvious inasmuch as workers cannot bargain individually about hours in large industrial establishments, which require the coordinated presence of hundreds or thousands of employees. See ROBERT MACDONALD, COLLECTIVE BARGAINING IN THE AUTOMOBILE INDUSTRY: A STUDY OF WAGE STRUCTURE AND COMPETITIVE RELATIONS 62 (1963).

46Insofar as earning sub-minimum wages makes it impossible to sustain a family and thus results in external effects in the form of state-mediated redistributive subsidies, the decision whether to acquiesce in such wages is not purely self-regarding. State intervention would, to that extent, be subject to a lower degree of justificatory scrutiny.

47"The great mass of our population has little patience with that small minority which has been termed 'chisels.' It is at this minority particularly that this bill...is aimed." H.R. REP. NO. 1452, 75th Cong., 1st Sess. 8 (1937). President Roosevelt also
impel an individual employee to accept a sub-minimum wage is that she prefers it to unemployment. Such a situation calls for more extreme action than that envisioned by Mill insofar as both employers and employees seek protection against fellow class members who need to be restrained from acting against the interest of their class and their own long-term interests.\textsuperscript{48}

Extensive testimony at the FLSA hearings in 1937 confirmed the view that employers refuse to be disadvantaged by competitors who engage in extraordinarily exploitative practices.\textsuperscript{49} As formulated by the U.S. Commissioner of Labor Statistics, FLSA was designed to recreate "a competitive system which gives to every business enterprise an equal opportunity in the struggle for existence;" by

set[ting] the rules of the industrial game...it...determines the manner in which competition will take place. ... It incorporates into law standards which, even though acceptable to the majority, could not be put into effect without governmental authority as long as a handful of men in any given industry refused to conform to them.\textsuperscript{50}

When an organization purporting to represent over half of


\textsuperscript{49}\textsuperscript{1} \textit{M}arx, \textit{Das Kapital} ch. 15 § IIIa.

\textsuperscript{50}FLSA \textit{He}arings at 309, 310 (statement of Isador Lubin). Numerous witnesses echoed this sentiment. "In this industry, as in many others, 'free competition' and 'fair labor standards'...cannot coexist." Id. at 464 (statement of Paul Brissenden, Vice-Chairman, N.Y.C. Millinery Stabilization Comm.). "As an employer, as long as you make my competitors do the same thing, I don't care what wages you force me to pay." Id. at 475 (statement of E. Lane, The Lane Co. [largest furniture producer in U.S.]). "'Sweatshop practices'... are not a matter which industry itself can correct." Id. at 710 (statement of G. Harrington, Nat'l Publishers Ass'n). "It is difficult to induce employers to enter into collective bargaining agreements when the unions are not in position [sic] to protect the employers from the undercutting of labor costs in other areas." Id. at 946 (statement of Sidney Hillman, Pres., Amalg. Clothing Workers of Am.).
all industrial employment in the United States stated "that it is an unfair competitive advantage for one manufacturing establishment to gain a commercial advantage over another through the exploitation of its labor," it neglected to explain that it had only one subset of exploitation in mind. For once larger employers were in a position to maintain profitability by relying predominantly on the increased productivity associated with labor-saving capital investment and the machine-forced intensification of labor, they could afford to dispense with lengthening the working day and wage-chiseling. Only in this sense, therefore, was the bill "a step away from what we have been doing in the past, where we had absolute liberty of action to exploit labor to our hearts' content." Consequently, the formal equalization of conditions of exploitation by means of a national statutory floor under wages and a ceiling on (non-overtime) hours in fact created unequal conditions inasmuch as it deprived smaller firms of their basic methods of exploitation: "The little fellow is the fellow who is going to catch the devil, who is not mechanized, who has got probably inefficient labor...." Precisely because "[e]very great industrial corporation in America" was paying in excess of the proposed minimum none opposed FLSA, while numerous industry associations and companies urged Congress not to exempt small employers. In its approach to workers who were earning below the

51Id. at 134 (statement of John Paine, Chairman of Management Group of Nat'l Council for Indus. Progress).
52See 1 MARX, DAS KAPITAL ch. 16-17; DOREEN MASSEY & RICHARD MEEGAN, THE ANATOMY OF JOB LOSS (1982); 83 CONG. REC. 7411 (1938) (Rep. Kitchen). The president of Johnson & Johnson Co. testified that he had introduced the six-hour day in his plants because that "is the longest operating period that a man or woman can work without interruption." FLSA HEARINGS at 99 (statement of Robert Johnson).
53Id. at 138 (statement of John Paine).
54The owner of numerous cotton spinning mills in Alabama and a former president of the Am. Cotton Mfrs. Ass'n urged a ban on overtime altogether: "Get another man." Id. at 451 (statement of Donald Comer).
55Id. at 487 (statement of E. Lane).
5683 CONG. REC. 6256 (1938) (Rep. Fish); FLSA HEARINGS at 149 (statement of Paul Hanway, Exec. Sec'y-Treasurer, Nat'l Can & Tube Ass'n). Several witnesses, including the National Association of Manufacturers (NAM), noted that exempting small employers would undermine the goal of eliminating sweatshops. See id. at 645-46, 654 (statement of N. Sargent, Sec'y, NAM); id. at 752 (statement of H. Gutterson, Pres., Inst. Carpet Mfrs. Am.).
minimum wage, FLSA was clearly paternalistic. As numerous witnesses testified, its purpose was to "protect[] only poorly paid workers who are not in a position to protect themselves." As to those--largely adult white male--workers whose wages already exceeded the level for which any plausible consensus could be marshalled, their agent, the American Federation of Labor, forcefully put Congress on notice that it would "strenuously oppose[] any proposal to deal with the fixing of general minimum wage standards by a government fiat for men in private industry...." In this view the AFL was joined by the CIO and numerous large employers, who emphasized the need to preserve voluntary collective bargaining.

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57KLEINIG, PATERNALISM at 11, misunderstands this connection. In defending itself against a lawsuit charging it with having entered into subminimum-wage agreements with its employees, according to Kleinig, a company argues that the workers entered into the agreements freely. In arguing that workers need to be protected against unwise agreements, "the judge has acted paternalistically toward the workers...though the law is not paternalistic in its intent. Though the workers have been treated paternalistically, they would not be justified in claiming that the law forbidding them from entering the particular wage contract was itself paternalistic." Precisely the opposite is the case: the entire motivation of a minimum wage law is to prevent them from acquiescing in offers that the state deems not to be in their interest. This type of legislation paternalistically constricts the permissible scope of consensual agreements by declaring that only economic coercion could induce a worker to accept such an exploitative offer. The judge is merely ministerially executing the letter, spirit, and purpose of the law.

58FLSA Hearings at 10 n.1 (statement of Robert Jackson, Asst. Att'y Gen.). Sen. Pepper referred to the bill as an effort "to build up the last group that is down at the bottom that have not been able to build themselves up by their own bootstraps." Id. at 234. John L. Lewis characterized this group as the "submerged element in our working people who incapable of helping themselves and whom the organized labor movement has not been permitted to serve...." Id. at 286.

59Id. at 1195 (statement of Donald Richberg); id. at 219 (statement of William Green, Pres., AFL); id. at 281 (statement of John L. Lewis); id. at 848-49 (statement of J. Battle, Exec. Sec'y, Nat'l Coal Ass'n). The opposition took the form of objecting to the proposed Labor Standards Board, which would have had the power to establish a "fair wage" up to a maximum of eighty cents per hour where it had reason to believe that, owing to the inadequacy or ineffectiveness of collective bargaining, employees were receiving less than such a wage. S. 2475, 75th Cong., 1st Sess. § 5(a) (1937). As an example of such opposition, see FLSA Hearings at 564 (statement of A. Besse, Pres., Nat'l Ass'n Wool Mfrs.). FLSA retained a very attenuated version of this provision in the form of industry committees that recommended minimum wage rates to the Wage and Hour Administrator with a view to raising the minimum wage from thirty to forty cents between the second and seventh year the Act was in effect. Fair Labor Standards Act of 1938, Pub. L. No. 75-718, §§ 5, 6, 8, 52 Stat. 1060, 1062-1065 (1938). When Congress raised the minimum wage from forty to seventy-five cents in 1949, it...
State intervention vis-à-vis employers, however, assumed a different quality. The relatively few low-paying firms that were either forced out of business or shocked into reorganizing production and increasing productivity were subjected at best to an attenuated version of impure paternalism. Those whose good the state was seeking to achieve were such firms' low-paid employees or more productive and higher-paying competitors to which production and employment would be shifted. FLSA sought "to protect the man who is engaged in interstate commerce on a fair and lawful basis from the competition of those who would go into it on an unfair basis." Such employers benefited from the enhanced viability and legitimation of the economic system as well as from the elimination of competitors who destabilized aggregate conditions of profitability. To the extent that FLSA was designed "to permit and protect the functioning of the competitive system," it served to save capitalism for the next generation of employers from the macro-economically dysfunctional rapacity of the current generation of sweatshop employers. If these benefits were clearly not contrary to large employers' intentions, did such firms have the power to


When FLSA went into effect in 1938 the percentage of covered employees earning less than the initial minimum wage of twenty-five cents was minuscule. Carroll Daugherty, The Economic Coverage of the Fair Labor Standards Act: A Statistical Study, 6 LAW & CONTEMP. PROBS. 406, 407 (1939).

See infra ch. 3; Lester Thurow, The Post-Industrial Era Is Over, N.Y. Times, Sept. 4, 1989, at 19, col. 1 (nat. ed.).

FLSA Hearings at 18 (statement of Robert Jackson, Asst. Atty. Gen.).

A poll conducted soon after FLSA went into effect revealed that small manufacturers and retailers supported it more than their larger counterparts. What Business Thinks, FORTUNE, Oct. 1939, at 52, 90. This surprising result may derive from the fact that the smaller firms may have been exempt by virtue of not having been engaged in interstate commerce. FLSA, §§ 13(a)(1) & (2), 52 Stat. at 1067.

FLSA Hearings at 309 (statement of Isador Lubin, Comm'r of Lab. Statistics). Manufacturers of some consumer goods also stood to benefit from the purchasing power redistributed to low-paid workers through a minimum wage.

NAM, while instinctively opposing any expansion of federal power or state economic regulation (but not state subsidies to capital), did not deny the need for local minimum wage laws. FLSA Hearings at 623-25 (statement of James Emery, Gen. Counsel, NAM). But see Albion Taylor, Labor Policies of the National Association of Manufacturers 166 (1928) (NAM's opposition to "class legislation" was inconsistent). On the eve of the Roosevelt administration's presentation of FLSA,
attain them without state intervention? If not, can employers’ lack of autarchy be analogized to farm workers’ inability to secure a minimum wage from employers through collective action?

Whereas the workers’ weakness manifested itself vis-à-vis an antagonistic class, the impediment to large employers’ profitability lay not so much in their own employees as in their relationship to competing producers (and the latter’s exploitation of their workers). Here it is necessary to distinguish between industries in which large employers and “wage-chiseling” employers competed directly and industries dominated by the latter. The former conflict played itself out at the time of the FLSA debates largely as a regional antagonism between northern industrial employers on the one hand and southern mills on the other, with the latter urging and the former (successfully) resisting regional differentials.66

Direct action by large employers to contain the disruptive effects of unbridled “wage-chiseling” by smaller employers would presumably have entailed competing them out of business. In industries in which the two competed, the wage differential may have been too great—given the stage of development of capital-intensive, labor-saving mechanization—to be offset. Industries dominated by sweatshop methods may have been little amenable to mechanization at that time. Finally, the largest employers in the most capital-intensive industries, which precluded entry by small firms, may have

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66See, e.g., FLSA Hearings at 813-14 (statement of C. Murchison, Pres., Cotton-Textile Institute). For a graphic account of the significant differences in wage rates between the North and the South, see How a Minimum Wage of 40 Cents an Hour Would Hit the Hiring Rates of Unskilled Labor, BUS. WK., Dec. 18, 1937, at 26.
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been unable to exert any direct market-mediated impact on unscrupulously exploitative employers in other industries.

In the absence of competition and given their confrontational anti-unionism in the 1930s, such large employers, as organizationally represented by the National Association of Manufacturers, lacked the long view of the plausibly realizable needs of employers as a class. It is precisely at such critical political-economic junctures that that class in general benefits from the fact that strong yet short-sighted groups of employers do not directly control the state.

IV. Prohibition of Child Labor

Child labor legislation creates a double layer of paternalism with the state paternalistically overriding or sanctioning the literal paternalism of parents who compel their children to work. Until

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67In the 1930s the leadership of NAM was captured by representatives of the largest manufacturing firms that were also closely associated with extreme right-wing political organizations. See Russell Burch, Jr., The NAM as an Interest Group, 4 Pol. & Soc'y 97, 102-103, 110-14 (1973). For a sample of contemporary progressive opinion of NAM, see Messiahs of Feudalism, 52 Christian Century 1615 (1935); The NAM through the Ages, 93 New Republic 184 (1937); Alfred Hirsh, What is Big Business Up to? Forum, July 1938, at 3.


70On the contemporary extent of child labor throughout the world, see Elias Mendelievich, Child Labour, 118 Int'l. Lab. Rev. 557 (1979). Arguably the most famous example of successful literal-paternal resistance to state paternalism is Hammer v. Dagenhart, 247 U.S. 251 (1918), in which a father, on behalf of his two sons
the 1966 amendments, FLSA exempted from the child labor provisions "any employee employed in agriculture while not required to attend school." In amending FLSA to phase in coverage of agricultural workers and to prohibit some child labor, arguably the most liberal Congress of the postwar period rejected an amendment that would have outlawed the employment of thirteen-and fourteen-year-olds as migrant farm workers. Consequently, migrant and seasonal farm worker-parents, for example, continue to enjoy considerable latitude with regard to their children's labor.

Children of any age may, with parental permission, be employed outside of school hours on farms not employing enough labor to be subject to the minimum-wage provision of FLSA.

71§ 13(c), 52 Stat. at 1068. Although FLSA exempted— that is, excused or released— employers of children from the obligations imposed by the Act, § 13 is worded as if the children (and excluded employees) were being freed from obligations rather than deprived of rights. On the child labor provisions of the Sugar Act of 1937, see supra ch. 1 § IV. On child agricultural labor, see LUMPKIN & DOUGLAS, CHILD WORKERS IN AMERICA at 59-81; TAYLOR, SWEATSHOPS IN THE SUN. For an overview of current state child labor laws and their applicability to agriculture, see 3 NEIL HARL, AGRICULTURAL LAW § 23.06 (1987); FEDERAL AND STATE EMPLOYMENT STANDARDS AND U.S. FARM LABOR; THOMAS COENS, CHILD LABOR LAWS: A VIVABLE LEGACY FOR THE 1980s, 33 LAB. L.J. 668 (1982). Extensive use of child labor in agriculture was historically, of course, not confined to the United States. As late as 1904, almost one-fifth of all German pupils under the age of fourteen were agricultural wage workers outside of their families. See TENNSTEDT, SOZIALGESCHICHTE DER SOZIALPOLITIK IN DEUTSCHLAND at 162.

72112 CONG. REC. 11,605-607, 20,639, 20,776-90 (1966). Although all parents possess this discretion, the very high accident and mortality rates among the under-sixteen-year-old children of family farmers exempt from the Occupational Safety and Health Act raise significant issues of state acquiescence in biological paternalism. A farmer whose eleven-year-old son had suffocated in a grain wagon revealed the commercial orientation of such paternalism by referring to him as "a good little worker." Isabel Wilkerson, FARMS, DEADLIEST WORKPLACE, TAKING THE LIVES OF CHILDREN, N.Y. Times, Sept. 26, 1988, at 1, col. 5, at 17, col. 3 (nat. ed.).

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Twelve-and thirteen-year-old children may be employed in agriculture with parental permission or on the same farm as their parents. Children fourteen and older may be employed on farms without any restrictions provided that the work is not found by the Secretary of Labor to be hazardous to children under sixteen. The Secretary may grant farmers a waiver to employ even ten- and eleven-year-old children to hand-harvest crops as non-migrant commuters on a piece-rate basis for as long as eight weeks. In addition, agricultural employers need not pay the minimum wage to children sixteen or under who hand-harvest for a piece rate on the same farm as their parents provided they are paid the same piece rate as adults.74

The fact that these statutory prohibitions apply only to children who are employees furnishes employers with an incentive to treat their child laborers as non-employees.75 Since parents are permitted to employ their own children under the age of sixteen, farmers may evade the ban on employing "oppressive child labor" if they succeed in classifying parents as self-employeds employing their own children as laborers.76

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75 For a prominent nonagricultural example, see Marc Linder, From Street Urchins to Little Merchants: The Juridical Transvaluation of Child Newspaper Carriers, 63 Temple L. Rev. 829 (1990).

76 29 U.S.C. § 203(f) (1978); § 212(c) (1965); 29 C.F.R. § 570.126; Lumpkin, The Child Labor Provisions of the Fair Labor Standards Act at 402. This freedom is restricted in manufacturing, mining, and other hazardous employment. In an attempt to circumvent the child labor regulations contained in federal sugar-beet contracts under the Agricultural Adjustment Act, growers in 1935 "made their laborers sign
Limits of Welfare-State Paternalism

By granting parents and farm employers waivers from the otherwise applicable bans on child labor and sub-minimum wages, the state defers not only to biological paternalism, but also to pre-capitalist master-paternalism: within the statutory limits, fathers and farmers are deemed to know the children's best interests to the point of being entitled to deprive them of the freedom not to perform hard labor. This deference is particularly ironic in the light of three consequences. First, the state apparently regards the parents' and employers' judgment as unclouded and unbiased despite the fact that it is exercised solely to the end of maximizing profit or family income and has little or no rational relation to the children's welfare.

Second, by acquiescing in such private commercial judgments and hence in the flooding of the farm labor market with a large number of low-paid workers, the state reinforces the vicious circle that induces migrant-parents to cause their children to work in the first place. "Even more ironic is the fact that child labor does not solve the family low-income problem. The employment of children sharecropper contracts and thus become in law independent 'producers' themselves--with their children free to continue working...." LUMPIN & DOUGLAS, CHILD WORKERS IN AMERICA at 73.


Marx spoke of working fathers as slave merchants vis-à-vis their wives and children insofar as the latter did not have unfettered disposition of their own labor power. This revolutionizing of the "legal relation between the buyer and seller of labor power, so that the transaction loses even the semblance of a contract between free persons," provided Parliament with the juridical excuse for intervention in the form of second-order paternalism. 1 Marx, das kapital, republished in II:6 Marx [&] Engels, Gesamtausgabe (MEGA) 385-86 (1987 [2d ed. 1872]). Whereas Marx viewed early capitalism's voracious appetite for child labor as a product of the most advanced mechanization and the highest capital-labor ratios, contemporary child labor is confined to atavistic, labor-intensive niches in the division of labor that use little capital. The industrial distribution of older employed teenagers has undergone a radical change. See Ellen Greenberger & Laurence Steinberg, When Teenagers Work: The Psychological and Social Costs of Adolescent Employment (1986); GAO, Child Labor: Characteristics of Working Children (HRD-91-83BR, June 1991).
in agriculture—a source of cheap labor—in the long run depresses the
general wage level."79 Consequently, the use of child labor creates
"a self-fulfilling prophecy that an adequate [adult] labor supply will
not be available."80 Thus whereas the state, treating parents and
employers as lacking the will to refrain from exploiting children,
could intervene to prohibit such employment—regardless of the
adults’ short-term preferences—it in fact works at cross-purposes
with the otherwise paternalistic minimum-wage legislation by
exacerbating the very conditions that make such laws necessary.
The problem, in other words, is not Odyssean self-binding, but
Sisyphean labor.

Finally, state deference to commercial or familial paternalism
perversely transforms parents into the labor-market appendages of
their working children: "Many Mexican fathers and mothers are
being hired today because they have a large family of young children
who will work next to them on their knees...picking crops."81

V. Protecting Farm Workers from
Procedurally Unconscionable Contracts

The Migrant and Seasonal Agricultural Worker Protection
Act (AWPA) is a virtually unique regime of paternalism designed to
protect its wards from specific types of overreaching by employers.
In this regard it is redolent of premodern (but still extant) legislation
prescribing the form of agreements between masters and seamen as
well as substantive provisions such as furnishing of meals, time of

696: Fair Labor Standards Amendments of 1961, 87th Cong., 1st Sess. 3 (1961);
Herrington Bryce, Alternative Policies for Increasing the Earnings of Migratory Farm
labor markets lags far behind this insight by characterizing it as "paradoxical and
romantic": "child labor is a problem of more concern to a variety of public interest
groups than to farmworkers themselves who feel their survival as a family may rest on
their ability to have their children joint hem in working." 2 Final Report: The Farm

80Joint Oversight Hearings on the Fair Labor Standards Act: Hearing Before the
Subcomm. on Labor Standards and the Subcomm. on Agricultural Labor of the House
Comm. on Education and Labor, 94th Cong., 1st Sess. 30 (1975) (prepared statement
of Michael Fox, gen’l counsel, UFW).

wage payments, and wage advances.\textsuperscript{82} Even in the nineteenth century, the United States Supreme Court upheld a paternalistic seamen's payment law as in the best interest of a peculiarly powerless class.

In this act very careful provisions are made for the protection of seamen against the frauds and cruelty of masters, the devices of boarding-house keepers, and, as far as possible, against the consequences of their own ignorance and improvidence. ... Indeed, seamen are treated by Congress, as well as by the Parliament of Great Britain, as deficient in that full and intelligent responsibility for their acts which is accredited to ordinary adults, and as needing the protection of the law in the same sense in which minors and wards are entitled to the protection of their parents and guardians.\textsuperscript{83}

That the state views migrants as requiring the same kinds of intervention as seamen, who, having entered into a quasi-voluntary servitude, "surrender[ed]" their "personal liberty" and were subject to "criminal punishment for desertion,"\textsuperscript{84} is powerful recognition of the antiquated forms of domination still prevalent in agriculture.

Insofar as a presumption of market rationality implies that all workers prefer $4.25 to $2.00 per hour, the state cannot be deemed to be acting without regard to workers' preferences by imposing a minimum wage. But is the state substituting its judgment for migrants' or merely supplementing their will and power when it prescribes requirements regarding written disclosures, labor contractor registration, recruitment, recordkeeping, payment of wages, transportation, and housing--matters that the federal government does not regulate on behalf of other privately employed workers?\textsuperscript{85}

If, that is, workers preferred to trade off some of these protections for higher wages, would the state be acting paternalistically in proscribing the exercise of that judgment?\textsuperscript{86}

\textsuperscript{83}Robertson v. Baldwin, 165 U.S. 275, 287 (1897). \textit{See also} Patterson v. The Eudora, 190 U.S. 169, 175 (1903).
\textsuperscript{84}Robertson, 165 U.S. at 280-81, 283. For the historical background, see MARCUS REDIKER, BETWEEN THE DEVIL AND THE DEEP BLUE SEA: MERCHANT SEAMEN, PIRATES, AND THE ANGLO-AMERICAN MARITIME WORLD, 1700-1750 (1989 [1987]).
\textsuperscript{86}Recent legislative initiatives to limit the waiving of rights by employees under the \textit{Age Discrimination in Employment Act} in connection with mass terminations reveal that even avowed opponents of paternalism bow to it. In opposing such a bill, they
Rather than giving rise to a trade-off, migrants' substandard non-wage terms of employment typically go hand in hand with substandard wages.\(^{87}\) It is nevertheless worth pursuing the question for its theoretical implications for paternalistic interference with "choices" made in ignorance or under economic coercion. This particular paternalism is, moreover, compensatory insofar as the state bears responsibility for migrants' historical self-defenselessness by virtue of having excluded them from such statutory rights as collective bargaining, premium overtime rates, social security, unemployment insurance, and workers compensation.\(^{88}\)

AWPA may be analyzed into substantive and procedural protections. The former, largely restricted to the safety and health aspects of transportation and housing,\(^{89}\) do not differ qualitatively from consumer safety or health requirements. What, after all, is the difference between mandating a bolted-down seat for every migrant transported by an agricultural employer and mandating safety belts on common-carrier airplanes?\(^{90}\) Just as an air passenger might protest that he would prefer that the government not burden the airline with additional costs so that it could reduce the price of a ticket by a few dollars, a migrant might say that he would prefer taking his chances sitting on the floor of a flatbed truck for a thousand miles\(^{91}\) if in exchange his hourly wage were raised by ten characterised it as saying "that Congress is in a better position than the employee to decide whether he or she should voluntarily sign a release because we can't trust employees to make such a decision for themselves." S.REP. NO. 79: THE AGE DISCRIMINATION IN EMPLOYMENT WAIVER PROTECTION ACT OF 1989, 101st Cong., 1st Sess. 30 (1989). Yet in offering their own alternative approach, these senators proposed mandatory disclosure of sufficient information "to make knowing and voluntary decisions." Id. at 35. In other words, they, too, did not trust employees to know when they do not know enough to make such decisions or to know how to secure such information on their own.


\(^{88}\)See supra ch. 1 & infra ch. 4.


\(^{90}\)29 C.F.R. § 500.104(i); 14 C.F.R. § 121.311 (1989).

\(^{91}\)The importance of the transportation conditions for migrants is enhanced by the fact that "[i]n the ordinary sense of the word, they do not travel; most of them are hauled." PRESIDENT'S COMM’N ON MIGRATORY LABOR, MIGRATORY LABOR IN
Limits of Welfare-State Paternalism

cents. Given the penury of most migrants, the costs associated with injuries that could have been avoided by compliance with such safety regulations would have to be socialized. These external effects and public charges thus reduce the justificatory weight that must be borne by this particular "impure" paternalistic argument.92

In contrast, state imposition on the contracting parties of a requirement that migrants be given a written disclosure of the terms of employment at the time of recruitment and a detailed written statement of their wages and all deductions can plausibly be interpreted as non-paternalistic in the sense that without such information no worker can make rational decisions concerning the range of relevant offers in the labor market. Such blind contracting lacks the consensual element inherent in the putative autonomy of the individual in his commercial relationships.93 In other words, those without an alternative may be exposed to such economic coercion that their autonomy becomes so attenuated that the state, rather than violating it, creates its prerequisites:

92Mill, ON LIBERTY ch. 4; Kleinig, PATERNALISM at 92-96.
9329 U.S.C. § 1821. Congress conferred a lower level of protection on local workers whom crew leaders or employers do not transport to work; they are not entitled to a written disclosure of the terms and conditions of their employment unless they request it. 29 U.S.C. §§ 1831(a), 1802(4); 29 C.F.R. § 500.20(g). Presumably Congress believed that, because such workers were not a captive labor force and could leave the worksite and return home immediately upon discovering that the work did not meet their expectations, any damages they might suffer would be minimal and could therefore safely be chalked up to experience. But massively fungible local workers without nonfungible alternative employment face the same predicament as long-distance migrants. As a vestige of Texas farmers' traditional proprietary attitudes toward their workers and attempts by northern employers to recruit them, the employers of seasonal farm workers in Texas who lobbied for this type of lesser protection were eager to testify that "when you have been transported to a housing facility thousands of miles away, you really do not have the freedom to negotiate, to work or not to work, that you would have living at your own home." Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 78 (1976) (statement of S. Toothaker). In the mid-nineteenth century, New England cotton manufacturers paid labor recruiters additional amounts for recruiting workers at such long distances that it was no longer easy for them to return home. Ware, THE EARLY NEW ENGLAND COTTON MANUFACTURE at 215.
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As a social fact that which the law calls "freedom of contract" may be no more than the freedom to restrict or to give up one's freedom. Conversely, to restrain a person's freedom of contract may be necessary to protect his freedom, that is to protect him against oppression which he may otherwise be constrained to impose upon himself through an act of his legally free and socially unfree will.94

This type of state intervention, which serves to prevent the creation of a temporarily captive labor force, can be analogized to Mill's exemption of agreements to enter into slavery from the general presumption in favor of liberty of contract on the ground that they defeat the very purpose of the justification for permitting people to dispose of themselves.95

FLSA and AWPA constitute a paternalistic regime designed to restrain atomized workers from acquiescing in their own exploitation. Incompatible with the moral groundwork of liberal capitalist society, such paternalism can be justified only insofar as it ultimately prepares these wards of the state for the collective autonomy that the non-paternalized working class has presumptively already achieved.96 Like the infantry-industry exception to free trade, labor protection is supposed to act as a temporary shield behind which ward-like workers can develop to the point of being able to dispense with such supports: "In one sense, the first objective of any [Minimum] Wages Council should be to commit suicide."97


95 Mill, On Liberty ch. 5.

96 It is ironic that farmers (including employers) are beneficiaries to a much greater extent than migrants of the perpetual largesse of a panoply of state paternalistic programs in the form of price supports, production controls, marketing orders, payment-in-kind programs, commodity loans, export credits, applied research, and extension service consulting. See 11 Harl, Agricultural Law ch. 90-92 (1987); 9 Harl, Agricultural Law ch. 70 (1982). In addition, the Perishable Agricultural Commodities Act, 1930, 7 U.S.C. §§ 499a-499t (1980 & Supp. 1991), protects farmers from unfair, deceptive, and fraudulent practices by the commission merchants, dealers, and brokers who buy their perishable commodities in ways analogous to the protections that AWPA affords migrants against overreaching employers. See also Agricultural Fair Practices Act, 7 U.S.C. §§ 2301-2306 (1988). P. Atiyah, The Rise and Fall of Freedom of Contract (1979), argues that Anglo-American legislatures and courts have paternalized contractual relations generally.

97 Wedderburn, The Worker and the Law at 352.
But unlike some beneficiaries of affirmative action programs—as well as their employers, co-workers, and unsuccessful co-candidates—who perversely may doubt whether they are meritocratically deserving of their positions, migrant farm workers' problem is not that their employers may believe that they could not have achieved the minimum wage or better housing without state intervention: since the latter's purpose is to suppress the spontaneous workings of a defective labor market, that belief can scarcely be refuted. Instead, their problem is the inability to vindicate—let alone to build on—these rights even with state intervention. To extend the comparison with affirmative action: where affirmative action candidates obtain positions for which they are currently less 'qualified' than other candidates, a positive self-fulfilling prophecy may be acted out in which the mere fact of occupying the positions invests them with the self-confidence to perform (and to be perceived as performing) as well as the preempted competitors. It is the analogous collective self-transformative process that migrants have yet to complete: circumventing market forces in the short run in order to forge conditions and consciousness under which they can ultimately confront their employers in a normally operating labor market.

The next chapter will examine the extent to which a minimum wage statute can shape those market forces.

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96. [P]referential treatment may...stigmatize its recipient groups, for...such a policy may imply to some the recipients' inferiority and especial need for protection.” United Jewish Orgs. v. Carey, 430 U.S. 144, 173-74 (1977) (Brennan, J., concurring).

99. In explaining the Roosevelt administration's FLSA bill to Congress, Ass't Att'y Gen'l Jackson indicated that he anticipated that enforcement would be fueled largely by complaints from labor unions and business competitors (rather than from the affected unorganized workers). FLSA Hearings at 71 (1937).
Minimum Wage Legislation as Anti-Sweatshop Regulation

Sen. Borah: [A] man who employs another must pay him sufficient to enable the one employed to live.
Sen. Pepper: What if he cannot afford to pay?
Sen. Borah: If he cannot afford to pay it, then he should close up the business. No business has a right to coin the very lifeblood of workmen into dollars and cents.¹

I. The Purposes of a Statutory Minimum Wage

What is the purpose of prohibiting employers from employing workers—and the latter from accepting employment—at less than a mandated hourly wage? "The historic starting point of minimum wage legislation was the wish to abolish sweating."² Contemporary


In 1938 the Congress decided that it is against the public interest for businesses to operate on the sweat of exploited workers. Any employer so inefficient that he could stay in business only by paying sweatshop wages—like the employer who could stay in business only by operating an unsafe plant—was told that he did not belong in business.


²Rudolf Broda, Minimum Wage Legislation in Various Countries 2 (BLS, Bull. No. 467, 1928). See generally, 3 John Commons et al., History of Labor in
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debate over minimum-wage legislation has lost sight of that original intent to deal—exclusively—\(^3\)—with those workers whose wage formation process was subject to "market failure" by forcing their employers to internalize the minimum social costs of maintaining a work force, which they had succeeded in shifting onto the workers or society: "The community is not bound to provide what is in effect a subsidy for unconscionable employers."\(^4\) Although the minimum wage was also intended to create micro-welfare effects, its primary function lay in removing labor costs from competition,\(^5\) increasing productivity macroeconomically by driving "parasitic" firms out of

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\(^3\)It is only those low-wage and long-working-hour industrial workers, who are the helpless victims of their own bargaining weakness, that this bill seeks to assist to obtain a minimum wage." S. Rep. No. 884, 75th Cong., 1st Sess. 3-4 (1937). In other words, even if wage rates and exploitation were positively correlated, state intervention was not aimed at interfering with the exploitation of highly paid workers. This limitation was expressly reflected in the original FLSA bill, § 5 of which prohibited the Labor Standards Board from establishing a wage that would give employees an annual income in excess of $1,200. Fair Labor Standards Act of 1937: Joint Hearings before the Senate Committee on Education and Labor and the House Committee on Labor, 75th Cong., 1st Sess. 58 (1937) [FLSA Hearings].

\(^4\)West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399-400 (1937). FLSA was "a recognition of the fact that due to unequal bargaining power as between employer and employee, certain segments of the population required Federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency...." Brooklyn Savings Bank v. O'Neil, 324 U.S. 697, 706 (1945). See also 82 CONG. REC. 1718-19 (1937) (Sen. Lodge). FLSA, in other words, effected a shift in the "cost accounting system" by converting "social variable costs," which might or might not be covered, into "social overhead costs," for which society has mandated responsibility. Fred Blum, The Social and Economic Implications of the Fair Labor Standards Act: An Interpretation in Terms of Social Cost, 9 PROC. IND. REL. RES. A. 167, 169-70 (1956).

\(^5\)See FLSA Hearings at 177 (testimony of Frances Perkins, Sec'y of Labor). The minimum wage was perceived as "prevent[ing] the backward businessmen from undermining the wage structure and from living off the purchasing power provided by the payrolls of businessmen who pay decent wages." CHESTER BOWLES, TOMORROW WITHOUT FEAR 59 (1946).
business and concentrating production in the most competent firms, as well as in steering capital-labor relations.  

[I]t is the chiseler, the corner-cutter, and the downright unscrupulous who need our attention. It is this small percentage of employers who drag down our business standards and make it harder for the overwhelming majority of our American businessmen to compete on a decent basis. These are the men for whom we need a Fair Labor Standards Act—let me call it a Fair Labor Competition Act....

The victims of sweating were and remain largely women, children and non-whites. For these largely unorganized workers a

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6This position is stated most clearly by Sidney Webb, The Economic Theory of a Legal Minimum Wage, 20 J. Pol. Econ. 973, 978-79, 983-88 (1912). See also Alan Fisher, Some Problems of Wages and Their Regulation in Great Britain since 1918, at 178-209 (1966 [1926]); Nat'l Indus. Conf. Bd., Minimum Wage Legislation in Massachusetts 5 (1927). The program appears to have been realized in Britain: "Many businesses which could maintain themselves only by the payment of sweated wages have been forced out of existence. But, on the whole, they have been replaced by more efficient units which have been able to support the higher rates." Hector Hetherington, The Working of the British Wage Board System, 38 Int'l Lab. Rev. 472, 479 (1938).


893 Cong. Rec. 1502 (1947) (statement of Rep. Klein). The preamble to FLSA containing the congressional "declaration of policy" is focused on findings relating to unfair competition. 29 U.S.C. § 202(a). Fair competition as the overarching goal of FLSA was taken to its logical conclusion where a judge would have enforced the Act even though Congress may have been indifferent to the welfare of prisoners on the ground that Congress meant to deny employers privileged access to uncovered exploited workers at the expense of competitors. Gilbreath v. Cutter Biological, Inc., 931 F.2d 1320, 1331-34 (9th Cir. 1991) (D.W. Nelson, J. dissenting).

9The Sweating System: Copy of Report to the Board of Trade on the Sweating System of the East End of London by the Labor Correspondent of the Board (89 Parl. Pap. 1887); First Report from the Select Comm. of the House of Lords on the Sweating System (20 Parl. Pap. 1888); Clementina Black, Sweated Industry and the Minimum Wage (1907); Duncan Bythell, The Sweated Trades: Outwork in Nineteenth-Century Britain (1978); Jenny Morris, Women Workers and the Sweated Trades: The Origins of Minimum Wage Legislation (1986). For an overview of the pre-FLSA State statutes covering women and children, see Dorothy Douglas, American Minimum Wage Laws at Work, 9 Am. Econ. Rev. 701 (1919). Today the modal minimum-wage worker is a white woman under thirty-five employed part-time (10-30 hours weekly) in retail trade or services. In 1987 women accounted for 65.5 per cent and 16 to 19 year-olds for 36.6 per cent of all hourly employees paid at or below the minimum wage, while white men between 25 and 64 years old made up only 6.8 per cent. Calculated according to
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statutory base wage was designed to function as a (minimalist) surrogate labor union.10

The pending bill does nothing more nor less than say, "You will not be left helpless. You few wage earners in the most remote part of the country...you in sections of this country unable to exercise the right of collective bargaining—we will not leave you helpless. We will not permit your plight to injure the progress made by other employees who have acquired better working conditions. We will not punish the employer who has yielded to them. We will see to it that you, too, are given some of the benefits and some of the privileges of collective bargaining."11

In the 1930s, such state intervention was welcomed by firms and industries facing "unfair" competitive practices.12 The political ramifications of this competition played an important part in the debates surrounding passage of FLSA in 1937-38. In his message to Congress accompanying submission of the wage and hours bill, President Roosevelt expressly motivated the need for state

unpublished data furnished by BLS, Characteristics of Workers Paid at Hourly Rates including those Paid At or Below the Prevailing Minimum Wage in 1987.

10In the earliest versions of the bill, which provided for employer-employee advisory wage boards, this intent was express. See, e.g., FLSA Hearings at 180-82 (testimony of Sec'y of Labor Perkins); 81 Cong. Rec. at 7652 ("the Government is attempting to set up machinery which...ought to be helpful in providing collective bargaining through a Government agency for the men and women who are not organized") (statement of Sen. Walsh). In 1980 96.6 per cent of minimum-wage workers were non-union members. Only 2.1 per cent of union workers—compared with 18.0 per cent of non-union workers—earned the minimum wage or less. Curtis Gilroy, A Demographic Profile of Minimum Wage Workers, in 2 Report of the Minimum Wage Study Comm'n tab. 10 at 169 (1981). But with the bulk of minimum wage workers concentrated in the service sector, one-fifth of all members of the Service Employees Int'l U. earn no more than four dollars per hour. Minimum Wage Restoration Act of 1987: Hearings before the Senate Comm. on Labor and Public Welfare, 100th Cong., 1st Sess. 341 (1987) (testimony of John Sweeney, Pres. SEIU).

1181 Cong. Rec. 7800 (statement of Sen. Walsh).

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intervention by reference to this class impasse:

\[\text{Exponents of the theory of private initiative as the cure for deep-}
\text{seated national ills fail for four evident reasons: First, they see the}
\text{problem from the point of view of their own business; second, they}
\text{see the problem from the point of view of their own locality or}
\text{region; third, they cannot act unanimously because they have no}
\text{machinery for agreeing among themselves; and finally, they have no}
\text{power to bind the inevitable minority of chislers within their own}
\text{ranks.}^{13}\]

However the statutory purpose was described, the underlying
notion amounted to a legalization of the social-moral revulsion at
certain kinds of "socially offensive" labor exchange transactions.\(^{14}\)
Given the overall level of productivity, payment of wages below a
specified limit created an irrebuttable presumption that the worker’s
economically coerced acquiescence in take-it-or-leave-it offers had
inverted and perverted his formal freedom to choose to contract or
to refrain from entering market relationships into its opposite. A
minimum wage law in effect "declare[s] that anyone who takes an
absurdly underpaid...job must be acting out of desperation. That
desperation may result from ignorance, immobility, or genuine lack
of alternatives, but it should be kept out of the marketplace."\(^{15}\)
Because Anglo-American law courts had failed to void labor
"sweating contracts" for unconscionability,\(^{16}\) legislatures intervened.

\(^{13}\text{S. Rep. No. 884 at 1.}\)

\(^{14}\text{E. Armstrong, Public Opinion on Minimum Wage Legislation in Britain and}
\text{America: A Comparison, 10 SCOT. J. POL. ECON. 243, 243 (1963). See also Emile}
\text{Durkheim, Leçons de sociologie 235 (2d ed. 1969 [1950]).}\}

\(^{15}\text{Arthur Okun, Equality and Efficiency: The Big Tradeoff 21 (1975). From his extreme social-Darwinist}
\text{standpoint, Sidney Webb adopted a similar position toward the "unemployable": "But of all ways of}
dealing with these unfortunate parasites, the most ruinous to the community is to allow them unrestrainedly}
to compete as wage earners for situations." Webb, The Economic Theory of a Legal}
\text{Minimum Wage at 992. See also A. Wolfe, Some Phases of the Minimum Wage-
Discussion, 7 AM. ECON. REV., Supp. No. 1 at 275, 278 (Mar. 1917) ("The elimination}
of the inefficient is in line with our traditional emphasis on free competition").}\)

\(^{16}\text{I know of no case in which a court invalidated a contract by reason of gross}
\text{exploitation, but neither can I recall a case in which a court was given an opportunity}
of doing so." Kahn-Freund, Labour and the Law at 23.\)
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II. An Impoverished Debate About Poverty

Recent theoretically truncated debates over raising the minimum wage have confined their focus to the empirical efficacy of the minimum wage in reducing poverty. Given the undisputed fact that the minimum wage has declined in terms of purchasing power as well as in relation to average wages, defenders urge that,

17Most of the data on minimum wage workers derive from unpublished tabulations from the Current Population Survey (CPS) made available by the BLS. For a synopsis, see Earl Mellor, *Workers at the Minimum Wage or Less: Who They Are and the Jobs They Hold*, MONTHLY LAB. REV., July 1987, at 34. Although it is assumed here that the data are reliable, analysis of the underlying data collection methodology as well as of the results regarding migrant farm workers in another context revealed that the data on migrants are virtually worthless. See Marc Linder, Martin Holt, "Draft Report, Migrant Farmworkers: Number and Distribution": A Texas Critique at 12-13 (unpub. 1987). If the demographic groups making up the poor minimum-wage population are similarly small and subject to significant sampling error, the CPS minimum-wage data may be flawed. On the CPS, see U.S. BUREAU OF THE CENSUS [BOC], THE CURRENT POPULATION SURVEY: DESIGN AND METHODOLOGY (Technical Paper 40, 1978).

18In this respect Milton Friedman has succeeded in imposing on the policy debate the fiction that it is about "positive" predictions rather than a "normative" contest between fundamentally different values:

Underneath the welter of arguments offered for and against such legislation there is an underlying consensus on the objective of achieving a "living wage" for all, to use the ambiguous phrase so common in such discussions. The difference of opinion is largely grounded on an implicit or explicit difference in predictions about the efficacy of this particular means in furthering the agreed-on end. Proponents believe (predict) that legal minimum wages diminish poverty by raising the wages of those receiving less than the minimum wage as well as of some receiving more than the minimum wage without any counterbalancing increase in the number of people entirely unemployed or employed less advantageously than they would otherwise be. Opponents believe (predict) that legal minimum wages increase poverty by increasing the number of people who are unemployed or employed less advantageously and that this more than offsets any favorable effect on the wages of those who remain employed.

Milton Friedman, *The Methodology of Positive Economics*, in idem, ESSAYS IN POSITIVE ECONOMICS 3, 5 (1953). The most prolific liberal writer on the subject of public policy toward low-wage workers agrees: "The acid test is whether the benefits of high wages outweigh the negative effects of lost employment opportunities." SAR LEVITAN & ISAAC SHAPIRO, WORKING BUT POOR: AMERICA'S CONTRADICTION 56 (1987). In trying to explain the defeat of the proposed increase in the minimum wage in 1988, Sen. Hatch claimed that: "We beat them intellectually; our facts were better than theirs." Donald Bacon, *A Victory on the Minimum Wage*, NATION'S BUSINESS, Nov. 1988, at 45.

19Ralph Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation to Incomes*
because the minimum wage no longer guarantees a "living wage," an increase is necessary in order "to restore a full measure of dignity to all minimum wage workers."^20 Opponents, having successfully maneuvered proponents onto this programmatic terrain, respond by offering similarly uncontested evidence that the vast majority of the poor do not earn the minimum wage,^21 while the vast majority of minimum-wage workers are not poor.^22 Alleging lack of employment

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^21 Ninety-four per cent of AFDC families are said to have no working members. H.R. Rep. No. 560 at 35. This figure (for 1984) declined from 16.3 per cent in 1973 to 5.7 per cent in 1983. See House Comm. on Ways and Means, Background Material and Data on Programs within the Jurisdiction of the Comm. on Ways and Means, 100th Cong., 2d Sess., Table 21 at 431 (1988 ed., Comm. Print 1988). Although the Survey of Income and Program Participation indicates that 43.2 per cent of persons sixteen years and older receiving AFDC in 1984 reported "labor force activity," the vast majority included under this rubric appear to be those merely "looking for work." BLS, LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS, 1984 SURVEY, tab. 23 at 30, 36 (Bull. 2270, 1986).

^22 In March 1985, 5,200,000 (or one-tenth) of 52,110,000 hourly employees earned the minimum wage or less. Of these minimum-wage workers, only 19.0 per cent (990,000) lived in families whose incomes in 1984 were below the official poverty thresholds (e.g., $10,990 for a four-person family). Smith & Vavrichek, The Minimum Wage tab. 2 at 27, at 30 n. 4. If workers frequently move into and out of the minimum-wage population, however, the relationship between earning the minimum wage during one month of one year and poverty in the previous year may be tenuous. For a more narrowly defined group of minimum wage workers, the poverty rate is somewhat higher: in 1984, 2,240,000 year-round employees working on full-time schedules (i.e., at least fifty weeks with no more than five part-time) earned no more than the equivalent of the minimum wage (i.e., $7,000); 550,000 or 24.3 per cent of these lived in families with incomes below the poverty thresholds. Id. tab. 5 at 28. Because it defines the universe of year-round full-time workers more broadly to include the self-employed as well as those working full-time merely in a majority of the weeks, the BLS found that 1,402,200 (or 31.1 per cent) of 4,492,000 year-round full-time workers earning the equivalent of or less than the minimum wage were members of families with incomes below the poverty threshold in 1984. BLS, LINKING EMPLOYMENT PROBLEMS TO ECONOMIC STATUS at 4, 33, tab. B-3 at 50. See also Edward Gramlich, Impact of Minimum Wages on Other Wages, Employment, and Family Income, BROOKINGS PAPERS ON ECON. ACTIVITY, No. 2, 1976 at 409; A Demographic Profile of Minimum Wage Workers, in 1 REPORT OF THE MINIMUM WAGE STUDY COMM'N 7, tab. 1-9 at 18 (1981).
rather than low wages as the primary cause of poverty, opponents note that as an anti-poverty measure, the statutory minimum wage is inefficiently over-inclusive and under-inclusive: it aids more non-poor workers than poor ones while missing most of those who are poor. Moreover, because virtually all economists agree that raising the minimum wage will disemploy at least some low-paid workers, the costs may outweigh the meager benefits. Consequently, with only one per cent of all workers both poor and minimum wage earners, opponents favor enactment of more accurately targeted


24The literature on this aspect is huge. See, e.g., John Peterson, Employment Effects of Minimum Wages, 1938-50, 65 J. POL. ECON. 412 (1957); JOHN PETERSON & CHARLES STEWART, JR., EMPLOYMENT EFFECTS OF MINIMUM WAGE RATES (1969); FINIS WELCH, MINIMUM WAGES (1978); SAR LEVITAN & RICHARD BELOUS, MORE THAN SUSTAINMENT 150-54 (1979); Peter Linneman, The Economic Impacts of Minimum Wage Laws: A New Look at an Old Question, 90 J. POL. ECON. 443 (1982); S. REP. NO. 6: MINIMUM WAGE RESTORATION ACT OF 1989, 101st Cong., 1st Sess. 43 (1989). But see Richard Lester, Employment Effects of Minimum Wages, 13 IND. & LAB. REL. REV. 254 (1960). DONALD PARSONS, POVERTY AND THE MINIMUM WAGE (1980), concluded that the transfer of income to the chief beneficiaries—namely, adult women—was more or less bought at the expense of increased unemployment among teenagers. But given the random hiring and homogenizing effect of the casual labor markets on which most minimum wage workers appear, the usual dichotomy between those who remain employed at the new minimum wage and those who are displaced may be invalid. See Allan King, Minimum Wages and the Secondary Labor Market, 41 S. ECON. J. 215-19 (1974).

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programs such as increased earned income tax credits keyed to family size.  

In an effort to make minimum wage legislation politically more palatable in a period during which the social wage has been under attack, supporters have taken issue with the claims of market-efficiency-oriented economists that increasing the minimum wage harms low-wage workers by bringing about greater unemployment.  

But by downplaying the degree of employment-destruction associated with a statutory minimum wage, proponents unwittingly undermine the most cogent grounds for supporting it--namely, that it destroys the basis that sustains low-wage, low-productivity, jobs. A minimum wage that did not significantly contribute to the elimination of such employment structures would be superfluous: "If you fix a wage that is so low that it won't do that any place in the United States, the convergence of liberal and conservative views on the efficacy of the minimum wage as an anti-poverty measure, see Charles Brown, *Minimum Wage Laws: Are They Overrated?* 2 J. Econ. Perspectives 133 (1988); Richard Burkhauser & T. Finegan, *The Minimum Wage and the Poor: The End of a Relationship*, 8 J. Pol'y Analysis & Mgmt. 53 (1989).


[T]he minimum wage has caused a small but real improvement in the personal well-being of those near the poverty level. Equally clear, however, is the message that other mechanisms such as direct government transfer payments or some variant of a negative income tax would be more effective tools for fighting poverty, no matter how it is defined.


chances are that it is so low that won't do anybody any good.\textsuperscript{28} Thus the familiar argument that the minimum wage hurts the very people it is supposed to protect by disemploying them overlooks the long-term objective of the minimum wage, which is to shift employment to efficient firms paying higher wages.\textsuperscript{29}

III. Low-Wage Labor Markets and Allocative Efficiency

The continuing relevance of minimum-wage legislation to the political economy of the United States is grounded in two interconnected facts: its low degree of union organization and underdeveloped social wage. In Western Europe a greater proportion of workers are union members and/or are covered by national collective bargaining agreements; relatively fewer workers are isolated, vulnerable employees in need of this type of state intervention. Moreover, the much more extensive European social welfare systems furnish those who would otherwise need protection against sweated wages with living family incomes.\textsuperscript{30} Consequently, statutory across-the-board minimum-wages are not characteristic of Western European economies.\textsuperscript{31}

\textsuperscript{28}FLSA Hearings at 66 (testimony of Asst. Att'y Gen'l Jackson). See also Galbraith, Economics and the Public Purpose at 248.

\textsuperscript{29}If those companies can't afford to pay a decent wage, it is too bad." Amendment of the Fair Labor Standards Act of 1938: Hearings before the Senate Comm. on Education and Labor, 79th Cong., 2d Sess. 1421 (1946) (testimony of Chester Bowles, Adm'r, Office of Price Adm'n). On this so-called shock or efficiency effect, see C. O’Herlihy, Measuring Minimum Wage Effects in the United States 66 (1969); on the flanking measures that would be required to facilitate re-employment of those made redundant, see \textit{infra} § III.


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To acknowledge that a statutory minimum wage is not an optimal anti-poverty measure is not to discredit it as obsolete depression-born state intervention. In an economy characterized by a chronic tendency to reproduce sub-standard working conditions, a measure designed to insure minimum standards has still not outlived its usefulness.\(^{32}\) First, minimum wage jobs are not simply short-term entry-level way stations occupied by workers "who rapidly begin to climb the economic ladder of ever increasing [sic] complex and more highly paying positions."\(^{33}\) Life-long employment at or below the minimum wage is particularly prevalent for the two occupations with the highest proportions of minimum wage workers--farm workers and domestic workers.\(^{34}\) Longitudinal studies, confirming dual-labor-market analysis, show that significant numbers of female and non-white male workers are trapped in minimum-wage secondary-sector employment.\(^{35}\)

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\(^{34}\) In 1978 47.4 per cent of farm laborers and 74.8 per cent of private household employed were minimum wage workers. 1 REPORT OF THE MINIMUM WAGE STUDY COMM’N tab. 1-11 at 20. By 1987 these shares had reportedly dropped to 14.2 per cent and 54.7 per cent respectively. Calculated according to BLS, Characteristics of Workers. Both the decline and the absolute level for farm workers are incredible, especially since by 1987, 62 per cent of non-supervisory employees in agriculture were not even subject to the minimum wage provision of FLSA. Calculated according to data in H.R. REP. No. 560 tab. 1 at 16. These implausible figures may explain why these two groups reportedly account for less than one-tenth of all minimum wage workers.

\(^{35}\) While 70 per cent of a cohort of 16-19 year-old women were minimum-wage workers in 1966, ten years later 15 per cent of the original group of women remained such; the corresponding figures for a cohort of 20-24 year-old women were 30 per cent and 15 per cent. While 57 per cent of a cohort of black men 16-24 years old and out of school in 1967 were minimum-wage workers, in 1976 one-eighth of the original group of black men were still so employed; for a similar cohort of black women, the
Second, regardless of the extent to which FLSA may increase the incomes of minimum-wage workers, a statutory minimum wage fosters macroeconomic productivity by interfering with the misleading messages sent by the pseudo-markets for sweated labor that disguise inefficiency in a bottom line swollen by extreme exploitation. An appropriately calibrated minimum wage, by eliminating the chief prop of such low-productivity firms and industries, will force out of business those that cannot modernize. Underlying this strategy is the assumption that, in the aggregate, the organizational and capital structure of the job—rather than the personal characteristics of the worker—control the level of productivity. In other words, a minimum-wage-driven productivity policy presupposes not that particular individuals are ‘worth’ $x per hour, but that no job should be structured so unproductively as to fail to provide for a $x wage.

Taken to its logical conclusion, this policy denies the possibility of "isolat[ing] the contribution of any industry, firm or individual worker" because no commodity is produced solely by the

corresponding figures were 60 per cent (for 1969) and 22 per cent (for 1977). 1 Report of the Minimum Wage Study Comm’n fig. 1-5 & 1-6 at 27.

36See Galbraith, Economics and the Public Purpose at 248.

37For empirical evidence suggesting that the minimum wage has indeed had the effect of reducing labor intensity among surviving firms and ousting marginal ones in low-wage industries, see David Kaun, Minimum Wages, Factor Substitution and the Marginal Producer, 79 Q.J. Econ. 478-86 (1965). The president of a small glass manufacturing firm offered confirming testimony to Congress:

We are fighting PPG Industries. Those people have millions to invest in training people on insulated glass techniques, tempering techniques; and we don’t have that kind of money, so minimum wage provides us with that pool. [T]here is machinery available that we could conceivably run our plant in Louisville with 12 people—if we bought all of the state-of-the-art stuff.

Now, there is an economic reason why. ... When business is bad, the interest payments and the maintenance on that equipment goes on; people are a variable cost, but ultimately, if you continue to raise minimum wages and mandated benefits, you will eventually make that business decision viable to modernize.

1 Hearings on H.R. 1834 at 134 (testimony of W. Stone). For a critique of Kaun’s use of the data, see Cornelia Motherall, Minimum Wages, Factor Substitution and the Marginal Producer: Comment, 81 Q.J. Econ. 343 (1967).

38To be sure, the heterogeneity of the work force ensures that some workers will be less productive than others at the same job. At the extreme, FLSA authorizes compensation, pegged to individual productivity, to handicapped workers at levels below the minimum wage. 29 U.S.C. § 214(c).
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workers in the end-product industry. If social wealth is "an indivisible activity of the whole community," then

the haphazard arrangements of the market give no assurance that the income drawn by an industry, or by the workers in an industry, from the national pool, shall be a fair measure of their share. Some groups are in a fortunate, others in an unfavourable position, and the varying "pulls" which scarcity and strategic accidents enable the several groups to exert upon national income, have no necessary or even usual relations to effort, skill or risk, and even less to need.39

This macrosocial theory underlies the Swedish "solidaristic wage policy." Advanced by the highly centralized trade union movement after World War II, this component of a national industrial policy stressed intra-occupational, inter-firm wage compression in order to eliminate the contingency of individual firms' profitability as a source of wage differentials. The ensuing profit squeeze in less productive firms was designed to cause them to become more efficient or to close.40 "If, in exceptional cases, weak firms had to be kept alive by subsidies, this should be a task for society as a whole and not for the workers who happened to have jobs in these firms."41

The statutory minimum wage is a diluted version of solidaristic wage policy. But as part of an industrial policy, a minimum wage cannot stand alone.42 In support of market-mediated


40See Andrew Martin, Trade Unions in Sweden: Strategic Responses to Change and Crisis, in Peter Gourevitch et al., Unions and Economic Crisis: Britain, West Germany and Sweden 189, 205-208 (1984). The Japanese minimum wage law, in contrast, specifically requires that the Minimum Wage Council, in setting a minimum wage, give consideration to "the ordinary enterprise's [tsujoo no jigyoo] ability to pay wages." Saitei chingin hoo, Law No. 137 of 1959, § 3.


42 With these bans, society assumes a commitment to provide jobs that are not...woefully underpaid. That commitment is often regrettably unfulfilled, and perhaps, if it were fulfilled, the bans would be unnecessary. Still, closing a bad escape valve may be an efficient way of promoting the development of better ones through the political process.

displacement of workers and capital from low-productivity to high-productivity firms and sectors, the state must intervene to insure that individual workers do not bear the risk or costs of such macroeconomic rationalization policy. Such an "active manpower policy" would include retraining and education, coordinated employment exchange, and public employment.

At the time of the original FLSA debates, the president of the Int'l U. Operating Engineers, John Possehl, wrote to the president of the AFL, William Green, that if a business could afford to pay only unconscionably low wages, "then the time is at hand for that business to conclude its affairs and turn its capital into other channels of investment." As printed in 81 Cong. Rec. 7898. In fact, the productive form of such capital may be morally obsolescent and thus incapable of being realized and transferred to more profitable investment.

An objection to this function of the minimum wage has been formulated by two leading advocates of the omniscience of unfettered markets. Rather than leading to enhanced economy-wide productivity, they see this use of the minimum wage as "causing a misallocation of capital." The Minimum Wage Rate: Who Really Pays? An Interview with Yale Brozen and Milton Friedman 18 (1966). Such an "automation effect" constitutes a less efficient use of capital because it is "forced" or the result of "arbitrary power" rather than the "normal" consequence of labor scarcity induced by the higher wages offered by other employers. Id. at 18-21. The ideological source of this position is the notion that large aggregates of capital confronting atomized individual workers on the labor market and at the workplace constitute the "natural" political-economic framework within which change would take place "in a more orderly fashion, without the enormous social costs we have now" such as poverty. Id. at 20. Thus, no matter how low wages might fall under such conditions, that level becomes the fictional standard against which Friedman and Brozen judge the effects of the 'artificial' and "arbitrary" intervention of unions or the state. They are thus blind to the fact that labor market imperfections make possible the existence of split labor markets separated from each other in such a way that workers in secondary market firms have little opportunity to become employed in the high-wage, high-productivity (largely) unionized primary sector. Finally, their extreme free-market stance is disingenuous; for although the elimination of unions, minimum wages, and other kinds of labor protection might foster the ruthless pursuit of capitalist efficiency, Friedman understands that his idealized capitalist society would be self-destructive unless it enacted some form of income redistribution to bolster the depressed standard of living of unprotected workers. The decisions regarding the calibration of Friedman's negative income tax, for example, would be as political and hence "arbitrary" as those underlying a minimum wage. See infra § VI.

For a description of the most advanced policies of this type as practiced in Sweden, see Rudolf Meidner & Rolf Andersson, The Overall Impact of an Active Labor Market Policy in Sweden, in MANPOWER PROGRAMS IN THE POLICY MIX 117 (Lloyd Ulman ed. 1973); G. Esping-Andersen, Politics Against Markets: The Social Democratic Road to Power 229-36 (1988 [1985]). A highly developed system of employer-oriented wage subsidies (to employ recipients of payments under means-tested transfer programs and other poor people) might also share this function of the minimum wage—but only insofar as it did not shore up inefficient employers. This
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This macroeconomic allocative function of the minimum wage, moreover, would not be superseded by the enactment of social welfare programs and policies specifically designed to ameliorate the condition of the working poor. For while an increased earned income tax credit adjusted for family size, or an extension of Medicare benefits to minimum wage workers might indeed be "more beneficial than a few extra cents per hour of work," they are neither inconsistent with, nor able to supplant the role performed by, a statutory minimum wage in preventing the allocative inefficiencies associated with sweatshop wages.46

IV. Industry Structure, Productivity, and Minimum Wages

A narrow microeconomic perspective is inadequate for


46H.R. Rep. No. 560 at 43. See also Peter Passell, Paying for Wider Health Insurance, N.Y. Times, May 18, 1988, at 26, col. 1 (nat. ed.). The earned income tax credit (EITC), which was enacted in 1975 and is codified at IRC § 32, merely offsets the regressive impact of social security taxes on low-income workers with children. See Colin Campbell & William Pierce, The Earned Income Credit (1980); Eugene Steuerle & Paul Wilson, The Taxation of Poor and Lower-Income Workers, in Ladders Out of Poverty 33, 37-39 (Jack Meyer ed. 1986). The EITC amounted to only $533 per family in 1986. House Comm. on Ways and Means, Overview of Entitlement Programs: 1991 Green Book tab. 18 at 901 (WMCP 102-9, 1991). The federal government would have to commit a sizable block of revenue to the EITC in order to transform it into a significant working-family allowance. Even the increased EITC levels mandated by the Omnibus Budget and Reconciliation Act of 1990 are projected to increase the per family EITC to only $818 in 1992. Id. A very modest EITC supplement for families with more than one child is now in effect; IRC § 32(b) (Supp. 1991). For a detailed account of such an EITC, see Welfare: Reform or Replacement? at 237-61 (statement of Robert Reischauer). As an alternative to a statutory minimum wage, a negative income tax "would be nothing but a public subsidy for unfair competition and/or monopsonistic exploitation." Fred Blum, Marginalism and Economic Policy: A Comment, 37 Am. Econ. Rev. 645, 650 (1947).
studying the overall consequences of quasi-captive employment in the secondary labor market, the contemporary industrial-racial-gender-age counterpart to the sweated trades. In order, therefore, to evaluate the effectiveness of a statutory minimum wage, it is crucial to distinguish among its potential purposes in relation to the various microeconomic and macroeconomic employment settings in which it may be brought to bear. These purposes include fostering (1) *equity* between wages and profits as well as inter-firm and inter-industry wage equity; (2) *fair competition* between firms by reducing the leeway for competition based solely on low wages; (3) *allocative efficiency and productivity* by ensuring that private wage costs reflect the full social costs of reproducing labor power equally across firms and industries, so that the displacement of labor by capital is not impeded by low wages' acting as a subsidy to inefficiency; and (4) *workers' welfare* by increasing their income. The employment settings include low-wage efficient firms, low-wage industries, low-wage firms in non-low-wage industries, and low-wage occupations in all industries.

William Taft, the conservative Chief Justice of the United States Supreme Court, appreciated that the prohibition of certain forms or levels of exploitation rather than the achievement of a "living wage" as such underlay early minimum wage measures. Explaining the policy behind a minimum wage statute for the District of Columbia struck down by the majority of the Court, he wrote that:

Legislatures, in limiting freedom of contract between employee and employer by a minimum wage, proceed on the

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47 For an overview of theories of the dual labor market, secondary labor market and labor market segmentation, see Peter Doeringer & Michael Piore, Internal Labor Markets and Manpower Analysis (1971); David Gordon, Theories of Poverty and Unemployment (1972); Richard Edwards, Contested Terrain ch. 9 (1979); David Swinton, *The Minimum Wage and Labor Market Fairness*, in Minimum Wage Restoration Act of 1987 at 227-40.

48 For examples of sophisticated pre-FLSA studies that did distinguish among purposes and situations, see E. Burns, Wages and the State: A Comparative Study of the Problem of State Wage Regulations (1926); Barbara Armstrong, Insuring the Essentials: Minimum Wage Plus Social Insurance—A Living Wage Program (1932).

assumption that employees in the class receiving least pay are not upon a full level of equality of choice with their employer, and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known.

Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits which were wrung from the necessities of their employees, and will concede the better terms required by the law....

Here Taft had in mind situations in which the state in effect enjoins an exploitative employer from mulcting self-defenseless employees; the employer then becomes a normal competitor with average profits. Since this analysis assumes that the firm had been paying them "less than they are worth, there is no reason to expect that the forcing of the wage rate up to a fair level will cause any of the people affected to lose their jobs for any length of time." Taft's model, however, fails to distinguish between an efficient firm that takes advantage of a weak labor force and a technologically substandard firm that sustains itself by squeezing employees:

[Exploitation of this kind is much more often practised by incompetent or badly situated employers, who, without it, could not maintain themselves in business, than by competent and well-situated men. The small masters have, throughout history, been always the worst exploiters. Hence exploitation provides, in the main, a bounty at the workers' expense for relatively incompetent and badly situated employers; and the prevention of exploitation would tend to hasten their defeat at the hands of more efficient rivals.]

Abolition of this kind of exploitation enhances aggregate allocative

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52 Id. at 563. Daniel Fusfeld, High Wages, Low Wages and Poverty 8 (Feb. 5, 1991) (unpub. MS), in asserting that "owners of low-wage, inefficient enterprises do not benefit" from low wages, overlooks the fact that such employers might otherwise become unemployed.
efficiency. This second scenario, in turn, must be distinguished from a third:

The thesis that industries which pay less than "fair wages" ought to be forbidden by law to do this, even though such prohibition involves their destruction, is quite different from, and lends no support to, the thesis that industries which pay less than a "living wage" to workpeople who are in fact worth, for all purposes, less than a living wage, ought to be subjected to a similar prohibition.54

Opponents of the minimum wage tend to focus exclusively on this third case--marginally productive employees (in all industries), whom it is allegedly no longer profitable for firms to employ at a higher minimum wage. Because they see no productivity-enhancing effects emanating from the imposition of a minimum wage, they foresee lay-offs as such employers' only option for offsetting higher wage costs.55 Supporters of the minimum wage, on the other hand, in effect fix their view on the first case--that of relatively efficient firms that can be compelled to part with their super-profits without having to change their level of employment or capital-intensity.56 By concentrating on the two extreme scenarios, the protagonists of the debate have neglected the central case to which a statutory minimum wage is directed--namely, labor-intensive, inefficient firms buoyed by

53Pigou, Economics of Welfare at 563.
54Id. at 601.
55See, e.g., N.Y. Times, Apr. 4, 1988, at A20, col. 4 (nat. ed.) (letter to editor). Thomas Sowell contends that "[t]heories of offsetting rising wages by increasing efficiency...have not distinguished real efficiency--larger output from given combinations of input--from a mere substitution of one input for another as their relative prices change." Thomas Sowell, Minimum Wage Escalation, in Fair Labor Standards Amendments of 1977: Hearings Before the Subcomm. on Labor of the Sen. Comm. on Human Resources, 95th Cong., 1st Sess. 525, 531 (1977). See also Howard Dickman, Industrial Democracy in America: Ideological Origins of National Labor Relations Policy 178 (1987). But if the focus is the minimum wage-driven shift of production within an industry from one sector using cheap labor and relatively little capital to a more capital-intensive sector employing less but higher-wage labor, the result is increased macroeconomic productivity.
56Even supporters are skeptical of such a scenario—in which imposition of a minimum wage would be an "unmixed blessing for both the entire economy and the working poor." SAR LEVITAN & RICHARD BELOUS, MORE THAN SUBSISTENCE: MINIMUM WAGES FOR THE WORKING POOR 64 (1979) (criticizing one "extreme" in the debate). For an oblique reference (by a business representative) to such a possibility, see 1 Hearings on H.R. 1834 at 140 (testimony of W. Stone).
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low wages. Interdiction of such a method of competition is designed to force these firms either to raise their level of productivity or to exit from the industry, leaving their former share of the market to more efficient firms. Either possibility--increased productivity in formerly inefficient firms or a shift of production to the already more productive firms--initially entails reduced employment in that industry.

This failure to attend to the representative case is ironic inasmuch as standard marginal productivity analysis compels the conclusion that: "If an employer has a significant degree of control over the wage rate he pays for a given quality of labor, a skillfully-set minimum wage may increase his employment and wage rate...." To be sure, marginalist economists, having assumed that such monopsonistic exploitation is not a real-world problem, have conducted this discussion on a purely theoretical plane because they believe that any labor market failure that might justify mandatory minimum wages is quantitatively insignificant. The underlying

[^57] For the claim that, because low-paid labor is not cheap, there is no evidence that parasitic trades exist, see Lees Smith, Economic Theory and Proposals for a Legal Minimum Wage, 17 Econ. J. 504, 508-509 (1907).


[^59] [T]his case is little more than a theoretical curiosum, and cannot be regarded as of any great practical importance. This is partly because significant degrees of monopsony are particularly unlikely to occur for factors of the kind affected by minimum wage rates...." Milton Friedman, Price Theory: A Provisional Text 190 (rev. ed. 1968 [1962]). See also Bernard Anderson, Background Materials on the Minimum Wage, in 2 Hearings on H.R. 1834, The Minimum Wage Restoration Act of 1987: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor, 100th Cong., 1st Sess. 62, 67 (1988). A standard textbook
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claim "that the occupations most affected by minimum wage legislation are in fact not monopsonistic but competitive"\(^6\) neglects the fact that firms selling their products in competitive markets may be—indeed, remain competitive precisely because they are—buying their labor oligopsonistically in a labor market, such as that for migrants, characterized by a virtually inexhaustible supply of workers willing to work at the prevailing wage rate.\(^6\)

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\(^6\) See, e.g., Herrington Bryce, *Alternative Policies for Increasing the Earnings of Migratory Farm Workers*, 18 Pub. Pol'y 413, 423-24 (1970). In analyzing the effect of a minimum wage on monopsony, standard marginalist theory assumes that the monopsonist firm faces an upwardly sloping (or imperfectly elastic) supply curve of labor (presumably because it is the only employer and must bid workers away from other labor markets). Hiring the marginal worker would therefore necessitate paying a higher wage rate. Marginalist theory further assumes that this step compels the firm to pay the same higher wage rate to all workers already in its employ. From these assumptions marginalists conclude that marginal labor costs exceed average wages. Under these circumstances, the equilibrium wage is not, as in a competitive labor market, represented by the intersection of the marginal value product and labor supply curves, but rather by that of the marginal value product and the (higher) marginal labor cost curves. The end result is fewer workers employed at a lower wage than at competitive equilibrium. See, e.g., Baumol & Blinder, *Economics* at 531-34. The critical assumption is that the firm must raise wages in order to attract additional workers. For although it may be true that higher wages may induce already employed low-wage workers to work longer hours (id. at 513-14), in oligopsonistic labor markets the buyers can take advantage of the sellers because the latter have few (if any) other opportunities to sell their labor. For want of an alternative, they are compelled to offer themselves at relatively low wage rates; in other words, poor members of the reserve army of the unemployed do not need to be coaxed into employment (they supply their labor relatively inelastically). Indeed, in the absence of an organized labor market, firms might be able to hire increasingly desperate workers at ever lower wage rates, which they could then impose on employees already on their payroll. Under any of these scenarios, a statutory minimum wage could successfully compensate for such workers' lack of bargaining power. But this set of circumstances is not what marginalism means by the effect of a minimum wage on monopsony. For as soon as the assumption of an upwardly sloping labor supply curve is abandoned, marginal labor

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V. The Perils of Minimum Wages for Marginal Workers

A minimum wage is too crude an industrial policy to be able to take into consideration all the complexities of heterogeneous economic patterns. Although it is principally designed to undermine the viability of "wage-chiseling" firms within industries, if the wage-price-profit matrix of an entire industry required restructuring, the consequences might include higher consumer prices; if consumers adjusted their budgets to devote a larger share of their resources to the commodities of this industry, a smaller share would be available to purchase the output of others. Since three-fourths of all minimum wage workers are concentrated in retail trade, clerical occupations, and services, which are by and large vulnerable neither to commodity imports nor to export of jobs, foreign dissipation of employment would not be a major risk. Migrant farm workers, however, who hand-harvest fruits and vegetables in competition with producers in Latin America may be the only numerically significant group of workers whose employment might be jeopardized by international competition solely as a result of lower wages.

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The cost ceases to be higher than average wages and the impediment to achievement of competitive equilibrium is removed. Marginalist "exploitation" thus exists only in the presence of an implausible tight labor market of which the sellers are unable to take advantage because firms cease hiring before the point is reached at which the marginal value product and labor supply curves would intersect. With fewer workers employed at lower wages, "exploitation" of the employed coexists with underemployment. A minimum wage is designed to compel the monopsonist to act more rationally by hiring more workers at a higher rate, thereby increasing his total profits.

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For that reason it is worth considering whether it would be appropriate to return to a modified form of the tripartite industry wage committees that operated under the original FLSA through the 1940s and are still in effect for Puerto Rico and the Virgin Islands. 29 U.S.C. §§ 205, 208; Z. Dickinson, The Organization and Functions of Industrial Committees under the Fair Labor Standards Act, 6 LAW & CONTEMP. PROBS. 353 (1939). Confining the committees to those industries--such as agriculture--with the greatest concentration of minimum-wage workers would provide rudimentary Ersatz-collective bargaining for workers who otherwise would not be able to engage in it. See infra ch. 7.

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of an increase in the minimum wage—if their low wages are primarily a function of low consumer prices rather than of high agribusiness profits.

In order to gain a purchase on this issue, it is necessary to explore how these low wages work their way through the micro- and macroeconomic wage-profit-price matrix. This *cui bono* question asks whether low wages are passed on to consumers in the form of low prices of fruits and vegetables or whether producers receive above-average profits. To create a framework for analyzing this question, several key variables would have to be studied carefully. First: What share of final prices do wages represent? If wages represent ten per cent of final prices, even a doubling of wages would, if passed on fully, force a price increase of only ten per cent. In fact, field labor costs as a share of retail prices of fruits and vegetables generally remain well under ten per cent.

Second: To what extent could capital be substituted for labor to absorb wage increases? An adequate response to this question would require an inquiry into the technological underpinnings of a shift toward harvest mechanization and the potential consumer tastes that would sustain or resist purchase of the new varieties of fruits and vegetables that might have to be developed to accommodate mechanical harvesting. Each crop would have to be examined separately. Where nature, however, is no obstacle to machines, the

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Daniel Fusfeld, *High Wages, Low Wages and Poverty* at 8-9, asserts apodictically that in general it is middle-class customers of low-wage industries that benefit. Sidney Weintraub & Stanley Ross, "TEMPORARY ALIEN WORKERS IN THE UNITED STATES 31-32 (1982), see both agricultural employers of exploited farm laborers and higher-income consumers as the gainers without quantifying the gains. "Producers" is too undifferentiated because it embraces farmers, packing sheds, processors, wholesalers, transporters, retailers as well as integrated entities performing several of these functions. Farmers receive about one-sixth to one-quarter of the retail price of fruits and vegetables. See Denis Dunham, *Food Costs...From Farm to Retail in 1990*, at 5 (ERS, Agric. Infor. Bull. 619, 1991).

S. REP. NO. 1549: THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES, 89th Cong., 2d Sess. 23 (1966). Unlike sweated workers at the turn of the century who produced largely inferior goods for other low-income consumers, because migrants produce commodities exclusively for higher-income consumers, higher wages will be translated into higher real incomes for them. Pigou, *The Economics of Welfare* at 688-690.

"Machines are not made to harvest crops; in reality, crops must be designed to be harvested by machines." Raymon Webb & W. Bruce, *Redesigning the Tomato for Mechanized Production*, in USDA, *Science for Better Living: The Yearbook of Agriculture 1968*, at 103, 104 (1968). On mechanization see, G. Brown, *Fruit and
level of skill and of productivity could be expected to rise while the supply of and demand for machine operators would increase vis-à-vis the prior supply and demand schedules for hand-harvesters. Some wage increase for a reduced labor force could be anticipated.

Enforcement of this process of increasing productivity and wages by means of substituting capital for labor represents one of the primary economic functions of labor unions. By the same token, employers consciously use the same process to discipline workers seeking to take advantage of a temporarily favorable constellation of supply and demand forces on the labor market. Where, however, mechanization is infeasible, and neither side can trigger the substitution process, producer-employers may have recourse to more overtly conflictual strategies that no longer carry the authority of quasi-automatic rational technical-economic processes. Although such responses may in fact be superfluous in the absence of an organized labor force, where employers are unable to resist demands for and to absorb wage increases without raising prices, the next critical turning point in the economic transmission belt is the final consumer product market.

Third: What is the price elasticity of demand for fruits and vegetables? Are they such a fixed staple of consumption that consumers devote a constant absolute amount of income or share of their budgets to them so that an increase in price will leave total expenditure unchanged? Or will consumers increase expenditures in order to consume the same physical amounts? Or will a price increase reduce total expenditures? Consumer responsiveness to price changes will vary from product to product and among consumers in accordance with their income levels. Relatively low-income consumers might stop buying luxury-discretionary items such


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as strawberries once the price exceeds a certain level, whereas their demand for lettuce or apples may be much more inelastic. But it is also possible that many low-income consumers consider the whole range of fruits and vegetables as one large discretionary item, so that a budget-sensitive price increase might lead to the substitution of other types of food not affected by the increases. Differential price elasticity is also relevant for union organizing efforts: whereas the United Farm Workers successfully organized a boycott of price-elastic grapes, a similar effort in lettuce foundered on the latter’s price inelasticity.

Finally: To what extent will an increase in wages lead producers to shift production to Latin America, where much lower wages may offset higher transport costs and translate into lower total costs and higher profits? Even at this level of abstraction, this set of complicated and interlocking structural constraints on the scope of agricultural wages indicates that flanking measures would have to accompany any significant increase in the minimum wage for migrants.


71 See infra ch. 7.
A minimum-wage could be set high enough either to secure a "living wage" or to prevent extreme exploitation by reducing profits to the societal average. A minimum-wage fixing that achieved both objectives would be coincidental; nothing in economic theory logically compels the compatibility in all sectors, industries, and firms of an average rate of profit with a "living wage." Productivity in some firms may be so low, and the ability to increase productivity so narrow, that the profit-wage conflict can become a zero-sum game. Where imposition of a minimum wage reduces above-average profits to average profits, this problem does not arise; but where it makes the difference between average or low profits and no profit at all, a decision in effect has to be made whether to eliminate a business altogether.

Rhetorically, New Deal supporters also cast the issue of a minimum wage in terms of a "living wage." Yet at twenty-five cents an hour in 1938, the minimum wage, which at forty to fifty hours weekly would have generated a worker's family ten to twelve dollars at a time when relatively few wives were employed and fewer social welfare programs were available, was not seriously regarded as guaranteeing a "living wage." Moreover, with only 2.7 per cent of all newly covered workers (who in turn represented only one-third of all employees) earning below, and thus benefiting directly from the introduction of, the minimum wage, and the vast majority of sub-

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72*Living wage* is used by minimum-wage advocates to refer to some statistically representative family budgets for basic necessities. See, e.g., SEIU, *Americans Deserve a Living Wage* at 14-15. When introduced at the turn of the century, the concept also rested on a theory of natural right as interpreted by Catholic moral theology. See *Pope Leo XIII, Rerum Novarum* ¶¶49-50 (1891); *John Ryan, A Living Wage* (1906). See also *Philip Snowden, The Living Wage* (1912). The living wage at that time was also understood to be high enough to make it unnecessary for wives and children to work for wages. *But see Brailsford et al., The Living Wage* at 20-26, 33 (minimum wage would have to be supplemented by family allowance). On the so-called family wage, see Michèle Barrett & Mary McIntosh, *The "Family Wage": Some Problems for Socialists and Feminists*, *Capital & Class*, Summer 1980, at 51; Wally Seccombe, *Patriarchy Stabilized: The Construction of the Male Breadwinner Wage Norm in Nineteenth Century Britain*, 11 *Soc. Hist.* 53 (1986).


minimum-wage workers excluded from the Act, it could not have been seriously considered as a general anti-poverty measure. Today, when two-thirds of all minimum wage workers are employed only part-time, even the most ardent proponents of minimum wage legislation concede that no politically plausible higher minimum wage could alone enable the families of such workers to escape poverty.

Calibrating the minimum wage to a "living wage" involves complicated issues, some of which were dealt with by Justice Sutherland in Adkins v. Children's Hospital. Sutherland was troubled by the fact that man-made wages did not bear any necessary relation to the employee's capacity or earning power or necessarily take into account any independent resources she might have. He was, in the abstract, correct in pointing out that if the intention was to transform the wage into a means-tested entitlement, consistency required disallowance of such resources. But since the typical minimum-wage worker had no such income or wealth on which to fall back, what Sutherland was transparently deploring was—as Taft alluded to in his dissent—the fact that interference with market forces deprived employers of the advantages that stemmed from transacting urgent business with needy individuals.

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76Calculated according to BLS, Characteristics of Workers. See generally, Martha Chamallas, Women and Part-Time Work: The Case for Pay Equity and Equal Access, 64 N.C.L.REV. 709 (1986).

77See, e.g., ISAAC SHAPIRO, NO ESCAPE: THE MINIMUM WAGE AND POVERTY 13 (Center on Budget and Pol'y Priorities, 1987). Immediately after World War II, Senator Taft argued that the minimum wage was designed to protect single persons against extreme hardship and poverty: "you can't hope to put a minimum at a point where it will support a family." Amendments of the Fair Labor Standards Act of 1938: Hearings Before the Senate Comm. on Education and Labor, 79th Cong., 2d Sess., pt. 2 at 1421 (1946). See also BRAILSFORD ET AL., THE LIVING WAGE at 22.

78For contemporary praise of this decision from the businessman's viewpoint, see Franklin Ryan, The Wage Bargain and the Minimum Wage Decision, 2 HARV. BUS. REV. 207 (1924). For a compilation of critical comment, see NATIONAL CONSUMER LEAGUE, THE SUPREME COURT AND MINIMUM WAGE LEGISLATION (1925).

79261 U.S. at 555.

80Since the current inadequate social welfare system is designed to transfer income to potential workers at a level below that which a year-round full-time minimum wage worker would earn, such transfers would not impede entry into the labor force of any worker whose reservation wage is at least equal to the minimum wage. Data on the relationship between the minimum wage and transfer income from the food stamp and Aid to Families With Dependent Children programs are presented in HOUSE COMM.
land thereby neglected the fact that labor contacts in the sweated trades were hardly an instantiation of the ideal consensualism act against which to judge state imposition of a minimum wage. On the contrary: they mediated and disguised—and thus helped to reproduce—a process of coercion. In that sense they were an exemplar of market failure.

Present-day opponents of the minimum wage have vindicated Sutherland's position by maneuvering proponents into conceding in principle that the minimum wage is intelligible as a welfare policy only as a quasi-means-tested entitlement. Although this strategy dovetails with opponents' emphasis of the fact that most minimum-wage workers are not members of families living below the government-defined poverty level, they fail to explain why this particular segment of the labor market should be uniquely subject to a wage formation process that obliges employees to disclose all their financial resources to employers. Such a procedure implies that the employment, at sweatshop wages, of the teenage children and spouses of non-poor family heads by inefficient firms does not constitute exploitation and therefore need not be prohibited. Even if it were conceded that a different moral quality inheres in such transactions, a conception of justice is only one aspect of the minimum wage; the subsidy to allocative inefficiency associated with...
extremely low wages remains regardless of who receives those wages. Since implementation of a means test that would authorize sub-minimum wages for the non-poor is politically untenable, such a notion may be regarded as an argument ad absurdum designed to underscore the futility of minimum-wage standards altogether.

Sutherland reserved his severest criticism for the economic and moral havoc that state-imposed contractual incommensurability would wreak: "The declared basis...is not the value of the service rendered, but the extraneous circumstance that the employee needs to get a prescribed sum of money to insure her subsistence, health, and morals." Even while conceding every worker's ethical right to a living wage, he considered it fallacious to assume that every employer was bound to furnish it. Because "[t]he necessities of the employee alone are considered, and these arise outside of the employment," the mandatory minimum wage ignored the moral requirement of "just equivalence" implicit in every contract of employment. In adopting an inchoate marginalism, Sutherland in effect objected to institutionalizing a Ricardian-Marxist conception of the wage--as an equivalent for the value of the worker's labor power fixed at a level of subsistence adjusted for a historical-moral component--since it was unrelated to a level of productivity that would guarantee profitability:

To the extent that the sum fixed exceeds the fair value of the services rendered, it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which, if it belongs to anybody, belongs to society as a whole.\(^\text{83}\)

Sutherland thus implicitly made the Friedmanesque concession that giving completely free reign to market forces would ultimately undermine the market: only state intervention in the form of perpetual redistribution of income to indigent workers could sustain certain labor markets.\(^\text{84}\)

\(^{83}\)261 U.S. at 557-58.

\(^{84}\)Believers in the omniscience of free markets regard such transfers--whether in the form of progressive taxation or of negative income tax programs that would supplant the current welfare system—as having the virtue of reducing the size of government without interfering with the markets for factors of production. See WALTER BLUM & HARRY KALVEN, JR., THE UNEASY CASE FOR PROGRESSIVE TAXATION 84-85 (1976 [1953]); MILTON FRIEDMAN, CAPITALISM AND FREEDOM 190-94 (1962).
Sutherland then generalized this implicit concession in the context of contesting the liberal and Marxist commonplace that labor is a unique commodity because of its inseparability from its owner:

Certainly the employer, by paying a fair equivalent for the service rendered, though not sufficient to support the employee, has neither caused nor contributed to her poverty. ... In principle, there can be no difference between the case of selling labor and the case of selling goods. ... If what he gets is worth what he pays, he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities.®5

Here Sutherland unwittingly proved more than he intended. For by equating labor markets and consumer markets, he implied that economic development had reached a stage in which it was no longer possible to contain the growth of productivity within the existing set of property relations. Consequently, partial de-commodification of labor exchange transactions became necessary. Why that process historically has taken the form of a minimum wage, on the one hand, and Speenhamland-like wage allowances,®6 negative income taxes, and food stamps (that is, expropriation of all sources of revenue through taxation), on the other, rather than of state-imposed discounts at stores, is, in this context, of subsidiary importance.®7

Of primary interest here is why such a sweated stratum as migrant farm workers remained totally barred from minimum-wage protection for so long. The following chapter examines the historical reasons.

®5261 U.S. at 558-59.


®7 Nevertheless: "Only a crass legal formalism could fail to see the far-reaching practical differences" between a grocer and an employer—in particular, the fact that "[a] housewife who buys a can of peas from a grocer does not thereby devote to his enterprise the whole of her working hours." Thomas Reed, Judiciality of Minimum-Wage Legislation, 37 Harv. L. Rev. 545, 564-65 (1924).
The Statutory Origins of Agricultural Exceptionalism: The New Deal Racist Ratification of Sweatshops

[C]heap labor has been the life-blood of the plantation system and an attack on low labor incomes in the South would be interpreted...as a mortal blow.¹

[I]t is...probable that the New Deal's rejection of agricultural labor is at the root of the farm workers' Rechtlosigkeit.²

Only thirty-eight per cent of farm workers today are entitled to the federal minimum wage.³ Even of these, one-fifth nationally and one-third in the South are, according to their employers' own statements, unlawfully paid wages below that level.⁴ Moreover,

¹E. Lewis, Black Cotton Farmers and the AAA, 13 Opportunity 72, 72 (1935).
employers in the thirty-one states without a minimum wage law applicable to agriculture can lawfully pay those who are excluded from FLSA a dollar or even ten cents an hour.\(^5\)

That it is precisely those workers most urgently in need of state intervention for the subsistence wages that the labor market withholds from them who are denied its protection has characterized FLSA from its inception. At the time the law went into effect in 1938, with the bulk of low-wage workers employed in industries exempt from coverage, only 300,000 of the initially 11,000,000 covered employees were earning less than, and hence stood to benefit from, the statutorily mandated minimum wage of twenty-five cents per hour.\(^6\)

Farm workers are also the only numerically significant group of adult minimum-wage workers wholly excluded from the premium overtime provision of FLSA on the basis of a criterion unrelated to firm-size.\(^7\) Almost half of all farm workers subject to the minimum wage provision of FLSA work more than forty hours per week; these overtime hours, in turn, account for between one-sixth and one-seventh of all subject work hours.\(^8\) In some instances, migrants work in excess of 100 hours weekly at the minimum wage.\(^9\) This exclusion from the statutory entitlement to time and one-half for overtime hours thus deprives an already very low-paid stratum of much needed income.

Many agricultural employers, particularly in the South and Southwest, face a perfectly elastic labor supply: "it appears to them that they can secure all the workers they need at any given wage rate. They do not feel any necessity to raise wages to attract additional workers."\(^10\) This unique labor market, marked by a permanent surplus of workers with no alternative to working more than forty hours per week at (or even below) the minimum wage, is


\(^7\)29 U.S.C. § 213.

\(^8\)Holt, Elterich, & Burton, Coverage, tab. 8.6 at 459, tab. 8.8 at 461, tab. 8.10 at 463; in 1981 mandatory overtime compensation could have increased farm workers' weekly earnings by 13.7 per cent.

\(^9\)Irrigators on citrus farms in the Rio Grande Valley fit this description.

\(^10\)Vernon Briggs, Jr., Comments in 4 REPORT OF THE MINIMUM WAGE STUDY COMM'N at 475, 478-79.
the product of a long history of policies formulated and implemented by governments at all levels. Hispanic and black workers perform most of the agricultural labor done by employees who are subject to the minimum wage provision of FLSA but are excluded from its maximum hours provision. This concentration of Blacks and Hispanics in such a vulnerable position within the division of labor is rooted in the still virulent vestiges of institutional racism.

This chapter traces the origins of this aspect of agricultural exceptionalism to the New Deal.

I. The Racist Underpinning of the New Deal Coalition

The exclusion of farm workers from coverage under FLSA (and other New Deal economic legislation) has traditionally been analyzed as having arisen "as a necessary political compromise without which it would have been impossible to inaugurate a most important reform in American institutions." But this specification of political compromise with the interests of agricultural employers in general conceals more than it reveals about the dynamics of the New Deal. For racial prejudice against southern Blacks, which

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11 See supra ch. 1.
14 The only relevant New Deal statute that cannot unambiguously be traced back to a racially discriminatory intent is the NLRA. It, too, excluded the two occupational groups encompassing the bulk of black workers in the South—agricultural and domestic employees; apart from the children of employer-parents, they were also the only groups excluded from coverage. Ch. 372, § 2(3), 49 Stat. 449,450 (1935). See generally, Austin Morris, Agricultural Labor and National Labor Legislation, 54 CALIF. L. REV. 1939, 1951-56 (1966); Note, The Constitutionality of the NLRA Farm Labor Exemption, 19 HASTINGS L.J. 384, 384-86 (1968). Race may not have been the predominant motive because:

Farmers as a class [we]re opposed to any form of labor organization. Attempts by the I.W.W. in the past to organize the migratory harvest hands have helped to give farmers a distaste for unionization of farm labor, a sentiment which deepened into hostility because of the tactics of
resulted in their virtually complete and unconstitutional expulsion from participation in the political life of the South and, hence, congressional and presidential political processes, went hand in hand with the overwhelmingly agricultural orientation of the political and economic power of the South and the overrepresentation of Southern Democrats in Congress. Inevitably, the interests and goals of especially rural southern white supremacy shaped the policies of the Democratic Party, President, and Congress.

The Democratic Party that promoted Franklin Roosevelt was a "classical alliance of city bosses of the North and barons of the South" that believed in little beyond states' rights and federal patronage...." This "classical partnership between northern bosses and southern and western agrarians" began to be undermined in the 1920s when the new racial, ethnic and sexual composition of the northern urban electorate triggered demands by metropolitan Democratic organizations for a greater role within the Party. After becoming President, "Roosevelt's first step was to heal the split within the alliance. He was admirably qualified to reunite the classical party" insofar as "he was also (and he never let the South forget it) a Georgian by adoption...perhaps more at ease with farmers than precinct committee-men or trade unionists." Roosevelt "more than any other northern Democratic leader...understood and empathized with the Southerners and their problems. ... As for blacks, it never occurred to him to question

I.W.W. organizational efforts, which by the time of the New Deal were more a bad memory than a current threat, were largely directed at white farm workers outside the South. STUART JAMIESON, LABOR UNIONISM IN AMERICAN AGRICULTURE 59-69, 212, 236, 396-405 (BLS Bull. No. 836, 1945); MELVYN DUBOFSKY, WE SHALL BE ALL: A HISTORY OF THE INDUSTRIAL WORKERS OF THE WORLD (1969); CLETUS DANIEL, BITTER HARVEST: A HISTORY OF CALIFORNIA FARMWORKERS, 1870-1941, at 76-99 (1981).


white supremacy."\(^{17}\)

The blatantly racist electoral procedures of the southern states insured the long seniority of, and hence stranglehold on Congress by, southern congressmen, "who fervently believed in the necessity of maintaining the traditional caste and class structure." This configuration of power led Roosevelt to "believe[] that he would lose the support of these Southerners if his administration made any direct attempt to reform traditional racial and class patterns...."\(^{18}\) Because he was "[u]nwill[ing] to risk schism with Southerners ruling committees, Roosevelt capitulated to the forces of racism," agreeing "to modify or water down the New Deal in its practical operation in the South...."\(^{19}\)

Consequently, the executive and legislative branches, by acquiescing in the preservation of political white supremacy, insured that intrusions into the socioeconomic sphere were as minimal and peripheral as possible. If even "[a]id to Southern Negroes would disturb existing social and economic relationships," the application of constitutional standards to their civil and political rights was out of the question.\(^{20}\) Thus not only did the New Deal fail to enact any civil rights legislation, but Roosevelt, ignoring a sharp increase in lynchings, also refused to oppose a Southern filibuster of an anti-lynching bill for fear that it would trigger Southern retaliation against the administration's pending economic legislation.\(^{21}\)

This unremitting accommodation of southern racism represented more than the ordinary dynamics of pluralist political compromise because the deliberate denial of socioeconomic and political rights to a disenfranchised minority was made possible by


\(^{20}\) Id. at 72. Even Harold Ickes, the Secretary of Interior and perhaps the most outspoken high-ranking New Deal advocate of equal rights for Blacks, assured racist Southern senators that he had no intention of attacking segregation. John Kirby, *Black Americans in the Roosevelt Era* 33-34 (1980).

southern domination of leadership positions in Congress during the New Deal:

Throughout the thirties, the representatives of Dixie...controlled over half the committee chairmanships and a majority of leadership positions in every New Deal Congress. The combination of a seniority rule determining access to congressional influence, a one-party political tradition below the Mason-Dixon line, and a Democratic weakness outside the South prior to 1930 resulted in legislative hegemony for the advocates of white supremacy.22

Southern domination of the New Deal legislative process was exemplified by the leadership of the Seventy-Fifth Congress, which enacted FLSA. In 1938, Southerners chaired the Senate Agriculture, Appropriations, and Finance Committees and the House Agriculture and Ways and Means Committees, while five of ten Democrats on the all-powerful Rules Committee were Southerners. The House Speaker and Majority Leader were also Southerners. The same committee chairmen presided during the Seventy-Fourth Congress, which passed the Social Security Act and the National Labor Relations Act. "So long as the New Deal did not disturb Southern...racial patterns, these leaders would support it...."23

Southern political leadership was not merely one sectional force among many engaged in the routine competition of regional interests: "Except on race legislation, the South was not ‘solid’ in Congress."24

We ought to be both specific and candid about the regional interest that the Democratic party of the South has represented in national affairs. [T]here is one, and only one, real

22 SITKOFF, A NEW DEAL FOR BLACKS at 45.
23 CONGRESSIONAL DIRECTORY, 75th Cong., 3rd Sess. 175, 177, 193, 204, 205, 259 (1937); id., 74th Cong., 1st Sess. 175, 177, 192, 204 (1935); JAMES PATTERSON, CONGRESSIONAL CONSERVATISM AND THE NEW DEAL 132 (1967). Cf. id. at 42-44, 179, 186, 193-98; DONALD GRUBBS, CRY FROM THE COTTON: THE SOUTHERN TENANT FARMERS’ UNION AND THE NEW DEAL 57 (1971). The power of the southern racist delegation was so great that even Sen. LaFollette, whose Comm. on Education & Labor held scores of hearings on Violations of Free Speech and Rights of Labor, never dared investigate thepeonage ofblack sharecroppers because southern senators opposed such hearings too strenuously. DAVID CONRAD, THE FORGOTTEN FARMERS: THE STORY OF SHARECROPPERS IN THE NEW DEAL 173-74 (1965). See also Edward Schapsmeier & Frederick Schapsmeier, Farm Policy from FDR to Eisenhower: Southern Democrats and the Politics of Agriculture, 53 AGRIC. HIST. 352, 353-60 (1979).
24 PATTERSON, CONGRESSIONAL CONSERVATISM at 330.
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basis for southern unity: the Negro. ... We need to be even more exact. [I]t is not the Negro in general that provides the base for white Democratic unity in national affairs: it is fundamentally the rural Negro in areas of high concentrations of colored population. It is here that 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. Here we find the persistent strain of southern unity.

The maintenance of southern Democratic solidarity has depended fundamentally on a willingness to subordinate to the race question all great social and economic issues that tend to divide people into opposing parties.25

More specifically still, the generator of the South’s racist politics was the so-called Black Belt—an area encompassing some 200 counties the majority of whose populations was black, stretching from Virginia to Texas, with the densest core extending from South Carolina to eastern Arkansas and Louisiana. It "sketches the section of the nation where the smallest proportion of the adults exercise the franchise and it defines the most solid part of the Solid South. White supremacy and its instrument, the white primary, are more sacred than any other political tenets." It was here that "terroristic methods [were] used to disenfranchise the Negro": "With the financial, educational and religious institutions maintaining the status quo and keeping the Negro ‘in his place,’ the threat of violence always hangs over his head and violence frequently is used upon slight provocation."26

The institutionalized racist ideology of the Black Belt plantation society not only dominated the South politically, but also formed the linchpin of the whole southern economy. It was the nodal point at which all the southern racist political-economic forces opposing the application of a federal minimum wage to southern black farm workers converged. Perhaps the most blatant example of this interwovenness of the political and economic was to be found in the person of Senator Byrd of Virginia. As reported by the then head of the Resettlement Administration:

"I know what’s the matter with Harry Byrd," Franklin [Roosevelt] said to me one time when Byrd was objecting to a resettlement project in Virginia. "He’s afraid you’ll force him to pay more than

25V. Key, Jr., Southern Politics in State and Nation 315-16 (1949).
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10 cents an hour for his apple pickers." Harry Byrd was the apple king of the Shenandoah and so his interest was direct.27

With "literally millions of farm laborers in the Black Belt...eagerly awaiting an opportunity to work for wages even smaller than are now being paid to textile and steel workers in southern cities," nothing less than the preservation of a virtually inexhaustible supply of the nation's cheapest labor was at stake: "The South can hope to be nothing but the Orient of this nation so long as its wages and working conditions are determined by the competition of plantation workers accustomed to practically no money and a minimum diet."28

From this overarching macropolitical-economic complex flowed the panoply of extralegal and unconstitutional measures that planters and their agents undertook to preserve their quasi-captive labor force.29

II. New Deal Racial Discrimination Against Farm Workers Before FLSA

The basis for exemption of agricultural labor from the Fair Labor Standards Act was laid during the operation of the National Industrial Recovery Act.30

To understand the historical-institutional context of the exclusion of farm workers from FLSA, it is necessary to sketch the treatment accorded racial minorities (chiefly Blacks) under earlier New Deal social-economic legislation. This retrospective is necessary because, by the time FLSA was drafted, the exclusion of farm workers from related legislation had become such a fixed

27REXFORD TUGWELL, THE DEMOCRATIC ROOSEVELT 447 n.7 (1957).
28RAPER, PREFACE TO PEASANTRY at 6.
component of New Deal politics that the drafters no longer consciously took the issue into consideration.\footnote{Judge Gerard Reilly, Solicitor, DOL, 1937-1941, chief drafter of FLSA, telephone interview (May 5, 1985). See also \textit{The Making of the New Deal} 172-75 (Katie Louchheim ed. 1983).}

\subsection*{A. The National Industrial Recovery Act (NIRA)}

The NIRA exerted a potent two-fold influence on subsequent New Deal treatment of Blacks and farm workers insofar as its administration by the National Recovery Administration (NRA) entailed both discrimination against black industrial workers in the South and exclusion of farm workers. A major purpose of the NIRA\footnote{Act of June 16, 1933, ch. 90, 48 Stat. 195 (1933) (held unconstitutional in \textit{Schechter Poultry} v. United States, 295 U.S. 495 [1935]).} was to stimulate the economy by insuring that depression-induced competitive wage-cutting would not feed underconsumptionist tendencies standing in the way of a cyclical recovery. By establishing codes of fair competition on an industry-by-industry basis, the NIRA sought to increase purchasing power by fixing minimum wages and maximum hours.\footnote{Morris, \textit{Agricultural Labor and National Labor Legislation} at 1945-51; Wolters, \textit{Negroes and the Great Depression} at 150.}

\begin{itemize}
\item \textbf{1. Discrimination Against Black Industrial Workers in the South.} Black workers were largely excluded from the wage and hour benefits of the NIRA by virtue of their concentration in two sectors of employment for which no codes of fair competition were established--agriculture and domestic service.\footnote{\textit{Arthur Schlesinger, Jr., The Age of Roosevelt: The Coming of the New Deal} 87-102 (1958); \textit{Grant Farr, The Origins of Recent Labor Policy} 59-76 (1959); \textit{Ellis Hawley, Monopoly and the New Deal} (1966); \textit{Peter Irons, The New Deal Lawyers} 17-34 (1982); \textit{Stanley Vittoz, New Deal Labor Policy and the American Industrial Economy} 73-96 (1987).} But even in industries where codes did exist, intentional anti-black discrimination prevailed:
\end{itemize}

\begin{quote}
[S]everal provisions...enabled employers to pay white workers more than blacks. Some codes provided that certain jobs in an industry would be covered by NRA while other jobs would not, and these "occupational classifications" frequently were arranged so that
\end{quote}
minimum wage scales covered only that work which was generally performed by whites. This strategy was pursued, for example, in the cotton textile industry in the South. More than a hundred codes with geographical classifications permitting the payment of lower minimum wages in the South camouflaged racial differentials. Where an industry (such as fertilizers) was largely composed of black workers, it was classified as "southern"; where, on the other hand, a southern industry (such as cotton textiles) employed few blacks, the code provided for only marginal differences between southern and non-southern wages.

President Roosevelt, who was required to approve each code, publicly expressed his support for such provisions: "It is not the purpose of the Administration, by sudden or explosive change, to impair Southern industry by refusing to recognize traditional differentials." And with few Blacks represented at code hearings—in contravention of the statutorily imposed obligation of representativeness—and "local control of compliance machinery mak[ing] it almost impossible for the Negro to seek effective re­dress," Congress and the Administration insured the continued subordination of southern Blacks.

2. The Exclusion of Farm Workers from NIRA Codes

It is my opinion that very early in any study of the agricultural labor problem in Florida, a division should be made between White labor and Black labor, so that proper attention may be given to certain racial conditions and habits.

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35 Id. at 124-25.
36 Id. at 126, 128-30; John Davis, What Price National Recovery? 40 CRISIS 271 (1933); idem, Blue Eagles and Black Workers, NEW REPUBLIC, Nov. 14, 1934, at 7.
37 LEVERETT LYON ET AL., THE NATIONAL RECOVERY ADMINISTRATION 328 n.9 (1935); NIRA § 3(b), 48 Stat. at 196.
38 JOHN FRANKLIN, FROM SLAVERY TO FREEDOM 535 (3rd ed. 1971 [1947]); NIRA § 3(a); SCHLESINGER, POLITICS OF UPEAVAL at 431-33. See generally, William Pickens, NRA—"Negro Removal Act"? 16 WORLD TOMORROW 539 (1933); John Davis, NRA Codifies Wage Slavery, 41 CRISIS 98 (1934); John Van Deusen, The Negro in Politics, 21 J. NEGRO HIST. 256, 273 (1936); BERNARD BELLUSH, THE FAILURE OF THE NRA 78-80 (1975).
39 Philip Murphy, Chief, Commodities Purchase Sect., Memorandum to AAA Adm'r (Feb. 20, 1935), National Archives (NA), Record Group (RG) 145: Dep't of Agric.: Subject Correspondence 1933-35, Folder: Citrus Fruit.
At the administrative agency level, the issue of the inclusion of farm workers appeared at first as a dispute between the NRA on the one hand and the Department of Agriculture (USDA) and its subordinate Agricultural Adjustment Administration (AAA) on the other. The NIRA and the Agricultural Adjustment Act (AAAct),\textsuperscript{40} cornerstones of the so-called first New Deal, were coordinated efforts to overcome the depression. Although the AAAct did not deal with labor issues, under the NIRA neither the provision establishing procedures for promulgating codes of fair competition nor that creating employees' right to organize under these codes\textsuperscript{41} expressly excluded agriculture.

Codes were voluntary: no industry was required to present one. Since the quid pro quo for complying with a code was exemption from the anti-trust laws, which did not pose a problem for agriculture, agricultural industries had little incentive to present a code, especially since the AAA attended to their interests by means of marketing agreements.\textsuperscript{42} Whether Congress intended the NIRA to cover agricultural labor is not at issue here.\textsuperscript{43} For even had Congress intended to cover agricultural labor, a number of institutional and organizational factors militated against effective coverage. While the NRA interpreted "industry" to mean employers, "[t]he AAA...took the position that the interests of agricultural workers would be amply safeguarded as a consequence of the benefits to be enjoyed by the farmers who enjoyed them." Since

\textsuperscript{40}Ch. 25, 48 Stat. 31 (1933).

\textsuperscript{41}NIRA, §§ 3, 7(a), 48 Stat. at 196, 198.

\textsuperscript{42}Id. § 5, 48 Stat. at 198. Although §§ 3(d) and 7(c) of the NIRA provided for the possibility of imposing a code on an industry, "no codes were imposed on industry." Woodbury, \textit{Limits of Coverage} at 2 n.*

\textsuperscript{43}A nearly contemporaneous study concluded that "[n]o such Code was submitted by any group of farmers to place their labor under code provisions." \textit{Id.} at 3 n.**, 21. Yet the files of the Secretary of Agriculture contain a Code of Fair Competition submitted by Agricultural Industry (file stamped Nov. 20, 1933), which included very liberal labor and maximum hours provisions. NA, RG 16: Gen'l Correspondence of the Office of the Sec'y of Agric., 1933, Tray 194, Folder: Agl. Labor. Moreover, "the legal division of the AAA held that a code covering farm labor was authorized under the Recovery Act"; and even the Bureau of Agricultural Economics of the USDA "drafted a code to be applicable to agriculture and agricultural labor," although it ultimately recommended that it not be adopted. Woodbury, \textit{Limits of Coverage} at 3 n.*. Finally, the authors of the \textit{Report of the Interdepartmental Committee Appointed to Investigate Labor Conditions in the Florida Citrus Industry} stated in 1934 that the NIRA was arguably intended to include farm labor within its scope. \textit{Id.} 35, 37 (reprinting Report).
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farm workers were little organized and "[a]ttempts by the I.W.W. in the past to organize the migratory harvest hands ha[d] helped to give farmers a distaste for unionization of farm laborers...the specific problems of agricultural laborers received little consideration in Congress in the framing of the NIRA and the AAA."\(^{44}\)

It is unclear whether racist considerations motivated this neglect of farm workers during the first one hundred days of the New Deal. At that particular juncture a more generalized solicitude for the interests of farmers may have played the dominant part. However, the subsequent exclusions of farm workers from the NRA codes for the "allied" citrus packing, cotton ginning, and tobacco warehousing industries, and their clear import for the largely non-white workers on the plantations of the South and (secondarily) of the industrialized farms of California and Arizona, did embody the racist motivation that underlay all the later exclusions from New Deal legislation.

The conflict over the coverage under the NIRA of agriculture-related industries—which as an extension of primary agricultural production employed many of the same workers otherwise classified as agricultural\(^{45}\)—was not easily resolved. The joint administration by the NRA and AAA of industries bordering on agriculture underwent a complicated series of changes. Using his authority under the NIRA, President Roosevelt in mid-1933 delegated his functions and powers to the Secretary of Agriculture "with respect to trades, industries, or subdivisions thereof which are engaged in the handling of any agricultural commodity or product thereof" except those relating to the labor provisions of the NIRA.\(^{46}\) A subsequent executive order enlarged the number of industries to include those "engaged principally in the handling of...[a]gricultural commodities...up to the point of first processing off the farm, including all distribution, cleaning, or sorting, ginning, threshing or other separation, or grading, or canning, preserving, or packing, of such commodities occurring prior to such first processing." The order also provided that any question arising as to whether a specific industry was included among those delegated to the Secretary of Agriculture "was to be finally and conclusively determined by

\(^{44}\)Id. at 3, 4.

\(^{45}\)Id. at 16, 20.

\(^{46}\)Exec. Order No. 6182, § 8(b) (June 26, 1933). This executive order defined the industries involved as those "engaged principally in the handling of milk and its products, tobacco and its products, and all food and foodstuffs."
agreement between the Secretary of Agriculture and the Administrator of the NRA, or, failing that, by the President.47

By the beginning of 1934 only six codes had been approved for industries falling within the jurisdiction of the AAA, which had a mandate to promote and protect the interests of farmers; among other policies the Agricultural Adjustment Administration sought...elimination of groups of workers who might be termed agricultural, from the scope of codes; [and] elimination of industries from NRA codes which might be deemed to fall within the scope of agricultural production.48

As a result of pressure exerted by industries that sought codification but whose codification was being frustrated by these policies, a new executive order re-delegated to the NRA codification of all industries in question subsequent to the first processing except that all price, marketing, and production control questions were subject to approval by the Secretary of Agriculture. Virtually none of the seventeen enumerated industries employed agricultural-type labor.49

The citrus growing and packing industry, which claimed to be outside the jurisdiction of the NRA on the ground that it was engaged solely in agricultural production or employed only agricultural workers, assumed the leadership in aggressively resisting subjection to the NRA.50 In order to understand this dispute it is necessary to sketch the structure of the Florida citrus industry, which deviated from the southern cotton plantation system: "The pattern of land ownership and control, and the corresponding labor-employer relations in Florida, resemble[d] in many ways those in California."51

47No. 6345 (Oct. 20, 1933).
48Woodbury, Limits of Coverage at 8.
49Exec. Order No. 6551 (Jan. 8, 1934) (pecan shelling being the exception). A second group of industries remained within the jurisdiction of the Secretary of Agriculture pursuant to the restriction of the previous orders that "the determination and administration of provisions relating to hours of labor, rates of pay, and other conditions of employment" fell within the authority of the NRA. In this group were included industries engaged in the handling, processing or storing of milk, oleomargarine, cotton and cotton seed and their products, including ginning, and fresh fruits and vegetables "up to and including handling in wholesale markets." Id. § II.
50Woodbury, Limits of Coverage at 12, 15.
51JAMESON, LABOR UNIONISM IN AMERICAN AGRICULTURE at 327. In the prewar political campaigns to shape or amend legislation so as to exclude industries "allied with agriculture," it was the fruit and vegetable, in particular, citrus, companies of California in collaboration with their own and southern racist congressmen that played...
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Under the control of large integrated grower-shippers, intensive agriculture in Florida became one of the most highly industrialized fields of agriculture. Structurally the industry is highly centralized, and it uses quasifactory methods of growing, packing, and shipping produce. ... The majority of growers are rather passive absentee owners, dominated financially and commercially by a few large companies which pack and ship the fruit for market. These establishments usually buy the fruit "on the tree," and hire the labor as well as provide the equipment required for harvesting operations. Many of them specialize also in "caretaking" the groves of individual owners for stipulated fees; they hire the maintenance labor required for plowing, planting, fertilizing, spraying, pruning and thinning.52

Labor in Florida was inherited largely from among displaced plantation sharecroppers. During the 1930s the share of non-whites (almost exclusively Blacks) among hired farm laborers in Florida reached almost two-thirds.53 These black workers 'faced the traditional 'Jim Crow' laws in many fields of social and occupational activity. They tend[ed] to lack recourse to legal action to protect themselves from exploitation by whites, and consequently...suffered violence and intimidation from extralegal groups such as the Ku Klux Klan.54 As a result of centralized production, the grove workers, pickers, and packers were all employees of the packing houses, lived in towns, and were recruited from the same general industrial labor market. Nevertheless:

The citrus packing houses wished to have all the labor,

the most prominent part. See Arthur Ross, Agricultural Labor and Social Legislation 133-264 (Ph.D. diss. U. Cal. Berkeley, 1941); Morris, Agricultural Labor; DANIEL, BITTER HARVEST.

52JAMIESON, LABOR UNIONISM IN AMERICAN AGRICULTURE at 328. Based on such operations, Florida and California ranked first and second respectively according to the number of farms reporting 100 or more hired laborers in March 1940. Of 304 such farms (employing 58,256 workers), 76 (employing 14,808 workers) were located in Florida and 63 (employing 11,876 workers) in California. BOC, ANALYSIS OF SPECIFIED FARM CHARACTERISTICS FOR FARMS CLASSIFIED BY TOTAL VALUE OF PRODUCTS 135, 148, 154 (1943).

53Calculated according to BOC, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, 4 POPULATION: OCCUPATIONS, BY STATES, tab. 11 at 353, 355 (1933) (60.9 per cent); idem, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, 3 POPULATION: THE LABOR FORCE, pt. 2, tab. 13 (65.8 per cent).

54JAMIESON, LABOR UNIONISM IN AMERICAN AGRICULTURE at 328.
including packing house labor, declared "agricultural" and exempted from the scope of the National Recovery Administration labor codes... The NRA tended to cover all wage earners in all codified industries...save only those specially exempted. Accordingly, if the Citrus Packing Industry was subject to a code, all employees of this industry were subject to the labor provisions unless they were exempted by the terms of the code. But the Citrus Packing Industry...was not required, except from the pressure of public opinion, to apply for a code, and in that event, the labor employed in that industry would not enjoy the benefits of coverage. So far as concerned the type of labor involved, the work appeared to partake of the character of industrial rather than of agricultural labor.55

In 1933 the NRA promulgated a definition of agricultural labor that had been approved by the AAA: "When workers are employed in processing farm products or preparing them for market, beyond the stage customarily performed within the area of production, such workers are not to be deemed agricultural workers." Issuance of this definition with its ambiguous term, "area of production," led the citrus growers to conclude "that they were not expected to present an NRA code." The AAA, in turn, "interpreted this definition as authorizing exemption...of workers engaged in handling and processing operations...if employed within the 'area of production.'" The upshot of the ensuing correspondence between citrus workers and unions in Florida and the NRA was the issuance of a new definition substituting "on the farm" for the vague "within the area of production." The AAA, however, refused to agree to this change and began negotiating a marketing agreement without reference to an NRA labor code. By December

55Woodbury, Limits of Coverage at 16, 36-37.
57The NRA later stated that "no Executive or Administrative Order appears to have been issued granting exemption to agricultural labor. Though the definition was thus drawn up and approved, the purpose seems never to have been carried out by formal action." Woodbury, Limits of Coverage at 17.
58Id. at 18. "The NRA...regarded the existence of the definition as an obstacle to the coverage of workers who might under it be termed agricultural. On the other hand, when it came to incorporating the definition of agricultural worker in the codes as a class exempt by the statute, the NRA Legal Division objected." Id.
59NRA Release No. 692 (Sept. 8, 1933); Fed. Doc. Center, Suitland, MD, Consolidated Unapproved Codes, RG 9, Box 6153. Cf. letter from W. Woolston (NRA, Lab. Advisory Bd.) to Wayne Raylor (AAA) (Sept. 7, 1933) (stating Bd.'s position that, contrary to view of AAA, packing done in places other than farms is industrial in character); id.
1933, marketing agreements without labor code provisions were in effect for the citrus industry in Florida, Texas, Arizona, and California. In January 1934, the NRA, despite the urging of the Foods Division of its own Labor Advisory Board, acquiesced in the accomplished fact created by the AAA and reinstated the earlier definition.\(^6^0\)

These disputes were not mere interagency jurisdictional squabbles. In late 1933 and early 1934 members of the bi-racial United Citrus Workers of Florida were conducting a number of important organizational strikes against which the employers used "the usual forms of terrorism." It was in this context that the AAA steadfastly opposed inclusion of labor provisions in Florida citrus marketing agreements, thus helping large-scale employers of non-white labor maintain their dominance.\(^6^1\) As a result of these joint efforts by the federal government and the citrus industry, which established the precedent of excluding farm workers from federal labor legislation, approximately 200,000 largely non-white citrus workers were deprived of the protective benefits of labor codes.\(^6^2\)

The policy of the AAA with regard to promulgating a code with labor provisions for the cotton ginning industry, which employed upwards of 100,000 workers, was even more blatantly racist. Here, again, employers claimed exemption on the ground that their employees were agricultural workers. Yet:

In many cases the same Negro farm hands who picked the cotton in the fields were also employed in the cotton ginning operation.

\(^{60}\)Woodbury, *Limits of Coverage* at 19-20; Release No. 2781.

\(^{61}\)Report of the Interdepartmental Committee at 35-36. The AAA claimed that inclusion of labor provisions "would require some supervision of the increased income resulting from the agreement [which raised the prices of Florida oranges "appreciably"] among those whom we class as producers and those who work for these producers as laborers" at a time when the AAA was receiving complaints from farmers about high wages. Memorandum from J. Tapp, Ass't Dir. of the Commodities Div. of the AAA, to the Sec'y [of Agriculture] (April 10, 1934); NA, RG 145: Dept of Agric., Subject Correspondence 1933-35, Folder: Agric. Workers. In fact, the wages in the Florida citrus industry were so low that the district director of the Civil Works Adm'n, who initially threatened that workers who quit their jobs would be ineligible for work relief, later announced that "packing houses and groves must assure a 'living wage' before clients would be cut off relief rolls." JAMIESON, LABOR UNIONISM IN AMERICAN AGRICULTURE at 331; Report of the Interdepartmental Committee at 35.

Where the identical individuals were not hired, others with the same general agricultural background were employed. The operators urged that higher wages paid to labor in cotton ginning would affect labor costs in the cotton fields, since the workers would demand the same pay. The Agricultural Adjustment Administration supported the industry in this contention.

The National Recovery Administration, on the other hand, was faced with similar but opposite problems in the possible tendency of lower paid cotton ginning labor to pull down industrial wage rates for somewhat similar tasks or to present problems of unfavorable competition through lower labor costs to industrial employers. The National Recovery Administration consequently insisted that labor in the cotton ginning industry was industrial and subject to a labor code.63

Although the Advisory Council of the NRA issued a recommendation that an "agricultural worker becomes...an industrial worker whenever he leaves the land and enters any plant, factory, or other establishment in which agricultural products are processed or prepared for the market," neither the NRA nor the AAA officially supported it. Ultimately the cotton ginning industry successfully avoided codification.64

The cotton ginning industry exemplified the way in which the AAA and the NRA dealt with so-called industries allied with agriculture such as raw peanut milling, pecan shelling, and loose leaf tobacco, all of which employed "unskilled labor of the same type as found employment in agriculture."65 In these industries the NRA approved codes providing for lower minimum wages on grounds that its own Division of Review deemed racist:

The justification adduced—the relatively low living costs in agricultural communities—was not the sole or even the principal ground for lower rates.

The relative inefficiency of the type of labor employed was often alleged as a ground for lower rates for these industries. In certain of these industries, a large proportion of the unskilled labor was Negro. Though no open racial differential or discrimination

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63 Woodbury, Limits of Coverage at 20; cf. id. at 30. The cotton ginning industry, like citrus, was not expressly listed as under the jurisdiction of the NRA or AAA. Id. at 12.

64 1 NRA, ADVISORY COUNCIL DECISIONS No. 2 (June 26, 1934); Woodbury, Limits of Coverage at 20-21; Theodore Saloutos, The American Farmer and the New Deal 182 (1982).

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was admitted in any NRA code, a low rate might be demanded by industry employing largely Negro labor as requisite to its continuing inoperation [sic]. In some cases the fact that labor was light repetitive work and was carried on largely by female workers, in some cases Negro and Mexican female labor, was advanced by industry as a reason why it could afford only a low rate.66

This racial accommodation was of a piece with the NRA's entire codification policy towards black industrial labor in the South. In tandem with the undisguised partisan policy of the AAA on behalf of large employers of non-white laborers, the NRA not only was party to the exclusion of hundreds of thousands of industrial workers from codes on the ground that they were agricultural employees, but also created the basis on which such workers later would be excluded from the protection of FLSA, and extruded, through amendment, from coverage under the Social Security Act.67

B. The Agricultural Adjustment Act (AAAct)

Under the AAAct, the centerpiece of New Deal farm legislation, "Negro tenant farmers and sharecroppers were the first to be thrown off farms as a consequence of the crop-reduction policy." This rural Black removal program was implemented most effectively on cotton plantations, "the South's basic social and economic institution...until the 1940s."68

The New Deal with its cotton restriction program, its relief expenditures, and its loan services, has temporarily rejuvenated the decaying plantation economy. ... The various federal resources which come into this region tend to be spent in conformity with the plantation, the philosophy and practices of which root back into slavery. New techniques of exploitation have been evolved.69

66Id. at 57-58. See generally, Selden Menefee & Orin Cassmore, The Pecan Shellers of San Antonio (1940).
When, in 1935, a group of liberal officials within the USDA and the AAA sought to guarantee the right of tenants to remain on the land during the life of the AAA contract, and in the process seemingly threatened the existence of the southern caste and class system, they ran afoul not only of the influential southern congressmen, but also of such New Deal stalwarts as Henry Wallace...and the AAA Administrator Chester Davis, who believed that...the conditions of all farmers could be improved substantially without launching a frontal assault on traditional southern practices.70

Secretary of Agriculture Wallace was "very much aware of the adverse effect the Triple-A was having upon the lives of the lowly sharecroppers. He was not insensitive to the plight of these poor people, but he was trapped in a moral paradox." This "moral paradox," characteristic of the entire New Deal, was resolved in the customary fashion--through accommodation of rural southern racist interests.71 Wallace's "fear of repercussions among the Southerners in Congress was overriding," he confided years later, in his decision to purge the AAA of the pro-tenant officials. Had he not carried out the purge, he would have had to resign to "make way for someone else who could get along with the men from the South in Congress."72

JOHNSON, SHADOW OF THE PLANTATION (1934); Fred Frey & T. Lynn Smith, The Influence of the AAA Cotton Program upon Tenants, Growers and Laborers, 1 RURAL SOCIOLOGY 483 (1936); FARM TENANCY, REPORT OF THE PRESIDENT'S COMMITTEE (1937); SALOUTOS, THE AMERICAN FARMER AND THE NEW DEAL at 179-91.

70Wolters, Negroes and the Great Depression at 56-57.


72Conrad, Forgotten Farmers at 147 (citing letter from Wallace to Conrad [June 13, 1959]). See generally, Allan Kifer, The Negro under the New Deal 1933-1941, at 142-56 (Ph.D. diss. U. Wisconsin, 1961); Gladys Baker, "And to Act for the Secretary": Paul H. Appleby and the Department of Agriculture, 1933-1940, 45 AGRIC. HIST. 235 (1971); Donald Holley, Uncle Sam's Farmers: The New Deal Communities in the Lower Mississippi Valley 82-105 (1975); Kirby, Black Americans in the Roosevelt Era at 25. On Wallace's and the USDA's relationship with Edward O'Neal, the racist Alabama planter who presided over the Farm Bureau during the entire New Deal, see Russell Lord, The Wallaces of Iowa 411-12 (1947); John Davis, A Survey of the Problems of the New Deal, 5 J. NEGRO EDUC. 3, 6 (1936); Theodore Saloutos, Edward O'Neal: The Farm Bureau and the New Deal, 28 CURRENT HIST. 356 (1955).
In the event, Bill Camp, one of the nation’s largest cotton growers, and Cully Cobb, who as head of the AAA Cotton Section "implanted into AAA policies all the prejudices acquired from a lifetime of work with the white southern agricultural establishment" and "unabashedly represented the planter class," arranged for the chairman of the Senate Agriculture Committee, "Cotton" Ed Smith of South Carolina, the chairman of the House Agriculture Committee, Fulmer of South Carolina, the majority leader of the Senate, Robinson of Arkansas, and the Chairman of the Senate Finance Committee, Harrison of Mississippi, to call on President Roosevelt. They issued him an "ultimatum" that unless the aforementioned USDA officials "were fired, no major farm legislation Roosevelt might want would be passed." Soon thereafter Wallace issued an executive order cancelling the telegrams that the officials had sent advising cotton farmers that they were obligated to retain the same tenants on their plantations when they signed AAA contracts; the officials were then purged.

Related to the issue of the creation by the AAA of an "enclosure movement," which led to the expulsion of largely black sharecroppers from the plantations, was that of the skewed division of benefit payments as between landlords and croppers for taking land out of cotton production pursuant to AAA contracts in 1934 and 1935. In order to gain the cooperation of as many landowners as possible, those "operating with sharecroppers...were offered nearly 90 per cent of the total payment." In the end, the AAA "found no way of writing a contract that would guarantee the cropper his share of the benefit payments." Even the minimal benefits formally

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76Henry Richard, Cotton and the AAA 140 (1936); Edwin Nourse et al.,
accruing to sharecroppers were frequently appropriated by landlords. If a cropper did not sign the contract, he received no benefit checks. Often the landlord did not obtain the written consent of the cropper; for although the latter was legally a lien-holder, "it was not likely that...he would be regarded as being on an equal footing with other persons interested in the crop, such as mortgagees or the landlord. This was particularly true in the black belt where most of the croppers were Negroes."77

This accommodation of racist imperatives at the highest levels of the USDA mirrored the attitudes and practices of the state and county extension officials upon whom devolved the implementation of AAA policies.78 While many AAA administrators were themselves southern landlords, "[m]ost officials hesitated to take any step that might alienate Southern landlords."79 By contrast, "[n]ot a single Negro served on an AAA county committee throughout the South"; with

the day-to-day management of the New Deal in the South...in the hands of the hierarchy that had traditionally oppressed Afro-Americans and still stood to profit by discriminating against blacks...[and] [b]ecause the most powerful whites in the South kept the records and wrote the reports that determined the activities of the AAA, the Resettlement Administration, and the Farm Credit Administration, blacks never shared equitably in the benefits from these programs.80

The AAA Administrator believed that the aborted plan to ameliorate conditions for sharecroppers and tenants would have "put AAA into the reform business...under conditions which might lead to

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78Nourse, *Three Years of the Agricultural Adjustment Administration* at 77.


80Sitkoff, *A New Deal for Blacks* at 53, 48.
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revolutionary outbreaks in the South."81 Although this "revolutionary" specter was not communist but merely that of equal civil and political rights for rural Blacks, "[a] concession to the sharecropper class [wa]s not only one to labor but one to the Negro as well."82 White supremacists were particularly alarmed by the bi-racial membership of the Southern Tenant Farmers' Union (STFU)--the chief vehicle of these putative "revolutionary outbreaks"--which had been founded in 1934. They deployed the full range of legal and illegal powers to crush the movement. Official and vigilante "terror and violence" reinforced the message.83 President Roosevelt, for fear of embarrassing the re-election campaign of Senator Robinson of Arkansas (the majority leader) and undermining southern congressional support for his legislative program, refused even to mediate between the STFU and the planters.84

C. Social Security

Southerners worried about its [Social Security's] implications for race relations. "The average Mississippian," wrote the Jackson 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."85

81 SCHLESINGER, THE COMING OF THE NEW DEAL at 78-79.
82 Lewis, Black Cotton Farmers and the AAA at 72.
Statutory Origins of Agricultural Exceptionalism

Plantation owners resisted extension of social security programs to their laborers because even a modest level of income security and supplements would have tended to raise workers' reservation wage, thus weakening their confinement to a quasi-captive labor market. At the congressional hearings in 1935, the NAACP put Congress on notice that the Social Security bill would exclude 3.5 million of 5.5 million black workers because they were employed as farm workers or domestics: "The more it [the NAACP] studied the bill, the more holes appeared, until from a Negro's point of view it looks like a sieve with the holes just big enough for the majority of Negroes to fall through." Congress promptly dispelled southern racist concerns by excluding agricultural and domestic employees altogether—and hence the vast majority of southern black workers—from coverage.

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88 Social Security Act, ch. 531, §§ 210(b)(1) and (2), 49 Stat. 620, 625 (1935). Census data indicate that in 1930 Blacks in the eleven states of the Confederacy accounted for 61.7 per cent of all farm wage laborers and domestic servants; these two occupations accounted for 25.4 per cent of all gainful black workers in those states. Calculated according to BOC, FIFTEENTH CENSUS OF THE UNITED STATES: 1930, 4 POPULATION: OCCUPATIONS, by STATES, table 11 (1933). By 1940 the figures had risen to 68.9 per cent and 24.5 per cent respectively. Calculated according to idem, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, 3 POPULATION: THE LABOR FORCE, pt. 2-5, table 13 (1943). These data, however, vastly underestimate the occupational concentration of southern Blacks. The category of farm wage laborers excluded unpaid family workers, sharecroppers and tenants. The magnitude of this omission can be gauged by the fact that "the bulk of Negro gainful workers in the South are engaged in raising cotton which involved some 698,839 tenant families or slightly over three million Negroes." Frank Davis, The Effects of the Social Security Act upon the Status of the Negro 30-31 (Ph.D. diss. State U. Iowa, 1939). The figures also deliberately underestimate the extent of black domestic employment because the most restrictive definition of domestic employment was used in order to avoid inaccuracies caused by defective enumeration procedures. See BOC, FIFTEENTH CENSUS OF THE UNITED STATES, 1930, 3 POPULATION: THE LABOR FORCE, pt. 2-5, table 13 (1943).
actual discriminatory impact of the Social Security Act (SSA) on Blacks corresponded closely to the NAACP's predictions. By 1940, 78.1 per cent of employed white workers were receiving wage credits under the old-age and survivors insurance program compared to only 53.0 per cent of Blacks. That even half of black workers received wage credits is explained by the fact that some excluded workers also worked in other, covered employment. Substantially similar occupational exclusions from the unemployment compensation provisions of the SSA also produced a disproportionately exclusionary impact on Blacks.

This 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.

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 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

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**STATES: 1930, 5 POPULATION: GENERAL REPORT ON OCCUPATIONS 8-9 (1933); idem, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, 3 POPULATION: THE LABOR FORCE, pt. 1 at 11 (1943). The data also fail to reflect the sizable population of Mexican origin in Texas, which was classified as white in 1940 and was omitted for 1930. But see BOC, FIFTEEN CENSUS OF THE UNITED STATES: 1930, 5 POPULATION: GENERAL REPORT ON OCCUPATIONS at 86-91. If black sharecroppers and tenant farmers in the eleven southern states are included (together with the narrowest definition of domestic employment), exactly half of the southern blacks employed in 1940 were excluded from employee status.**

**90**Calculated according to U.S. Bd. of Old-Age & Survivors Insurance, HANDBOOK OF OLD-AGE AND SURVIVORS INSURANCE STATISTICS: EMPLOYMENT AND WAGES OF COVERED WORKERS: 1940, table 5 at 8 (1943); BOC, SIXTEENTH CENSUS OF THE UNITED STATES: 1940, POPULATION: COMPARATIVE OCCUPATIONAL STATISTICS FOR THE UNITED STATES 1870-1940 at 196-97, 200-201 (1943). See also W. Woytinsky, LABOR IN THE UNITED STATES 43 (1938); Davis, The Effects of the Social Security Act upon the Status of the Negro, tab. XXI at 99, tab. XXIII at 102.

**91**Telephone interview with Wilbur Cohen, one of the drafters of the Social Security Act and a former Sec'y of HEW (May 1985); §§ 907(c)(1) and (2), 49 Stat. at 643; Davis, Effects of the Social Security Act at 97.

**91**Economic Security Act at 71-78.
Negroes in the administration of old age assistance.\(^92\)

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."\(^93\)

This statutory accommodation of southern racism, masked as states' rights,\(^94\) was part and parcel of "the reluctance of the dominant race to provide for aged Negroes, Mexicans and Indians [which] 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." 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," "there was a tendency to grant lower sums, especially in the South, to aged Negroes than to aged Whites." 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."\(^95\)

D. Discrimination by Other New Deal Agencies

Because "Federal agencies dared not challenge entrenched habits," "[i]nexorably discrimination stalked Negroes in every Federal program." Only the most prominent examples are highlighted here.\(^96\)

**Civilian Conservation Corps (CCC).** Despite the express congressional prohibition of the use of racially discriminatory criteria


\(^{93}\)**WITTE, DEVELOPMENT OF THE SOCIAL SECURITY ACT at 144.

\(^{94}\)**SSA, § 2, 49 Stat. at 620.

\(^{95}\)**Davis, Effects of the Social Security Act at 198, 157, 149; FRANKLIN, FROM SLAVERY TO FREEDOM at 538.

\(^{96}\)**TINDALL, EMERGENCE OF THE NEW SOUTH at 545. See generally, John Davis, A BLACK INVENTORY OF THE NEW DEAL 42 CRISIS 141 (1935); Sitkoff, THE IMPACT OF THE NEW DEAL ON BLACK SOUTHERNERS.
in enrolling young men in the CCC, directors in a number of southern states either refused to enroll any Blacks or permitted only token representation. When Southerners objected to the inclusion of Blacks in the CCC, President Roosevelt, characterizing the issue as "political dynamite," "asked that his name 'be not drawn into the discussion' and acquiesced completely in the restrictions on Negro enrollment." Secretary of Labor Frances Perkins, an interdepartmental supervisor of the CCC, did, to be sure, permit the director of the U.S. Employment Service, who selected young men for the CCC on behalf of the DOL, to express his disapproval of discrimination. "But as soon as he reached a point where she thought he might cause the President embarrassment, she silenced him." Consequently, under the director of the CCC, Robert Fechner, a Southerner, exclusion of Blacks from the program in the South at the outset gave way to underrepresentation and segregated camps together with discrimination against black supervisors.  

Farm Security Administration (FSA). At the FSA, which was administratively subordinate to the Secretary of Agriculture, "[m]ost of the leaders...were southerners [who] adhered fairly consistently to southern attitudes and practices regarding race in matters pertaining to allocation of loan and grant funds, personnel and appointments, cooperative and group enterprises, resettlement projects and public information activities." Where, on the other hand, a more independently minded agency head sought to resist racist patterns, the political power of the alliance of Southern Democrats and the Roosevelt Administration sufficed to thwart innovations. Thus when Will Alexander, the first administrator of the FSA, appointed Blacks to state advisory committees, Senator Byrnes of South Carolina told him to back off. When Alexander refused to comply, Byrnes went directly to Secretary of Agriculture Wallace, who "retreated." 


96Sidney Baldwin, Poverty and Politics: The Rise and Decline of the Farm Security Administration 279, 307 (1968); see also Paul Mertz, New Deal Policy and Southern Rural Poverty 193-95 (1978) (discrimination by loan committees against black applicants); Donald Holley, The Negro in the New Deal Resettlement Program, 45 AGRIC. HIST. 179 (1971).
Tennessee Valley Authority (TVA). At the TVA "local officials denied blacks their proportionate share of jobs and relegated them to the least skilled, lowest paying tasks" within an overall pattern of segregation. The TVA also constructed "lily-white" homesteads, totally excluding Blacks, even in model towns such as Norris, Tennessee, which was owned and controlled by the federal government.99

Relief Programs. Since the federal relief programs initiated during the depression years channeled their funds to the States, which administered them, relief had to accommodate the specifically agrarian racism of the South: "Because Negroes were usually among the people most in need of welfare, many southerners also had racial objections to heavy relief payments. [I]n the South, they complained, it [relief spending] raised the Negro to the white man's economic level and created a shortage of cheap farm labor."100

Southern landlords left no doubt that even the elimination of the threat of starvation, which relief payments to rural Blacks barely achieved, sufficed to endanger their power: "Ever since federal relief...came in you can't hire a nigger to do anything for you." "I don't like this welfare business. I can't do a thing with my niggers. They aren't beholden to me any more. They know you all won't let them perish."101

Payments by the Federal Emergency Relief Administration (FERA), the chief New Deal relief agency from 1933 to 1935, to rural black families "ran considerably lower" than those to Whites.102

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100 PATTERSON, CONGRESSIONAL CONSERVATISM at 145. See also VANCE, NEGRO AGRICULTURAL WORKER UNDER THE FEDERAL REHABILITATION PROGRAM at 226 ("discrimination against Negroes...in some areas of the South in the administration of public relief...was exercised in an effort to keep relief expenditures for Negroes in line with low wages prevailing in agriculture").


102 TINDALL, EMERGENCE OF THE NEW SOUTH at 480, 547. See also ARTHUR RAPER & IRA DE A. REID, SHARECROPPERS ALL! 233 (1941) (showing differentials ranging from 33 to 191 per cent in favor of Whites); Kifer, The Negro under the New Deal at 211-18; WEISS, FAREWELL TO THE PARTY OF LINCOLN at 57-59.
"Similar differentials appeared in the work-relief programs." The advent of the Works Progress Administration (WPA) in 1935 was accompanied by a drastic reduction in wages below the thirty cents per hour established by the short-lived Civil Works Administration in the South in 1933-34, a cut described at the time as "a concession by the federal government to Southern opposition to the payment of Negroes of wages of thirty cents an hour." Racially discriminatory work-relief in the form of geographic wage differentials and classification into unskilled occupations was virtually preordained by the fact that even as late as May 1940 the WPA employed only eleven Blacks among its more than ten thousand supervisors in the South.\(^{104}\)

The WPA performed two functions on behalf of southern planters. On the one hand it created a racially bifurcated wage structure that deterred workers from remaining on the relief rolls:

Negro workers accustomed to relatively low standards of living...may be denied WPA employment on the ground that they are not in need whereas workers accustomed to relatively higher standards of living may be declared eligible for such employment even though they have as large and possibly larger resources than the former. Similarly, since workers are denied WPA employment if they refuse private employment at pay prevailing in the community for the type of work offered, Negro workers refusing jobs at prevailing rates of $3.00 or $4.00 a week may be denied WPA employment whereas white workers might not be required to accept jobs at such rates if these were lower than those customarily paid white workers.\(^{105}\)

On the other hand the WPA forced (chiefly non-white) workers off the rolls outright when planters demanded an immediate supply of the cheapest possible labor:

In 1936 [WPA Administrator] Harry Hopkins began a practice of closing WPA projects and releasing workers during the cotton-picking season. ... The purpose was not to create an oversupply of labor...but soon it became apparent that officials in the mid-South had joined in a drive to undermine the Southern Tenant Farmers Union. Several state relief agencies developed elaborate procedures to prevent the diversion of surplus farm workers to relief. In Louisiana regulations stipulated that relief

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\(^{103}\)Tindall, Emergence of the New South at 480, 481; Davis, Survey of the Problems of the Negro under the New Deal at 10.

\(^{104}\)Tindall, Emergence of the New South at 548.

\(^{105}\)Donald Howard, The WPA and Federal Relief Policy 291 (1943)
offices should consider sharecroppers for WPA referral only after consultation with the plantation management or the usual source of credit.106

This pattern repeated itself in the Rio Grande Valley, where fruit and vegetable farmers were able to induce FERA officials "to displace all Mexican casuals who had got on their relief rolls in the city [San Antonio] during the winter so the area might have its accustomed supply of cheap...labor."107

III. The Intent and Impact of the
Original Exclusion of Farm Workers from FLSA

A. Legislative History

The legislative history of the exclusion of farm workers from FLSA is meager because the bill as drafted by the Roosevelt Administration and introduced by Representative Connery and Senator Black already contained this exclusion.108 Indeed, agricultural laborers constituted the sole industrial group--apart from executive, administrative, supervisory and professional employees--wholly excluded from the bill.

The precursor of FLSA originated in the office of Secretary of Labor Perkins in the mid-1930s as a long-term substitute for the wage and hour standards that would (and did) become void when the Supreme Court eventually held the NRA codes unconstitutional. Of crucial importance was the fact that "[t]he President decided upon a comprehensive minimum wage and maximum hour bill, partly as a measure for reuniting the party." Any legislative measure

106TINDALL, EMERGENCE OF THE NEW SOUTH at 479-80.

107VANCE, NEGRO AGRICULTURAL WORKER UNDER THE FEDERAL REHABILITATION PROGRAM at 228-29.

calculated to reunite the Democratic party in the spring of 1937 had
to accommodate the plantation interests of the southern wing of the
party.109 This political constellation of forces specifically precluded
minimum wages for black farm laborers: "the South's misgivings
about social change derived in considerable measure from the fact
that almost any kind of change might challenge the bi-racial system.
Wage and hour laws were resisted because they might mean equal
wages for Negroes and whites."110

This acquiescence in the racially motivated sectional demands
of the largest solid bloc of Democratic voting strength was reflected
in Roosevelt's message to Congress of May 24, 1937 in which he
urged support of the minimum wage bills introduced that day. He
alluded, albeit in the code language adapted to the modern forms
which the 'peculiar institution' had assumed, to the needs of the
South: "Even in the treatment of national problems there are
geographic and industrial diversities which practical statesmanship
cannot wholly ignore." The committee reports in both houses of
Congress echoed the President's call for "having due regard to local
and geographic diversities."111

Testimony before the congressional committees was replete
with references to the patterns and practices of de facto exclusion of
Blacks under earlier New Deal legislation. Thus John Davis,
representing the National Negro Congress, testified that:

In the period of the N.R.A. code hearings Negro workers were
helpless to defend themselves against demands, especially by
representatives of southern industry, for longer hours and lower
wages for those occupations, industries and geographic divisions of
industries in which the predominant labor supply was Negro.
Unorganized and without perceptible collective bargaining power,
the Negro worker was soon singled out by pressure groups of
employers as the legitimate victim for all manner of various
differentials.

Davis stressed that "the bill now under consideration makes possible
even worse differential treatment of Negro workers." The chief
vehicle of discrimination remained: "Negro domestic and agricultural

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109 Frances Perkins, The Roosevelt I Knew 246-56 (1946). See generally,
Leuchtenburg, Roosevelt and the New Deal at 238-39.
110 David Potter, The South and the Concurrent Majority 70 (1972).
(1937).
laborers--representing the bulk of Negro labor--have had no benefits from the Social Security Act or other protective legislation.  

In the congressional debates themselves southern representatives openly articulated the racially discriminatory purpose behind the de facto exclusion of Blacks from FLSA. As Representative Wilcox of Florida observed:

Then there is another problem of great importance in the South, and that is the problem of our Negro labor. There has always been a difference in the wage scale of white and colored labor. So long as Florida people are permitted to handle the matter, this delicate and perplexing problem can be adjusted.... You cannot put the Negro and the white man on the same basis and get away with it. Not only would such a situation result in grave social and racial conflicts but it would also result in throwing the Negro out of employment and in making him a public charge. There just is not any sense in intensifying this racial problem in the South, and this bill cannot help but produce such a result.

Those who know the facts know that when employers are forced to pay the same wage to the Negro that is paid to the white man the Negro will not be employed. This in turn will mean that he will be thrown onto the relief roll to be fed in idleness. ... This bill, like the antilynching bill, is another political goldbrick for the Negro....

His colleague, Edward Cox of Georgia, stated for the record that:

The organized Negroes of the country are supporting it [the FLSA] because it will, in destroying state sovereignty and local self-determination, render easier the elimination of racial and social distinctions.... I say to you that these local problems cannot be so administered. It is...dangerous beyond conception to try to so adjust all of these intimate questions of daily life.

"The organized Negroes of the country" must have gotten this message, for the National Urban League urged its locals not to push too strongly for passage of FLSA lest they rally southern opposition.

112FLSA Hearings at 571, 573, 574.
11382 Cong. Rec. 1404.
115NANCY WEISS, THE NATIONAL URBAN LEAGUE 1910-1940, at 306 (1974). FLSA provided for the establishment of industry committees, which were authorized to recommend to the Wage and Hour Administrator intra-industry classifications for the purpose of reaching a universal minimum wage of forty cents per hour during the
B. Why the Minimum Wage was Irreconcilable with the Southern Plantation System

On the exclusion of farm workers from FLSA hinged not the profitability of the farm sector in general, but rather the continued viability of the southern plantation system, which rested on unconstitutional forms of exploitation and oppression. Unlike any other type of farming in the United States in the 1930s, the plantation system was absolutely dependent for its survival on the unimpeded exploitation of large numbers of (chiefly) black farm workers at wages far below the national average. The rural oligarchy could maintain itself only if it preserved its unchallenged pseudo-feudal control over its quondam slave labor force. Given the central role of the plantation in the political economy of the South, federal imposition of an agricultural minimum wage even remotely approaching the level prevailing on northern farms would have undermined the specific racist underpinnings of the plantation system. It was this peculiar chain of vital interests that formed the basis of southern opposition to the exclusion of farm workers from FLSA (as well as other socioeconomic legislation).

The vast majority of farm workers who would have been covered under FLSA would have been non-white employees of southern and southwestern farmers. The wages of these workers were so far below any proposed national minimum wage, whereas those of white employees of northern farmers were already so close to or in excess of the proposed minimum, that even on a purely economic level southern black farm workers would have been the only clear winners and southern planters the only clear losers had FLSA covered agricultural employment.

1. The Unconstitutional Structure of the Plantation Labor

period between the second and seventh year after the Act took effect. In spite of the extensive protests against the racist industrial and occupational classifications under the NIRA, Congress saw fit to prohibit classifications on the basis of age, but not of race. § 8(a). In order to redress persistent administrative racial discrimination under the FLSA, the NAACP later unsuccessfully urged Congress to amend sect 8(c) to include an express prohibition of classifications based on race. Proposed Amendments to the Fair Labor Standards Act: Hearings Before the House Comm. on Labor, 79th Cong., 1st Sess. 441 (1945) (statement of Lester Perry, Adm. asst., NAACP). § 208, which deals with wage orders in Puerto Rico and the Virgin Islands, still lacks such a ban.
System. Ever since the abolition of slave labor, southern agricultural employers, supported by the state governments they controlled, had been seeking a regime of quasi-free labor that ensured a stable labor force at the lowest possible cost. Modernized versions of post-Civil War legislation designed to suppress market-induced labor mobility still flourished in the South at the time FLSA was being debated. These statutory schemes to evade the Thirteenth Amendment's prohibition of involuntary servitude demonstrate that the unique quality of plantation labor relations underlay the South's distinct sectional-racist position with respect to FLSA.

So-called false pretense laws were "one of the most important of all the statutes...framed to keep agricultural laborers on the plantation for the duration of their contracts...." North Carolina, Florida, Georgia, South Carolina, and Alabama, for example, used the threat of imprisonment "to force plantation croppers, tenants and workers to carry out their contracts faithfully and completely" by criminalizing the act of obtaining advances with an intent to defraud and wilfully to fail to begin or to complete contractually agreed upon work.\textsuperscript{116} The Georgia statute, which the U.S. Supreme Court held repugnant to the Thirteenth Amendment in 1942, contained "no material distinction" from the Alabama statute that the Supreme Court had held contrary to the Thirteenth Amendment three decades earlier.\textsuperscript{117} The Florida statute, which the state legislature had re-enacted several times--most recently as late as 1943--was "substantially the same" as the Alabama statute. Since the provision of the Florida act that made mere refusal to perform labor, once an advance had been made, prima facie evidence of intent to defraud "was known to be unconstitutional and of no use in a contested case, the only explanation we can find for its persistent appearance in the statute is its extra-legal coercive effect in suppressing defenses." From the availability of a general and comprehensive Florida statute outlawing the obtaining of money by false pretenses as well as from the repeated re-enactment of the statute in the face of Supreme Court decisions holding such statutes unconstitutional, the Court concluded that "[w]here peonage has existed...it has done so chiefly


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by virtue of laws like the statute in question." The resulting unfreedom, which survived World War II in Florida, was rooted in the fact that "[w]hen the master can compel and the laborer cannot escape the obligation to go on, there is no power to redress and no incentive above to relieve a harsh overlordship or unwholesome conditions of work."118

Not satisfied with controlling this aspect of the labor relationship, planters also caused their state legislatures to enact complementary legislation prohibiting the "enticing" of croppers, tenants and laborers from their employers. Farm hands might be kept on the plantation by threat of economic loss and legal punishment, but planters still had to eliminate the danger of outside interference.... The chief competitors for the cheap and tractable labor supply...were, first, the industrial enterprises of the North and to a lesser extent those of the South, and secondly, farm operators, who because of labor shortages or other crises had to secure immediate extra help. In order to eliminate the danger from the first source, some states, notably Alabama, Georgia, Mississippi and South Carolina, have placed prohibitory restrictions upon employment agents who solicit and send labor out of the state.119

In addition, Alabama, Arkansas, Georgia, Louisiana, Mississippi, North Carolina, and South Carolina all enforced criminal provisions punishing enticement of agricultural laborers under contract to other farm employers.120

This complex of legislation, which permitted "whites to use Negro labor when and as they chose," and restored "to the landlord legal control of the crops and laborers on the post-Civil War


119Zeichner, Legal Status at 426. The pertinent statutes are: Ala. Code §§ 696, 697, 3980 (1928) ($5,000 annual agent fee plus up to $2,500 per county); Ga. Code § 92-506 (1933) ($1,000 per county); Miss. Code, Supp. App., Privilege Tax Code No. 116 at 442 (1930) ($500 per county); S.C. Code §§ 1377, 1378 (1932) ($500 annually per county).

plantation after 1865," was a state-sponsored effort to insure that the emancipation of the slaves assumed optimally beneficial forms to their erstwhile owners and then-employers.121 The overpopulation of the rural South with sharecroppers, tenants, and wage laborers created an oversupply of labor that depressed wages to a fraction of the level prevailing on northern farms. Where laborers sought to extricate themselves from this vicious circle by offering their labor to higher-paying employers, enforcement of these state laws suppressed the normal workings of supply and demand on the labor market. If a labor shortage arose nevertheless, cotton farmers could still rely on the WPA to help out by requisitioning laborers on its payrolls to pick cotton at the prevailing rate. Those who refused were permanently released from the relief rolls "in accordance with WPA policy" in the southern states.122

When and where even these weapons did not suffice to override the forces of supply and demand, plantation owners had recourse to more effective self-help measures. Thus a front-page headline in *The New York Times* in 1937 read: *Armed Farmers Hold Cotton Pickers on Job; Refuse to Let Negroes Take Higher Pay Offer*.123 This incident is especially illuminating because the vigilantes in Warren County, Georgia, where Blacks accounted for two-thirds of the population, were planters, whereas the enticers lived in Glasscock County, where the proportion of small white farmers was relatively large. The planters' action underscored the fact that economic-racist animus was specific to the plantation--"a feeling, on the part of the planters, of a sort of collective ownership of the workers in the community."124

2. The Unique Dependence of the Plantation System on Low-Wage Black Labor. The urgency of excluding farm workers from

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123Sept. 16, 1937, at 1, col. 6.

124Myrdal, *American Dilemma* at 1243 n.78. See also Am. Civil Liberties Union, *peonage in Georgia* (March 1938) (reproduced in *Southern Tenant Farmers Union* [STFU], *Papers*, 1934-1970 [microfilm reel no. 7]); supra ch. 1.
FLSA as a peculiarly southern, race-oriented issue can be traced through a chain of interconnected relations. First, agriculture was predominantly a southern industry and the South was the only predominantly agricultural region of the country. In 1930, fifty-three per cent of all persons engaged in agriculture, but only nineteen per cent of those engaged in manufacturing, worked in the South. During the 1930s, half or more of the country's farms and farm population were located in the South. Whereas 21.5 per cent of the gainfully employed in the United States were employed in agriculture in 1930, the corresponding shares in Mississippi, Arkansas, South Carolina, Alabama, North Carolina and Georgia were 66.0, 57.6, 50.1, 48.0, 43.8 and 42.8 per cent respectively.\textsuperscript{125}

Second, southern agriculture was overwhelmingly dominated by cotton. From two-thirds to five-sixths of all farms in the Cotton Belt States were classified as cotton farms. Fifty-five to sixty per cent of the world's annual supply of cotton was grown on the forty-two per cent of the South's cropland that was dedicated to cotton.\textsuperscript{126} With southern farmers depending on cotton and tobacco for two-thirds of their cash income, "[n]o other similar area in the world gambles its welfare and the destinies of so many people on a single crop market year after year."\textsuperscript{127} Including working members of sharecropper families, the 2,348,000 sharecroppers and farm laborers in the cotton states accounted for one-fifth of all persons engaged in agriculture in the United States in 1935.\textsuperscript{128}

Third, cotton as well as the region's other major


\textsuperscript{126}O. Baker & A. Genung, A Graphic Summary of Farm Crops figs. 4 and 5 at 5 (USDA Misc. Pub. No. 267, 1938) (S.C., Ga., Ala., Miss., Ark., La., and Tex.); Vance, Negro Agricultural Worker Under the Federal Rehabilitation Program table II at 77, supp. tab. xiii (unpaginated) (cotton farm defined as one at least forty per cent of the value of whose output attributed to cotton); Vance, Human Factors in the South's Agricultural Readjustment at 262.


\textsuperscript{128}National Farm Labor Problem at 473. Cf. O. Baker, A Graphic Summary of the Number, Size, and Type of Farm, and Value of Product table 2 at 4 (USDA Misc. Pub. No. 266, 1937) (more than one-quarter of all U.S. farms classified as cotton-producing).
crops—tobacco, rice, and sugar—were all large-scale, labor-intensive operations. In the mid-1930s, 88 worker-hours were required on the average to produce one acre of cotton compared to 6.1 hours for wheat and 22.5 hours for corn. Fourth, Blacks in the South were more dependent than Whites on agriculture. In 1940 about one-third of white males, but more than one-half of black males in the South were farmers or farm laborers. Blacks, moreover, were "almost wholly confined to the Cotton Belt." 

Fifth, between 1930 and 1940 the number of sharecroppers in the eleven states of the Confederacy decreased dramatically—from 721,268 to 509,814, while the share of black sharecroppers rose from 53.1 per cent to 58.1 per cent. Sixth, the vast majority of tenants and sharecroppers worked on cotton plantations. The extraordinary size of the (largely Mississippi Delta cotton) plantation was captured by a special census study in 1939 which enumerated 12,160 plantations employing 169,208 families that included upwards of a million workers. With the average plantation employing fourteen "wage hand" and cropper families, fifty-one plantations (fifty of which were located in Mississippi and Arkansas) employed one hundred or more families. Seventh, Blacks predominated on the plantations, "operating" almost four-fifths of all tenant (including cropper) farms on them. In the Mississippi Delta cotton plantation area almost all sharecroppers were black. 

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129 Rupert Vance, Human Geography of the South 177-225 (2d ed. 1935 [1932]); William Holley et al., The Plantation South 1934-1937, at 115-18 (1940); Folsom & Baker, Graphic Summary at 4; Rupert Vance, All These People: The Nation's Resources in the South 218 (1945); John Hopkins, Changing Technology and Employment in Agriculture table 40 at 118, table 41 at 123, table 43 at 131 (differential between the Mississippi Delta cotton region and the prime Northern corn and small grain areas even greater); Eldon Shaw & John Hopkins, Trends in Employment in Agriculture, 1909-36 at 130-39 (1938).

130 Calculated according to BOC, Comparative Occupation Statistics for the United States 1870-1940 at 196, 200; Folsom & Baker, Graphic Summary at 25.

131 BOC, Sixteenth Census of the United States: 1940, 3 Agriculture: General Report table 22 at 178-88 (1943); Myrdal, American Dilemma at 233; BOC, Special Study, Plantations, Based upon Tabulations from the Sixteenth Census of the United States, 1940, tab. 16 at 86, tab. 17 at 88-90, tab. 25 at 113 (n.d. [ca. 1943]). The study defined a plantation as a "continuous tract or closely adjacent tracts of land in which five or more families (including one cropper or tenant family) are regularly employed, and which tracts are operated as a single working unit in respect to central farm headquarters and to the control of labor, cropping systems, and farming operations." Id. at v. On plantations in Mississippi, where almost half of all those enumerated were located, Blacks "operated" almost nine-
Eighth, Blacks worked on the plantation proper where they could be closely controlled and supervised, whereas white tenants predominated on small holdings in outlying areas where they worked more independently.132 Consequently, "[t]he cropper has practically no voice in deciding what crops to grow, or what methods to follow in cultivation," while "[a]lways the planter has been accustomed to complete political rule over the cropper."133 This transparent fusion of political and economic domination led some contemporary observers to conclude that "[t]he plantation community is essentially feudalistic" and "the Negro...in the position of a tenant peasantry with semi-feudal attachment to the land."134

Ninth, Blacks received lower wages than white workers. Statistically this differential was insured by the fact that wages were generally lower on plantations and the per capita incomes of sharecropper families were even lower than the wages of formally employed wage laborers. Moreover, the success of the cotton plantation also hinged on the massive use of unpaid labor of black women and children.135

Tenth, Blacks tended to remain in a permanently dependent position, "many seek[ing] work as croppers in their old age, whereas white farmers by that time commonly achieve ownership, if they


132MYRDAL, AMERICAN DILEMMA at 243-44. "One of the leading objections to plantation labor other than negro is the difficulty of supervision, although one class may be as efficient as the other in farming ability." C. BRANNEN, RELATION OF LAND TENURE TO PLANTATION ORGANIZATION 23 (1928).


134RAPER & REID, SHARECROPPERS ALL! at 26; VANCE, NEGRO AGRICULTURAL WORKER at 126. For similar observations, see V. LENIN, NOVYE DANNYE O ZAKONAKH RAVVITIIA KAPITALIZMA V ZEMLLEDII, Pt. 1: KAPITALIZMA I ZEMLLEDIE V SOEDINENNKH SHTATAKH AMERIKI, in 27 V. LENIN, POLNOE SOBRANIE SOCHINENII 129, 142 (5th ed. 1962 [1915]); DAVIS ET AL., DEEP SOUTH at 255-538; GRUBBS, CRY FROM THE COTTON at 15; ERSKINE CALDWELL, TENANT FARMER 21 (1935).

135MYRDAL, AMERICAN DILEMMA at 240; RAPER, PREFACE TO PEASANTRY tab. x at 55. BRANNEN, RELATION OF LAND TENURE TO PLANTATION ORGANIZATION at 29; KARL BRANDT, FALLACIOUS CENSUS TERMINOLOGY AND ITS CONSEQUENCES IN AGRICULTURE, 5 SOC. RESEARCH 19, 33 (1938); VANCE, HUMAN FACTORS IN THE SOUTH'S AGRICULTURAL REAJUSTMENT at 272. The vast majority of sharecroppers with working wives and daughters were black. FOLSOM & BAKER, GRAPHIC SUMMARY at 5, 7. The total labor of the working family members was the equivalent of that of two adults; BRANDT, FALLACIOUS CENSUS TERMINOLOGY AND ITS CONSEQUENCES IN AGRICULTURE at 31-32.
farm at all." This huge reservoir of inter-generationally recruited black workers trapped in lifelong subordinate status contradicted one of the most cherished ideological fictions underlying the farm policy of the USDA:

In the general farming territory the agricultural laborer is one of the steps in the agricultural ladder and, if farming conditions are corrected, is an important stage in the progress through tenancy to ownership. There has not been established a definite group of agricultural laborers in great farming sections. Hence, any approach which proceeds from the assumption of the usual employee-employer relationship found in industry, is likely to be wrong.

The not-so-hidden agenda of the New Deal USDA was to combat that approach, which appeared to be gaining momentum with "[t]he rapidly developing close affiliation of agricultural workers and industrial workers." When a 1937 USDA memorandum stated that "for the first time in the history of American agriculture...large groups of agricultural workers...are being swept along by the same powerful forces as are the workers in industry," its authors had in view workers on the plantation in the broader sense of a socio-economic complex extending geographically along the coasts and southern border from California to Virginia:

Plantation workers belong to an economically and socially submerged racial group. Thus, agricultural labor has not been thought of as an occupation which should give adequate support to its members. ... The modern variant of the plantation may well employ white Americans of pioneer ancestry. But the agricultural industry has been organized, and the mentality of the agricultural employer has congealed, on the basis of apprentice "hired men" and colored wage hands.

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137Memorandum from A. Black, Chief of Bureau of Agric. Econ., to Paul Appleby, Office of Sec'y of Agric. (June 4, 1937) (copy furnished by Wayne Rasmussen, Chief, Agric. Hist. Branch, USDA). But see William Ham, Farm Labor in an Era of Change, in USDA, Yearbook of Agriculture 1940 at 907, 909-10 (1940) (belated, wartime-related recognition of the existence of a stratum of farm laborers who would never advance up the "agricultural labor").

138Memorandum for Secretary of Agriculture Wallace from Comm. on Agricultural Labor [USDA], Section II: The Interest of the Department of Agriculture in Agricultural Labor at 2 (Sept. 4, 1937) (copy furnished by Wayne Rasmussen).

139Ross, Agricultural Labor at 84. See also Paul Taylor & Tom Vasey,
But even if agricultural employment relations were becoming assimilated to the industrial model, "[t]he aristocracy of the South [wa]s not going to put up with any nonsense about sharecroppers unions and the like."140

Eleventh and last, plantations witnessed a trend toward the displacement of sharecroppers (and other tenants) by wage laborers during the 1930s. Planters were impelled to convert sharecroppers into wage laborers not only by the attendant elimination of burdensome capital advances, but also and especially by the financial incentive of no longer having to share AAA cotton benefits with them.141

As planters faced the necessity of conducting their operations with an increasingly black and waged labor force, the need to retain their traditional controls free from federal regulation increased as well. The peculiar urgency inhering in the intense opposition of plantation owners to the inclusion of farm workers in FLSA owed as much to their fear of the Act's application to their sharecroppers as to their wage workers. These fears were well founded since workers frequently shifted between sharecropper and wage laborer status and only one-tenth of black tenants (including sharecroppers) in the South were cash tenants--the highest tenure rank and the only one that could plausibly be regarded as non-employees.142 Moreover, the

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Contemporary Background of California Farm Labor, 1 RURAL SOC. 401 (1936).

140Lewis, Black Cotton Farmers and the AAA at 72.

141Alexander, Arkansas Plantation at 57, 59; Brannen, Relation of Land Tenure to Plantation Organization at 22-23; Jamieson, Labor Unionism in American Agriculture at 287; Grubbs, Cry from the Cotton at 22-23; Myrdal, American Dilemma at 254, 257; Rupert Vance, Farmers Without Land 7 (1937); Davis et al., Deep South at 283-84; Rain, Snow Defied by Sharecroppers, N.Y. Times, Jan. 12, 1939, at 5, cols. 4-6. The higher the price and yield of cotton, the more advantageous it was to the planter to employ wage laborers; but once daily wage rates rose beyond the range of $1.00-$1.25, no plausible combination of price and yield would induce a planter to prefer wage workers to sharecroppers. National Farm Labor Problem at 506-507; Alexander, Arkansas Plantation at 59-60.

prevailing statute and case law in a number of southern states already treated sharecroppers as employees for various purposes.143

3. The Racial-Sectional Distribution of Farm Workers. Although more than one-quarter of all farm laborers in the United States were black or "Other Races" than white in 1930, fifty-five per cent of farm laborers in the eleven states of the Confederacy were non-white; they in turn accounted for eighty-seven per cent of all black farm workers.144 The largest concentrations of "Other Races"
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(presumably largely Hispanic and possibly Japanese or Chinese) were located in Arizona, New Mexico and California, where they accounted for forty-one per cent of all farm workers. Non-whites in these fourteen states constituted fifty-three per cent of all farm laborers there, who in turn formed forty-four per cent of all farm laborers in the United States. Conversely, only a minuscule number of non-white farm workers lived in the remaining states. In the eighteen states comprising the Small Grain, Western Dairy, Corn, and Eastern Dairy Areas and accounting for three-eighths of all farm laborers and the vast majority of non-southern family farms, only two per cent of farm workers were non-white.

By 1940, non-whites accounted for more than one-third of farm laborers nationally. The racial-regional distribution of farm laborers in the remaining 67,899 black farm workers, more than three-fifths were returned for the "border" States of Maryland, Kentucky, Oklahoma and Missouri.


In 1940, 26.7 per cent (514,602) of all (1,924,890) persons returned as employed farm laborers were non-white. Calculated according to BOC, Sixteenth Census of the United States: 1940, 3 Population: The Labor Force, pt. 1: U.S. Summary tab, 62 at 89-90 (1943) [BOC, 1940, Labor Force]. The apparently unchanged share of non-white farm laborers during the 1930s was a significant understatement caused by the fact that the census classified "Mexicans" as White in 1940. Id., pt. 2: Alabama-Indiana 2 (1943). This re-classification particularly distorted the composition of the work force in Texas and California. Another definitional change may have produced a further understatement of the number of non-whites. Whereas in 1930 data were collected for "gainful" workers (regardless of whether they were currently employed) above the age of ten, in 1940 persons who were "employed" and above the age of fourteen were recorded. Id. at 3. Because a disproportionately large share of minority farm workers was unemployed and/or between the ages of eleven and fourteen, their numbers were artificially depressed. As an indicator of the undercount of non-white workers: Blacks alone in 1930 accounted for 19.7 per cent of all farm workers, whereas by 1940 they accounted for 25.1 per cent of the total.
workers was even more skewed in 1940 than in 1930. In the South, Blacks alone accounted for fifty-three per cent of farm workers as against forty-eight per cent in 1930. Black farm workers in the South as a share of all black farm workers rose to ninety-two per cent, while southern agriculture increased its share of all farm workers from 35.5 to 43.4 per cent. The relative (and absolute) size of the black farm work force in the aforementioned eighteen northern states shrank: while the aggregate agricultural wage-labor force in those states decreased to 32.2 per cent of the national total, the share of Blacks declined to a negligible 0.9 per cent. If the huge southern sharecropping force, including unpaid family members, had been added to those returned as wage laborers by the census, the share of non-whites in the national and southern farm work force would have been even higher.

4. The Racial-Sectional Impact of a Farm-Size-Based Exemption from FLSA. The original bill as introduced in Congress excluded the employees of employers who employed fewer than a fixed number of employees (whereby this number was left blank). This size exclusion was ultimately deleted from the bill. Instead, the requirement that the employee be "engaged in commerce or in the production of goods for commerce" served as a surrogate for the small employer exclusion. Although there is no determinate equivalence between firm-size and coverage in terms of interstate commerce, the DOL used six employees as the surrogate definition of local (intrastate) business. Given the more seasonal nature of farming, a higher threshold might

Between 1930 and 1940 the total number of farm workers declined by 29.6 per cent, whereas that of black farm workers decreased by only 10.3 per cent. If "Mexicans" had been classified as "other" in 1940 and if the total number of "other" farm workers had diminished at the same rate as that of black farm workers, the total minority share would have amounted to slightly more than one-third. BOC, 1940, LABOR FORCE, pt. 1, tab. 62 at 89-90.

446,532 of 834,721 farm laborers were black. Id., pt. 2-5, table 13 (1943). Had "Mexicans" been classified as "other" and had the "other" group decreased in numbers at the same rate (5.3 per cent) as did black farm workers in the South between 1930 and 1940, then non-whites in the South would have accounted for more than three-fifths of all farm workers there. 5,594 of 619,792 black farm workers lived in the eighteen states.

§ 6(a) of bill and Act; John Forsythe, Legislative History of the Fair Labor Standards Act, 6 LAW & CONTEMP. PROBS. 464, 483-85 (1939).

be more appropriate (although many farmers with no employees produce for interstate commerce). The following calculations are based on a cut-off point of ten or more hired laborers.

It is not possible to determine precisely what proportion of farm workers who would have been excluded from FLSA—had agricultural coverage been subject to the same intrastate commerce/small employer exemption as other industries—was non-white at the time the Act was debated and enacted. It is possible, however, to determine the geographical location of farm workers by race, and derivatively and indirectly, by farm-size.\textsuperscript{151}

\textsuperscript{151}The use of census data for this purpose presupposes that the states in which farm workers were returned as living were also the states in which they were employed. Since there was relatively little relevant non-white South to North seasonal migration, the data from the census of population for 1930 and 1940 in combination with those from the census of agriculture employment for 1930, 1935 and 1940 may plausibly serve as a surrogate for the state of employment. In "the complete absence of broad and authoritative material" on the number of migrant farm workers in the 1930s, the most appropriate approach is to review the estimates made for various crops or geographic areas that took the racial/ethnic composition of the migratory work force into account.

\textit{National Farm Labor Problem} at 149-50 (testimony of William Ham, USDA). For the late 1930s, three broad "dominant racial types" of migrant farm workers were distinguished: (1) "Mexicans" in the Southwest and in sugar beets in the North Central States; (2) Blacks in the cotton states of the Southeast; and (3) Whites in Kentucky, southern Missouri, northern Arkansas, eastern Oklahoma and New Jersey. H.R. REP. NO. 369: \textsc{Report of the Select Committee to Investigate Interstate Migration}, 77th Cong., 1st Sess. 353 (1941). For the most part, migration north of the Mason-Dixon line and west of the Mississippi was restricted to Whites (including the Pacific Northwest and the wheat belt). \textit{Id.} at 338, 354, 357; \textit{National Farm Labor Problem} at 148, 385; Paul Taylor, \textit{Migratory Labor in the United States}, 44 MONTHLY LAB. REV. 537, 538-39 (1937); Bowden, \textit{Farm Employment} at 1252-57. The vast majority of black migrants migrated within the South to Florida (citrus and sugar cane) and Louisiana (sugar cane), and along the Eastern seaboard (various crops). A smaller number migrated as far north as New Jersey, New York and Connecticut, harvesting potatoes and truck crops. Taylor, \textit{Migratory Farm Labor} at 538-39; \textit{National Farm Labor Problem} at 145-46, 319-54, 458, 461; N. Tolles, \textit{A Survey of Labor Migration between States}, 45 MONTHLY LAB. REV. 3, 13 (1937); McWilliams, \textit{ILL FARES THE LAND} at 168-85.

The only significant group of non-whites migrating from the South or Southwest to work in the North in the 1930s was a contingent of largely Mexican-Americans from Texas who cultivated sugar beets in Colorado, Michigan, Ohio, Nebraska, Minnesota, North Dakota, and Wisconsin. In 1939 it was estimated that of 93,100 contract sugar beet workers fifty-seven per cent were "Mexicans." \textit{National Farm Labor Problem} at 442; see also \textsc{Report of the Select Committee to Investigate Interstate Migration} at 147-48, 338. But even this sole example of significant South to North non-white migration is irrelevant to the present purpose of showing that, since northern farmers by and large employed white workers at the level of the minimum wage set by FLSA in 1938, they had no economic motivation to
Relatively few farms employed any hired labor at all and still fewer employed large numbers of workers. In 1935, only one in seven (967,594 of 6,812,350) farms employed any hired labor, while fewer than one per cent employed four or more workers, and not even one-quarter of one per cent employed eight or more workers. In short: "Only the plantations of the South and a comparatively few farms elsewhere [we]re too large for family operation."¹⁵²

Farms in the South with the greatest concentration of black farm laborers accounted for forty per cent (2,770,671) of all farms, twenty-five per cent (242,625) of all farms using any hired laborers, and fifty-five per cent (6,277) of all (11,410) farms reporting ten or more hired laborers. If the states in which other non-white farm laborers were concentrated (California, Arizona, and New Mexico) are included, these fourteen states accounted for seventy-eight per cent (8,856) of all farms using ten or more hired laborers. In turn, these 8,856 farms accounted for eighty per cent (196,617) of all (244,132) farm laborers employed on farms with ten or more hired laborers.¹⁵³ The twelve North Central States, the locus of the family farm, accounted for one-third of all farms in 1935 but only six per cent of hired farm laborers on farms with ten or more such

¹⁵²Statutory Origins of Agricultural Exceptionalism

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oppose coverage of their employees. Sugar beet workers stood outside this framework altogether because their wages—alone among farm workers'—were set by the USDA pursuant to the Sugar Act. On their wages, see National Farm Labor Problem at 450; see also id. at 1018-19, 458-64 (lower wage rates set for southern sugar cane workers); Ducoff, Wages of Agricultural Labor tab. 43 at 85; id. at 32-33; Elizabeth Johnson, Wages, Employment Conditions and Welfare of Sugar Beet Laborers, 46 Monthly Lab. Rev., 322 (1938); Selden Menefee, Mexican Migratory Workers of South Texas 19-26 (1941). Even if the sugar-beet industry had had an economic motivation to oppose coverage, the racial dynamic in the use of Mexican labor was, by the time of the Depression, sufficiently analogous to that in the South that this industry, too, would not have been viable without a racially oppressed low-paid labor force. See supra ch. 1 § IV. A significant number of Hispanic farm laborers also migrated within Texas and California as well as to Arizona, but such migration does not affect the present discussion of the geographic-racial composition of the farm work force. National Farm Labor Problem at 149.

¹⁵³Turner, A Graphic Survey of Farm Tenure at 1; calculated according to Julius Wendzel, Distribution of Hired Farm Laborers in the United States, 45 Monthly Lab. Rev. 561, 568 (1937).

¹⁵⁴Calculated according to Wendzel, Distribution of Hired Farm Laborers tab. 1 at 564, tab. 2 at 565; BOC, Census of Agriculture, 3 General Report tab. 11 at 166-67 (1935). Since the census of agriculture was conducted in January, the data "may understake the proportion of Negroes," who were concentrated in cotton production. Ducoff, Wages of Agricultural Labor at 21. See generally, Benjamin Free, Seasonal Employment in Agriculture (1938).
Migrant Workers and Minimum Wages

Wage labor was heavily concentrated on the relatively few larger plantations and industrialized farms in certain discrete geographic areas specializing in cotton, citrus, sugar, and fruits and vegetables. These were the Mississippi Valley of Arkansas and Mississippi, the Black Belt of Alabama, Georgia, and South Carolina, southeastern Louisiana, Florida, the Rio Grande Valley, Corpus Christi, and Black Prairie districts of Texas, the Salt River Valley of Arizona, and California—all areas in which non-white farm workers predominated, on whose extraordinarily cheap labor the owners were crucially dependent.

In summary, then, only a minuscule number of agricultural employers would have been affected by FLSA coverage. But they would have been almost exclusively southern planters and California

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154Wendzel, *Distribution of Hired Farm Laborers* tab. 1 and 2 at 564-65. Nationally 14.8 per cent of all farm laborers worked on farms with ten or more hired laborers. The greatest centralization of farm employment was found in Arizona (65.0 per cent), Louisiana (44.9 per cent), Florida (42.2 per cent), and California (37.3 per cent). Calculated according to id. table 2 at 565. These data are for January 1935. Estimates for July of that year indicate that the major relative shift was in favor of California. *Id.* at 568. Inclusion of sharecroppers among hired laborers would have increased the figures for the South. *Id.*; Bowden, *Farm Employment* at 1248-49; *National Farm Labor Problem* at 122-23.

155BOC, Fifteenth Census of the United States: Census of Agriculture: 1930: Large-Scale Farming in the United States 1929 tab. 6 at 27 (1933). See also BOC, Census of Agriculture: 1940: Analysis of Specified Farm Characteristics for Farms Classified by Total Value of Products tab. 6 at 103-54 (1943) (farmers with 100 or more employees concentrated in South and Southwest); Carl Taylor et al., Disadvantaged Classes in American Agriculture 32-36 (FSA, Soc. Research Rep. No. 8, 1938); *National Farm Labor Problem* at 123, 135; Ross, Agricultural Labor at 274, 321; Alexander Morin, The Organizability of Farm Labor in the United States 97-98 (1952) (in the Mississippi Delta cotton areas, where the vast majority of wage laborers were hired in gangs of ten or more, "virtually all of the...wage laborers [we're Negroes]"); Brannen, Relation of Land Tenure to Plantation Organization at 22 ("practically all common laborers working for wages in the plantation are negroes, except in Texas and southern Louisiana where the Mexican has recently come to play an important secondary roll [sic]. Indians...are also used as plantation labor in the coastal plain section of the Carolinas").

156Cf. Hearings before the House Select Comm. to Investigate the Interstate Migration of Destitute Citizens, 76th Cong., 3rd Sess. Part 8 at 3365, 3369 (1941) (statement of Frances Perkins, Sec'y of Labor, and Philip Fleming, Wage and Hour Adm'r, defining industrialized agriculture as the approximately 63,000 farms employing four or more employees at least six to eight months—or "regularly"—annually and accounting for 1.5 per cent of all farms and one-third of all farm wage earners).
factory-farmers, who were "able to subject their workers to unusual legal disabilities. They...preferred to use racial groups with subordinate social status.... Although slavery and serfdom [were] forbidden in the United States, second-class citizenship [was] still the badge of agricultural labor."^{157}

5. **The Enormous Agricultural Wage Gap Between North and South.** The significance of the sectionally dichotomous distribution of the (hypothetically) covered non-white agricultural labor force becomes clear in juxtaposition with the sectional wage gap prevailing in the 1930s. Northern farmers who were already paying their employees at or near what was to become the lawful minimum wage had little or no economic incentive to oppose inclusion of farm workers. Indeed, many industrial employers who were already paying wages in excess of the minimum wage supported FLSA precisely as a tool of inter-sectional competition in order to deprive southern industry of its considerably lower wage level. As Senator "Cotton" Ed Smith put it: "Any man on this floor who has sense enough to read the English language knows that the main object of this bill is...to overcome the splendid gifts of God to the South."^{158}

Consequently, it is historically more convincing that opposition to inclusion of farm workers was not a general demand of 'the farm lobby,' but rather a specific component of the peculiar sectional struggle conducted by plantation interests to maintain their power at the expense of rural Blacks. The plausibility of this reasoning is enhanced by the fact that after FLSA became law, the National Farmers Union, the members of which were smaller farmers who employed few if any workers, advocated application of FLSA to farm workers on the ground that it would restore fair competition between small and larger farmers.^159

The wage gap between the South and the other states was

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^{157}Ross, Agricultural Labor at 5. See generally, Daniel, Bitter Harvest; Jamieson, Labor Unionism in American Agriculture at 284; Nourse et al., Three Years of the Agricultural Adjustment Administration at 350.


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enormous. For example, on July 1, 1937, daily farm wage rates (without board) ranged from eighty cents in South Carolina to $3.15 in Connecticut—a ratio of almost four to one. On Oct. 1, 1937, the regional averages amounted to:

<table>
<thead>
<tr>
<th>Region</th>
<th>Wage Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pacific</td>
<td>$3.08</td>
</tr>
<tr>
<td>New England</td>
<td>2.73</td>
</tr>
<tr>
<td>Middle Atlantic</td>
<td>2.54</td>
</tr>
<tr>
<td>Mountain</td>
<td>2.42</td>
</tr>
<tr>
<td>East North Central</td>
<td>2.37</td>
</tr>
<tr>
<td>West North Central</td>
<td>2.24</td>
</tr>
<tr>
<td>West South Central</td>
<td>1.34</td>
</tr>
<tr>
<td>South Atlantic</td>
<td>1.25</td>
</tr>
<tr>
<td>East South Central</td>
<td>1.11</td>
</tr>
</tbody>
</table>

The only regions with averages below the national average

\[160\] Crops and Markets 145 (1937). See generally, John Black, Agricultural Wage Relationships: Geographical Differences, Rev. Econ. Statistics, May, 1936, at 67. These regional wage rates underestimate the gap. During this period the only national time-series was compiled by the USDA on the basis of quarterly responses of voluntary farmer-correspondents who provided information on monthly and daily rates with and without board. The rates generated by these compilations suffered from a number of significant defects. First, farmers were not asked what they paid their workers, but rather about the “Average rates being paid to hired farm labor at the present time in your locality.” R. Hale, Reliability and Adequacy of Farm Wage Rate Data Exh. F (1940) (reproducing USDA, Agric. Marketing Serv., Oct. [1939] Gen’l Schedule). Since “[a] preponderance of the returns is from operators of general crop and livestock farms,” while “schedules sent to other lists of fruit, truck, dairy, and similar special reporters do not carry questions concerning wage rates,” “[i]t is doubtful if wage rates paid on such farms are adequately represented in the regular quarterly sample.” Id. at 4. Second, since the coverage of piece-rates as well as of the earnings of employees hired through labor contractors was spotty, id., and since these workers along with hourly employees “constitute[d] the bulk of the hired workers on the large farms,” broad inter-regional comparisons of wage rates are the most meaningful. National Farm Labor Problem at 1029 n.52. Third, before 1939 only the wages of male farm workers were used as weights for computing regional and national averages. U.S. Bureau of Agric. Econ., Farm Wage Rates, Farm Employment and Related Data 2 (1943). The significance of this weighting procedure derives from the fact that “the hired workers on American farms, outside the South, were predominantly native born white men. Only among Negroes was there a large proportion of female workers.” William Ham, The Status of Agricultural Labor, 4 Law & Contemp. Probs. 559, 563 (1937). Moreover, children formed an appreciable part of the labor supply only in the South (and in special crop areas). Id. Cf. Brannen, Relation of Land Tenure to Plantation Organization tab. 8 at 25, 26 (29 per cent of plantation acreage cultivated by women and children in 1920, virtually all of whom were black).

\[161\] Hale, Reliability and Adequacy of Farm Wage Rate Data Exh. B at 10, 4.
were the three covered by the South, where the regional daily average approached one dollar. On April 1, 1937, for example, the daily wage rates (without board) ranged from eighty cents in South Carolina to $1.35 in Virginia. Since black farm workers were paid less than Whites, they were doubtless being paid significantly less than one dollar per day in the late 1930s. In the northern and western regions of the country, on the other hand, wages were near or in excess of $2.50 per day.

If an average workday of ten hours is applied to these regional daily wage rates, farmers outside the South were, on the eve of FLSA's enactment, already paying the twenty-five cent per hour minimum wage required by the Act when it went into effect in 1938. Farm workers in the Cotton Belt, on the other hand, were

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162 Texas, Florida, and North Carolina were the only other southern states with averages in excess of $1.00 daily. 14 CROPS AND MARKETS 73 (1937). In 1938 President Roosevelt was paying his three black farm workers in Warm Springs, Georgia twenty dollars per month—slightly more than the state average. The governor, Gene Talmadge, had written to Roosevelt in 1935 denouncing the size of federal stipends issued by the WPA as a danger to the supply of hired farm labor. In reply, Roosevelt sarcastically alluded to Talmadge's approval of daily wage rates of forty to fifty cents for ten to twelve hours of work. FREDEL, F.D.R. AND THE SOUTH at 68-69.

163 Although a few North Central States—e.g., Wisconsin, Kansas and Nebraska—exhibited average daily rates closer to two dollars, this relatively low level was meaningless since very few farm workers there worked for daily wages without board (7.9 per cent compared with 20.6 per cent nationally). HALE, RELIABILITY AND ADEQUACY OF FARM WAGE RATE DATA tab. 3 (data for Oct. 1, 1939); cf. USDA, INCOME PARITY FOR AGRICULTURE pt II.—EXPENSES OF AGRICULTURAL PRODUCTION: Sect. 1.—THE COST OF HIRED FARM LABOR, 1909-38 (Preliminary) 12 n. 8 (1939) (with data for 1927 showing similar distribution). These were the states of "[t]he traditional hired man" par excellence, who was an "apprentice...enjoy[ing] the same simple standard of living as a farm family." ROSS, AGRICULTURAL LABOR at 8-9. A special collection of data from volunteer crop reporters in 1938 relating to the daily rates paid for harvesting grain revealed that farmers in these three states were paying near or above $2.50 daily in addition to providing two or three meals, whereas their counterparts in the South offered little more than one dollar and one meal per day. HALE, RELIABILITY AND ADEQUACY OF FARM WAGE RATE DATA, tab. 4. Cf. FOLSOM & BAKER, GEOGRAPHIC SUMMARY at 12-13 (map of regional wage differentials derived from 1930 census).

164 A study of farm workers' hours conducted by the USDA in 1939-40 was methodologically flawed and severely limited as a basis for calculating minimum wage rates because the respondents were, once again, by and large general crop and livestock farmers whose workers were hired typically by the month or day. "It is doubtful whether these working hours reflect the conditions characteristic of piece workers...[who] generally work longer hours than other farm workers in order to maximize their earnings through the performance, within the limited season, of as much work as possible." NATIONAL FARM LABOR PROBLEM at 1030. The hours reported
being paid about ten cents per hour—about forty per cent of the federal minimum wage; and black farm workers in the South were being paid even less.\textsuperscript{165}

Consequently it was southern planters employing largely black farm workers who had by far the greatest incentive to oppose coverage of farm workers under FLSA. This incentive was not merely economic, but went to the root of preserving their domination of the entire racist system of political-economic relations in the rural South.\textsuperscript{166} This opposition was so inclusive that it

for the South were underestimated because the major crop, cotton, which required the greatest amount of labor, was typically paid by the piece. DUCOFF, WAGES OF AGRICULTURAL LABOR at 28. If, on the other hand, the relatively long hours reported in the northern livestock and dairy regions for "the traditional hired man," who as a permanent year-round employee was paid by the month, are mismatched with the daily wage rates (without board) paid to an entirely different group of workers whose wages served as surrogates for the rates of all farm workers in those states, significant underestimates of hourly rates can result. HOPKINS, CHANGING TECHNOLOGY AND EMPLOYMENT IN AGRICULTURE at 23-25. In spite of these methodological problems, the regional average deviated but little from the estimated national average of 10.0 hours per day. They ranged from a low of 9.1 hours in the Pacific region to a high of 10.4 in the West North Central States. In all three regions encompassing the South the average was 9.7 hours. National Farm Labor Problem tab. 7 at 1030. Since California fruit and vegetable pickers were largely paid by the piece, it may be assumed that the hours for the Pacific region were underestimated. Id. at 1026; DUCOFF, WAGES OF AGRICULTURAL LABOR at 28-29. Because it is no longer possible to go behind these data, the overestimates and underestimates are compromised here by assuming a ten-hour day in all regions. Cf. id. table 36 at 77. But see BRANNEN, RELATION OF LAND TENURE TO PLANTATION ORGANIZATION at 29, 42 ("The workday on the plantation is from 'sun to sun,' except where the plantations are near a factory. Such plantations usually have a 10-hour workday...").

\textsuperscript{165}That black farm laborers in the South were earning even less than the aforementioned day rates is confirmed by the crucial fact that in the late 1930s, "the average daily earnings of cotton pickers were lower than the prevailing day rates (without board) in nine of the 13 States and were equal to the day rates in 2 other States." DUCOFF, WAGES OF AGRICULTURAL LABOR at 86. Anecdotal information confirms these extraordinarily low wages: (1) the largely black day laborers of eastern Arkansas were reported earning only seventy-five cents for a sunup to sundown workday on cotton plantations in 1936; letter from H. Mitchell (founder of the STFU) to Gardner Jackson (May 6, 1936) (reproduced in STFU PAPERS, 1934-1970 [microfilm reel 3]); (2) their counterparts across the Missouri border were still earning the same rate three years later; Rain, Snow Defied by Sharecroppers, N.Y. Times, Jan. 12, 1939, at 5, cols. 4-6; and (3) in Alabama daily farm wages were as low as sixty cents in 1937; Farm Laborers and Cotton Field Workers Union, No. 20471, A.F. OF L., A CALL TO ALABAMA'S FIRST AGRICULTURAL WORKERS WAGE CONFERENCE (April 18, 1937) (reproduced in STFU PAPERS, 1934-1970 [microfilm reel no. 4]).

\textsuperscript{166}A further indicator of the crucial sensitivity of Cotton Belt planters to wage increases was the fact that expenditures for labor bulked proportionally larger on
extended to the adoption of any federal minimum wage at all for fear that a rise in southern industrial wages would deplete the supply of farm labor and thus undermine an important source of their power—the total dependence of a huge overpopulation of black laborers and sharecroppers. Had Congress included farm workers under FLSA and had sharecroppers been deemed planters' employees, imposition of a minimum wage of even fifteen to twenty cents an hour would have shaken the foundations of the plantation as a system of regional subjugation of Blacks. In the event, the socioeconomic policies of the New Deal—and not least the agricultural exclusions—further depressed farm wages in the South vis-à-vis industry and other regions.

The legacy of these racially motivated exclusions of the New Deal is the current exemption for so-called small farm employers from the minimum wage and for all agricultural employers from mandatory premium overtime. Whether this vestige is still racially motivated or merely the result of legislative inertia, non-white farm workers remain disproportionately affected by their isolation in a subminimum wage sector. As the next chapter will show, migrant farm workers are also still subject to vestiges of pre-modern authority relations.

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cotton plantations than in other branches of agriculture. Holley et al., Plantation South at 34-35 (wages accounting for thirty-six per cent of current expenses in 1936). Cf. Ross, Agricultural Labor tab. 4 (unpaginated) and 313; National Farm Labor Problem at 1032-33 (showing wages as a share of farm output and expenditures for various branches of agriculture); Schwartz, Seasonal Farm Labor in the United States at 67-101 (cost of labor in fruit and vegetable farming substantial in relation to total costs and more subject to grower decisions than any other costs).

167 As they were when farm workers were finally included in 1966. See infra ch. 6.

The Worst of Both Worlds:
Atavistic Authority over
"Independent Contractors"

In agriculture, the relations between workers and employers often seem to be a mean and ugly survival from an almost forgotten era.¹

A decision...can be seen to be clearly wrong when it puts a worker in a position of being unable to claim the benefits of an employee although his real work and his bargaining power preclude him from availing himself of the advantages of the independent contractor.²

Considerable irony attaches to the fact that, although migrants are subject to the most primitive forms of entrepreneurial control and exploitation, employers have managed to confer a veneer of legitimacy on their legal strategy of expelling them from the universe of workers covered by numerous protective laws by the simple expedient of denying that they are (their) employees. In addition to saving the costs imposed by those statutory obligations, agricultural employers have succeeded in sidetracking efforts at unionization by tying up workers (and their lawyers) in never-ending litigation over their employment status. That migrants will ultimately

prevail in this skirmish does not detract from the fact that employers, by postponing their inevitable decision as to whether to accept unions or to mechanize, will have gained years of cheap labor.

By means of an economic-legal conceptualization of migrants' employment relationship, this chapter explores the undue process of which employers have been able to take advantage; the following chapter analyzes that litigation concretely.

I. Sisyphus in the Courts

In 1938, Congress passed the FLSA in order to palliate the grave economic ills then ailing our nation. The treatment prescribed is relatively simple—mandatory minimum wages to ameliorate depressed earnings, and overtime penalties to induce shorter working hours. Before ordering putative employers to swallow the congressional pill, however, courts must first ensure that the relevant business suffers from an FLSA illness, viz., that the etiology derives from actual employees, and thus that the Secretary [of Labor] is not a legal hypochondriac.3

Even the most fervent judicial promoter of market-oriented jurisprudence has certified migrant farm workers, who "sell[] nothing but their labor," as the dependent employees par excellence.4 Nevertheless, whereas most other dependent workers in the United States routinely enjoy the uncontested presumption of employee status,5 migrants are caught in the daily dilemma of either acquiescing in the inferior conditions imposed by employers who deny that status or of assuming the risks of vindicating that presumption. Yet in spite of more than a quarter-century of federal labor law protecting migrants and of an express congressional mandate that the real employers be held accountable for their acts and omissions, a considerable proportion of FLSA and AWPA suits continues to be bogged down in the Sisyphus labor of proving time

3Brock v. Mr. W Fireworks, Inc., 814 F.2d 1042, 1043 (5th Cir. 1987).
4Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1545 (7th Cir. 1987) (Easterbrook, J., concurring).
5Although employers in other industries have also sought to treat their employees as self-employed, many of the affected workers are, unlike hand-harvest laborers, either skilled (e.g. building trades workers) or work outside of the direct physical control of their employers (e.g., industrial homeworkers, truck and taxi drivers, salespeople). See Marc Linder & Larry Norton, The Employee-As-Contractor Dodge, Phil. Inquirer, June 15, 1987 at 15-A, col. 1.
and again that the aggrieved are employees in general and of financially solvent agricultural employers in particular rather than of a ragtag assortment of judgment-proof straw men.\(^6\)

For the affected migrants the economic consequences of the employers' strategy can be devastating. In order, for example, to avoid payment of the minimum wage, the world's largest producer of onions has adopted the fiction that its onion hand-harvesters are not its employees but rather the employees of its labor catchers. The latter's functions are to recruit the onion clippers at the Mexican border crossing and to drive them a few miles to the fields; at the work-site they act as straw bosses, supervising and paying the workers in accordance with instructions passed down by company payroll supervisors. Although the courts have ruled that the company is the employer of the workers, it continues to indulge in this practice, knowing that only very few of its impoverished employees will seek legal redress at the risk of becoming blacklisted.\(^7\)

If workers nevertheless sue for their back wages, they must bear the burden and expense of discovering in every case the specific facts that will sustain the allegation of an employment relationship. Because such cases may last more than a decade, employers calculate that their employees' immediate incentives to sue them are so small that the benefits of continuing to violate FLSA and AWPA exceed the costs.\(^8\)

In the meantime, the workers' resolve to resist such violations of the few employment rights they possess is undermined.

By classifying their employees as independent contractors, agricultural employers also seek to evade their responsibilities under


a host of other labor and income-security statutes. Since the employer can accomplish this end by the simple act of non-compliance or non-reporting, the worker will in the first instance be deprived of the benefits of these protective statutory schemes. Only those workers knowledgeable and assertive enough to contest their employers' violations administratively and/or judicially will ultimately receive those benefits. How has this predicament arisen?

II. Independent and Dependent Contractors: An Ambiguous Dichotomy

The law of independent contractors...was never intended to apply to humble employees of this sort, so completely subject to the domination and control of the employer.10

The socioeconomic and juridical distinction between independent contractors and employees can be traced back to the Roman concepts of locatio conductio operis and locatio conductio operarum.11 They reflected a fundamental divide between one who contracted to perform specified work within his own dominion (an entrepreneur) and one who was placed in the dominion of the buyer of his labor to do whatever the latter demanded of him ("wage-slave"). This conceptual pair was intended to get at the difference between freedom and unfreedom.12


11See 25 PAULY'S REAL ENCYCLOPÄDIE DER KLASSISCHEN ALTERTUMSWISSENSCHAFT col. 933-42 (new ed. 1926) (s.v. locatio & locatio conductio); MAX KASER, DAS RÖMISCHE PRIVATRECHT: DAS ALTROMISCHE, DAS VORKLASSISCHE UND KLASSEISCHE RECHT 562-72 (2d ed. 1971); idem, DAS RÖMISCHE PRIVATRECHT: DIE NACHKLASSISCHEN ENTWICKLUNGEN 400-407 (2d ed. 1975); H. Danckwardt, Die locatio conductio operis, 13 [Jherings] JAHRBUCHER FÜR DIE DOGMATIK DES HEUTIGEN RÖMISCHEN UND DEUTSCHEN PRIVATRECHTS (n.s. [1]) 299 (1873).

12See C. Drake, Wage-Slave or Entrepreneur? 31 MOD. L. REV. 408 (1968). In fact, locatio conductio operarum may have been largely restricted to the renting of slaves; the uncommon subjection of free labor to work for hire appears to have been a response to peak seasonal demands for labor (such as agricultural harvests), creating opportunities for otherwise free laborers to earn supplementary incomes. See W. Endemann Die rechtliche Behandlung der Arbeit, 12 JAHRBUCHER FÜR NATIONALÖKONOMIE UND STATISTIK, 3d ser., 641, 642-60 (1896) (discussing locatio
This dichotomy has maintained a subterranean existence underlying the distinction between those who contract independently and those whose lack of capital and of access to the means of subsistence causes them to enter into economic exchange relations only seemingly consensually. But for the application of the ideology of market equality to labor relations, the latter group would be called dependent contractors. Instead, in order to avoid invidious comparisons with their independent counterparts, they are called employees—that is, those whom the employer uses "to accomplish his chosen ends." Having had to surrender their ability to work and, thus in some meaningful sense, themselves, to the power of their employers, employees are unfree and dependent.

Thus the Statute of Labourers, which established a coercive regime of employment and wage regulation in the wake of the

*conductio operarum* in the context of the transition from the pandectist to the civil code system in Germany; Francesco De Robertis, *Lavoro e lavoratori nel Mundo Romano* (1963); Dieter Nörr, *Zur sozialen und rechtlichen Behandlung der freien Arbeit in Rom*, 82 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte* (Romanistische Abt.) 69, 90-91 (1965); M. Finley, *Economy and Society in Ancient Greece* 99-100 (1983); *idem*, *The Ancient Economy* 73-75, 185-86 (2d ed. 1985 [1973]). For a discussion of the hybrid system (involving crew leaders) used in olive harvests, see Marcus Portius Cato, *De agri cultura* ch. 144; Herman Gummerus, *Der römische Gutsbetrieb als wirtschaftlicher Organismus nach den Werken des Cato, Varro und Columella* 25-30 (published in Klio, 5th Beiheft, 1906); Max Weber, *Agrarverhältnisse im Altertum*, in *idem*, *Gesammelte Aufsätze zur Sozial- und Wirtschaftsgeschichte* 1, 243-45 (1924 [1909]).

The Pennsylvania Supreme Court characterized a truck law providing for payment to laborers at iron mills at regular intervals and in lawful money as "an insulting attempt to put the laborer under a legislative tutelage, which is...subversive of his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal...." Godcharles v. Wigeman, 113 Pa. 431, 6 A. 354, 356 (1886).


For an uncommonly strong modern statement of this position, see Kahn-Freund, *Labour and the Law* at 6, 13.
fourteenth-century plague, did not apply to "what we would call an independent contractor."[17] Similarly, only employees have been deemed in need of society's protection when dealing with employers or the consequences of the loss of their dependent income caused by unemployment, work-related accidents and diseases, or old-age. The New Deal legislation that institutionalized this program of social protection in the United States deemed the self-employed sufficiently active participants in and beneficiaries of the system of free enterprise to be able to dispense with state assistance. That some protective legislation was later amended to cover the self-employed suggests a societal perception that in a political economy dominated by oligopoly, the freedom-unfreedom dichotomy may have broken down.[18] Yet if welfare-state statutes, whose definitions of employee are rooted in pre-capitalist societies, require courts to operationalize the freedom-unfreedom continuum within the binary mode demanded by administration and litigation, can the outcomes be coherent?

A. Control

In order to answer this question, it is first necessary to examine the socioeconomic and legal contexts in which parties have litigated the issue of the existence of an employer-employee relationship. English courts in the eighteenth and nineteenth centuries were called upon to adjudicate the issue with respect to several distinct kinds of claims.

First, under the poor laws, one of the ways in which a poor person could secure a right to settle in a parish without threat of removal to her former parish was by virtue of remaining "in the same service" for a year.[19] In appeals against orders of removal the parties frequently litigated the issue of whether a master-servant


[19] 8 & 9 Will. 3, ch. 30, § IV (1697). See also 13 & 14 Car. 2, ch. 12 (1662); 3 W. & M. ch. 11 (1691).
relationship existed. Many of the cases hinged not on whether the master controlled the servant at the workplace, but rather on whether he had the power to require her services at all times.20

Second, third parties brought negligence actions against the alleged employers of those who had injured them. In order to prevail on such a claim, which was based on the doctrine of vicarious liability or respondeat superior,21 the plaintiff had to show that the defendant in fact was the "superior" of the one who had directly caused the injury. What is most striking about this litigation, which has exerted the most lasting influence on the structure of twentieth-century employment law, is that it did not arise from disputes between employers and employees over matters internal to their relationship, but rather over the choice of a proper defendant in triangular situations involving an employer, a worker, and an injured third person. On the resolution of that issue nothing turned as between employer and employee. Why legislators and judges perceived that third-party matrix as affording an appropriate basis for the evolution of the employer-employee relationship itself is puzzling in light of the fact that twentieth-century labor-protective statutes were designed to mitigate the harshness of the common law, which served to curtail the employer's responsibility.22

The English (and American) vicarious liability cases worked out two different lines of precedent dealing with the distinction between independent contractors and employees. The older line, which was gradually ousted and became submerged and virtually consigned to oblivion in twentieth-century accounts,23 emphasized the relative skill and expertise of the two parties and the related factor of the integration of the worker's activity into the employer's


22James Wolfe, Determination of Employer-Employee Relationships in Social Legislation, 41 COLUM. L. REV. 1015, 1020-21 (1941). Although the employer could seek indemnification from the employee, presumably the reason that the third party had sued him in the first place was that the employee was judgment proof. 2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I at 533 (1968 [1895]).

23The major exceptions are Wolfe, Determination of Employer-Employee Relationships; Benjamin Asia, Employment Relation: Common-Law Concept and Legislative Definition, 55 YALE L.J. 76 (1945); Joseph Jacobs, Are "Independent Contractors" Really Independent? 3 De Paul L. Rev. 23 (1953).
business. Where the worker possessed a skill which the employer
did not possess and could not integrate into this business, the courts
regarded the worker as pursuing an independent or distinct calling.
The factor of control was seen as flowing from this skill-integration
complex. The other, dominant, line of cases focused exclusively on
control, relegating all other factors to a subordinate role as mere
evidence of control. According to one still influential nineteenth-
century definition of control: "A servant is a person subject to the
command of his master as to the manner in which he shall do his
work." In enticement actions, which were created for the benefit of employers,
a finding of independent contracting exculpated the worker and the
enticing employer. In the famous case of Lumley v. Gye, the Court
of Queen's Bench extended the scope of enticees beyond that of
traditional servants in breach of a contract for personal services to
include an opera singer who could only with difficulty be considered
subject to control. Once the fellow-servant rule began to bar

24 See, e.g., Bush v. Steinman, 1 Bos. & Pul. 404, 126 Eng. Rep. 978 (1799); Laugher
(1840); Allen v. Hayward, 7 Q.B. 960, 115 Eng. Rep. 749 (1845); Peachev v. Rowland
and Evans, 13 C.B. 182, 138 Eng. Rep. 1167 (1853); Sadler v. Henlock, 4 El. & Bl. 570,

25 See 1 C. Labatt, Commentaries on the Law of Master and Servant 57-
60 (1913).

Earlier Bramwell had remarked that a master had the right to say "how" the work
was to be done. R. v. Walker, 27 L.J.M.C. 207, 208 (1858). The Restatement defines
a master-servant relationship as one in which the former "controls or has the right to
control the physical conduct of the other in the performance of the service." RESTATEMENT (SECOND) OF AGENCY, § 2(1) (1958 [1933]).

27 See LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW at 62-
74.

282 El. & Bl. 216, 118 Eng. Rep. 749 (1853); Lea VanderVelde, The Gendered
Origins of the Lumley Doctrine: Binding Men's Consciences and Women's Fidelity, 101
YALE L.J. 775 (1992). The long-standing narrower precedent had been Lord
Mansfield's opinion in Hart v. Aldridge, 1 Cowp. 55, 98 Eng. Rep. 964 (1774). Such
employees' negligence suits against their employers, there unfolded the judicial spectacle of employees' claiming to be independent contractors in order to escape the rule, while defendant-employers insisted that those suing them were indeed employees and hence subject to the rule. Although the courts generally framed their decisions in terms of control, judges who doubted the wisdom of the fellow-servant rule visibly delighted in putting it out of operation by finding plaintiffs who were clearly employees to be independent contractors.

The ascendency of the so-called control test toward the end of the nineteenth century and the beginning of the twentieth century in England and during the years around World War I in the United States coincided with the enactment of workers' compensation statutes. Where the language of the statutes itself did not prescribe the (narrow) control test, the courts showed great alacrity and virtual unanimity in imposing it so as to exclude from coverage many impoverished workers (or their widows).

B. Economic Dependence

A turning point in the juridical evolution of the employment relationship was triggered by state intervention in the form of the
rudiments of a social wage and a legal framework for collective bargaining. In the United States this change took place under the aegis of the New Deal. In the NLRA, the old-age, survivors, disability and unemployment insurance provisions of the Social Security Act (SSA), and FLSA, the state confined the statutorily afforded rights, benefits, and protections to "employees." By inserting empty but potentially capacious definitions of employee and employ into these laws, Congress unreflectingly left it to the federal courts to map the boundaries of the dependent working class. In developing these definitions, judges purported to reject the applicability of the control test, looking instead to the "underlying economic realities" to decide whether the aggrieved workers were "subject to the evils the statute was designed to eradicate."

In *NLRB v. Hearst Publications*, decided under the NLRA during World War II, the Supreme Court held that workers' economic dependence on their employers was more relevant to the underlying mischief of unequal bargaining power than whether the employers controlled their physical conduct. Having gone that far, the Supreme Court then made itself vulnerable to the charge that it was in effect conceding that a certain nineteenth-century political-economic theory was correct after all in predicting the tendency of industrial capitalism to develop into a two-class society. The Court could then have frankly admitted that with the impressive advances

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34 Ch. 372, 49 Stat. 449 (1935); ch. 531, 49 Stat. 620 (1935). On the scope of the employment relationship in state unemployment insurance statutes, see LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGO-AMERICAN LAW at 211-15. The NLRA defined an "employee" to "include any employee." §2(3). The SSA defined "employment" to mean "any service, of whatever nature, performed...by an employee for his employer..." § 210(b); § 811(b).


36 322 U.S. at 128.
toward economic concentration by the end of the War,37 significant
groups of small entrepreneurs, whose day-to-day activities were not
subject to control by those who contracted for their services, were as
much at the mercy of the tidal waves of market forces created by the
unequal accumulation of capital as were traditional "servants"—and
that they therefore also needed the protection of the New Deal
legislation.

To reach that conclusion, judges could have drawn on a body
of precedent that had evolved into an economic-reality-of-class-
poverty test under nineteenth-century protective and regulatory
statutes the operation of which had also been triggered by the
existence of an employment relationship. Chief among these were
the Truck Act and a succession of statutes designed to regulate
master-servant disputes.38 The English courts, guided by the
mischief which the statutes were designed to relieve, largely made
coverage hinge on whether the affected workers earned "their bread
by the sweat of their brow" or whether they speculated on the state
of the labor market by exploiting other workers.39 This proto-
economic reality of dependence test, however, failed to exert any
influence on the control test because of the overwhelmingly
contractarian view of capital-labor relations nurtured by mid-
Victorian judges, who were at pains to confine the legislative

37See Report of Smaller War Plants Corporation to the Special
Committee to Study Problems of American Business: Economic
Concentration and World War II S. Doc. No. 206, 79th Cong., 2d Sess. chart 12
at 41 and passim (1946).

381 & 2 Will. 4, ch. 37, §§ XIV, XX, XXV (1831); 20 Geo. 2, ch. 19 (1747); 4 Geo.
4 ch. 34, § III (1823); 5 Geo. 4 ch. 96, § II (1824); 38 & 39 Vict. ch. 90, §§ 3, 10 (1875).
Toward the end of the nineteenth century further litigation arose under employers' liability statutes, which did away with various common law defenses to employees' actions. 43 & 44 Vict. ch. 42, § 2 (1880).

39Riley v. Warden, 2 Ex. 59, 68, 154 Eng. Rep. 405 (1848); Ingram v. Barnes, 7 El.
& Bl. 115, 135, 119 Eng. Rep. 1190 (1857) (Truck Act); Heebner v. Chave, 5 Pa. 115
(1847) (exemption of wages from attachment); Mohr v. Clark, 19 P. 28 (Wash. 1888)
(lien law). Where an employer brought suit under a master-servant act, it was to the
worker's advantage that the court classify him as an independent contractor so as to
withdraw from the magistrate (who was formally the defendant on appeal) jurisdiction
over him. See, e.g., Lancaster v. Greaves, 9 B. & C. 627, 109 Eng. Rep. 233 (1829);
Hardy v. Ryle, 9 B. & C. 601, 109 Eng. Rep. 224 (1829); Ex parte Johnson, 7 Dowling
702 (Q.B. 1839). In embezzlement cases, the courts tended to interpret the master-
servant relationship broadly, thus expanding the scope of the criminal accused. See,
e.g., Reg. v. Thomas, 6 Cox's Crim. Cases 403 (1853) ("butty collier" held to be
servant); but see Reg. v. Goodbody, 8 Car. & P. 665, 173 Eng. Rep. 664 (1838) (cattle
drover held not to be servant).
invasion of the prerogatives of consenting adults to as small a sphere of the potential universe of exploitative transactions as possible. Consequently, this class-oriented approach was neither intellectually nor socioeconomically available to the New Deal judiciary.

As the later inclusion of the self-employed in the social security old-age program showed, affording entrepreneurs at least some forms of security did not dry up the supply of risk-takers necessary to sustain a profit-driven economy.40 Affording dependent business entities a framework for collective bargaining or state-monitored minimum compensation in their contractual dealings with large firms would surely have given rise to ideologically provocative debate.41 Confronted with this impasse, the Supreme Court could have frankly admitted that it was compelled to recognize the existence of this new category of "dependent contractors."42 In this way, the Court would have framed the issue as one that required systematic re-thinking of the traditional conception of the relationship between the three-class socio-economic system (employees--self-employed--employers) and the fledgling "social wage."

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40 Frank Knight, Risk, Uncertainty and Profit (1923). In Knight's terminology, what is called "risk" here would be "uncertainty" because it is unquantifiable and uninsurable.

41 For statements of the position that one must choose between being an employee or an entrepreneur and cannot have the former's security as well as the latter's opportunity for profit, see Littlefield v. Morrill, 97 Me. 505, 54 A. 1109 (1903); Social Security Revision: Hearings Before the Senate Comm. on Finance, 81st Cong., 2d Sess. 491-92 (1950) (testimony of Marion Folsom, Treasurer, Eastman Kodak). A large manufacturer like General Motors may contract out production of parts to much smaller firms that do nothing but produce them for GM. On the background of the decision by GM whether to contract with or vertically integrate suppliers, see Benjamin Klein, Robert Crawford, & Armen Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process, 21 J. Law & Econ. 297, 308-10 (1978). Despite the fact that in economic reality such suppliers are mere adjuncts of GM, which has chosen to shift uncertainty and risk to them rather than to integrate backwards, no court would hold them—or their employees—to be employees of GM. The economic reality of the relationship between automobile manufacturers and their dealers (into whose operations they have chosen not to integrate forwards) is dimly reflected in the Automobile Dealers' Day in Court Act, 15 U.S.C. §§ 1221-25 (1982 and 1991 Supp). See also Friedrich Kessler, Automobile Dealer Franchises: Vertical Integration by Contract, 66 Yale L.J. 1135 (1957); Stewart Macaulay, Law and the Balance of Power: The Automobile Manufacturers and their Dealers (1966); Peter Drucker, The Concept of the Corporation 89-101 (1964 [1946]).

Worst of Both Worlds

In the event, the Court succeeded in provoking congressional reaction—but not on its own terms.

In 1947 congressional repeal of *Hearst* was incorporated into the Taft-Hartley Act. At the same time, the Supreme Court decided several SSA and FLSA cases that concretized the economic reality of dependence test by offering a list of factors that the lower courts could use to test the presence of an employer-employee relationship: (1) the skill required by the work performed; (2) capital investment by the worker; (3) opportunity for profit or risk of loss by the worker; (4) degree of control by the employer; (5) whether the work is performed in the course or as a part of an integrated unit of employer's business; and (6) the permanence and/or exclusivity of the relationship.

In applying the factors to the facts of these cases (or deriving them therefrom), however, the Court failed to distinguish rigorously between personal dependence, in the sense of the control test, and economic dependence. Where it found the workers to be employees, the Court either did or could have done so by reference to control factors alone. Ironically, in holding most of the workers in these cases not to be employees, the Supreme Court proved that the economic reality of dependence test could be kept on an arbitrarily short leash so that even workers contractually obligated to work exclusively for one employer would not qualify as its employees. Such subtleties, however, did not mollify the Eightieth Congress. Spurred by its success in the first session, in 1948 it also mandated the control test for interpreting the definition of *employee* in the SSA. Consequently, of the New Deal statutes only FLSA has

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45 That distinction was crystallized in a lower court ruling that "statutory coverage is not limited to those persons whose services are subject to the direction and control of their employer, but rather to those who, as a matter of economic reality, are dependent upon the business to which they render service." *Fahs v. Tree-Gold Co-Op Growers of Florida*, 166 F. 2d 40, 44 (5th Cir. 1948).

consistently been interpreted by reference to economic dependence. 47

III. What Is an Employee—Controlled by, or Economically Dependent on, an Employer?

[W]hen manual laborers are themselves the only directors of their own industry, their resources beyond their wages can be but small. Masses of capital cannot be employed to assist an industry which remains entirely in the hands of the laboring class. The possession of such property, and the position of day-laborers, are two inconsistent things. 48

How then do the control and economic reality of dependence tests differ? The economic reality of dependence test is widely held to differ from the control test by virtue of encompassing the aforementioned five factors in addition to control. 49 In fact, however, even the control test subsumes almost all of these criteria. 50 While the purpose of both tests is to identify "the economist's distinction between one who sells his labour power to the enterprise of another and one who operates his own enterprise," 51 the nub of the distinction between them is this: whereas control focuses on personal worksite subordination, economic dependence embraces in addition those who are economically dependent on a firm even in


49Silk, 331 U.S. at 716. See also H. REP. NO. 885, 97th Cong., 2d Sess. 7 (1982).

50These include skill, investment, control, integration into the employer's business, and permanency. Restatement (Second) of Agency § 220(2).

the absence of control. Indeed, the whole point of the economic reality of dependence test has been to extend coverage and protection to uncontrolled employee-like persons. The trial judge captured the spirit of the test this way:

[W]here it is shown...that the maximum benefits that can be expected by the cook and her helpers from this sort of arrangement are less than would accrue to them outright from employment under the wage and hour restrictions of the Act; and when...the arrangement appears...to be intended for the benefit of the employer in limiting his outlay, rather than for the benefit of the cook-contractor (who is given little opportunity to make of the contract a profitable business venture), the surface appellation of "contractor" must be stripped off to uncover the real relation of the parties.  

The historical dialectic between the two tests will illuminate their current juridical-economic interrelationship. Control as an indicator of the employment relationship originated in pre-capitalist forms of state-enforced compulsory labor in England. Embedded in a network of laws, institutions, and customs designed to underwrite a legal status creating a liability to serve, such control was most influentially exemplified by the course of litigation under the poor laws. In order to contest settlements, parishes successfully advanced the proposition that control was necessarily coextensive with service; where the worker could not be shown to have been continuously subject to his master's control for an entire year, the settlement failed and removal was ordered. The master's abstract power and authority to dispose of his servant's time twenty-four hours a day, 365 days a year was applicable to agricultural laborers, domestic servants, and others living in the master's house. Thus before the rise of large-scale mechanized industry, control of unskilled labor was rooted in a type of personal-physical subordination common to

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52That the test does not automatically generate such outcomes even in the hands of a very liberal judge is shown by Brennan v. Longview Carpet & Specialty Co., 74 Lab. Cas. 33,073 (E.D. Tex. 1973) (per Justice, J.) (holding carpet installers who earned $100 weekly for fifty hours of work, worked almost exclusively for one employer where they showed up every day at 8:00 a.m., and did not hold themselves out to world as contractors, to be independent contractors and thus not covered by FLSA).


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slave, feudal, and capitalist economies.55

Because even in the eighteenth century such a doctrine "ruled out most of the workmen who were employed by the capitalist manufacturer by the week or by the day,"56 this concept of control eventually had to be adapted to the development of this new form of enterprise, which can supervise and direct in detail the activities of its employees, but is not entitled to use force--or to call upon the state to use force--to compel their appearance or to prevent their departure. The control test, according to one of the leading international comparative labor law historians,

was well suited to govern relationships like those between a farmer and an agricultural labourer (prior to agricultural mechanisation), a craftsman and a journeyman, a householder and a domestic servant, and even a factory owner and an unskilled "hand." It reflects a state of society in which the ownership of the means of production coincided with the possession of technical knowledge and skill. ... The control test postulates a combination of managerial and technical functions in the person of the employer, i.e., what to modern eyes appears as an imperfect division of labour. The technical and economic developments of all industrial societies have nullified these assumptions.57

This view is both true and false. While Kahn-Freund correctly underscored the elements of control in the past, he overlooked both the variety of employment relations without such control in the nineteenth century and the profound advances in control achieved by industrial firms in the twentieth century. The most fertile sources of employment litigation in the past century were precisely industries such as construction, mining, and transportation, in which firms were able to exercise only relatively circumscribed control despite being more capitalistic than farmers. Even in the later nineteenth and into the beginning of the twentieth century so-called inside contracting in the mining, iron and steel, and machinery industries in England and the United States pointed to a low level of socio-technological integration that made such operations compatible with owners' delegation to autonomous

55Drake, Wage-Slave or Entrepreneur? at 413.
57Otto Kahn-Freund, Servants and Independent Contractors, 14 Mod. L. Rev. 504, 505-506 (1951).
workers of the authority to supervise and exploit the work force. Indeed, the struggle between owners seeking to introduce innovations designed to undermine the basis of craftsmen’s autonomy and the resisting workers was the hallmark of labor relations in these industries. It was during this transition period that the control test became inadequate to the task of identifying the spectrum of employment relations.

Paradoxically, however, not until the twentieth century did the control test come into its own as a standard appropriate to gauging the socio-technological domination of closely supervised unskilled and semi-skilled detail workers by firms that own, control, understand, and coordinate the use of all the means of production. Two early twentieth-century movements created the conditions under which firms were able to achieve a level of effective control inconceivable in much smaller factories a few years earlier. These were the successful efforts of Taylorism to wrest control from semi-industrial artisans through a top-down intensification of the division of labor by which management centrally coordinated de-skilled and atomized workers; and the development of mass production in which workers became appendages of machines they no longer understood (Fordism).

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60 In this sense the frequently voiced criticism that the control test has become obsolete because “corporations...by their very nature could have no personal competence in any area of human activity at all” misses the point. C. Mills, Defining the Contract of Employment, 7 Australian Bus. L. Rev. 229, 232 (1979).

At the same time, however, the control test disqualifies dependent workers whom employers have not yet succeeded in thoroughly subordinating. While some—such as migrant farm workers—continue to be subject to atavistic forms of control, others may be uncontrolled yet still economically dependent on their employers. But identifying precisely what "economic dependence" entails is difficult, for it could plausibly encompass the relationships of the entire economically active population except those able to live on their capital indefinitely.62

Both historically and categorically, the lack of ownership of the resources that enable workers to work for their own account constitutes the dependence and inequality that compel them to subordinate themselves to those with such resources. The latter assume two forms: (the money to buy) the means of subsistence on which to live until the results of the labor process are monetized; and the facilities, machines, and raw materials specifically required by that process in conformity with the standards enforced by competition. The control test reflects both aspects: workers without capital must submit to the authority of those who attach them to their capital; and that lack of capital in turn prevents workers from accumulating the capital that would enable them to become independent—that is, to relate as capital to other capitals as contradistinguished from relating as labor to capital.63

In other words, the control test identifies those workers who are subject to untrammeled entrepreneurial authority. Controlling workers by transforming them into machine appendages is adequate to modern conditions of production because it constitutes the basis of relative surplus value production—a potentially open-ended process of cheapening the elements entering into the value of labor power. In contrast, the control associated with non-mechanized types of labor—such as hand-harvesting fruits and vegetables—is the basis of absolute surplus value production, which is subject to much narrower limits because its outer dimensions are the finite length of


63In an oligopolistic political economy the minimum capital required to achieve that status generally exceeds the amount that a single self-employed person without employees can valorize alone. See LINDER, FAREWELL TO THE SELF-EMPLOYED at 44.
the day and the finite intensity of unaided labor. In this crucial sense, control—rather than the economic dependence of uncontrolled employees—is the essence of the capital-labor relation.

Although the control test situated the employment relationship on the level of the employer's authoritative disposition over the use of labor, it did not programmatically embed these individual phenomena in a compulsory class structure. Ironically, the nineteenth-century economic-reality-of-class-poverty test did just that—by inferring control from the (implicitly judicially noticed) categorical class differences in specific assets and income.

The modern economic reality of dependence test, in contrast, by resisting the conceptualization of a binary class system, has diluted the robustness of both the control and the economic-reality-of-class-poverty tests. This refusal is unwarranted because labor-protective statutes are by their nature collective-compulsory class institutions, which cannot be adequately conceptualized within the framework of individual exchange. To bar admission to these systems by reference to adventitious details of the forms of exchange and control is self-contradictory. Making protected employee-status hinge on whether a worker is economically dependent on a particular business or employer—rather than on the employing class as a whole—is not only inappropriate to the context, but self-defeating. The modern problem to which the courts are respond-

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64 Marx, Das Kapital ch. 7-18.

65 Control "is hardly an incident of the master and servant relationship; it is the essence.... It is hardly an attribute of the relationship. It is the relationship." Stover Bedding Co. v. Industrial Commission, 107 P.2d 1028, 1041 (Utah 1940) (Wolfe, J., dissenting).

66 Where a defendant-employer sought to turn the economic reality of dependence test against itself by claiming that its alleged employees could not be dependent upon it because the income they received from it was a fraction of what they received in public assistance, the court, unable to distinguish between personal work-site control and economic dependence, reverted to control in order to support a finding of dependence. Marshall v. Michigan Power Co., 92 Lab. Cas. ¶34,097 at 44,190-44,191 (W.D. Mich. 1981). Appellate courts have also failed to confront this gap in the economic reality of dependence test. Instead, they have irrelevantly held that its proper meaning is whether the worker is dependent on the particular business for continued employment in that line of business. Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376, 1385 (3d Cir. 1985); Halferty v. Pulse Drug Co., 44,190-44,191 (W.D. Mich. 1981). Appellate courts have also failed to confront this gap in the economic reality of dependence test. Instead, they have irrelevantly held that its proper meaning is whether the worker is dependent on the particular business for continued employment in that line of business. Donovan v. Dialamerica Marketing, Inc., 757 F.2d 1376, 1385 (3d Cir. 1985); Halferty v. Pulse Drug Co., 826 F.2d 261, 267-68 (5th Cir.), modified on other grounds, 826 F.2d 2 (1987). Because relatively few workers would be unemployable in one line of business if a particular employer did not employ them, this condition is so restrictive that it would disqualify most workers as employees under FLSA. Inconsistently, the Fifth Circuit also maintains the logically
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ing is that, once the wage-form encompasses workers who no longer fit the stereotype of classical proletarians, it becomes difficult to justify protective statutes without opening a breach in the scheme of categorical coverage. By conflating dependence and interdependence, the economic reality test has made itself vulnerable to the charge that it does "not...encompass reasonable limits." It lays this trap for itself by virtue of its inability to conceptualize "dependence" rigorously.

Although the economic reality of dependence test was intended to have, was perceived (by supporters and opponents) as having, and has had the effect of creating a built-in bias towards enlarging the universe of protected workers, as applied to unskilled workers without capital it is unnecessarily cumbersome and amenable to judicial abuse. Because under "[m]odern industrial conditions...economic independence is hardly any longer a reliable criterion by which to distinguish" independent and dependent contractors, the economic reality of dependence test may have lost its raison d'être.

It is a virtue of the economic reality test that, by articulating the underlying reasons why partial suspension of market forces is necessary to achieve a modicum of security otherwise unavailable to the majority of dependent workers, it underscores the fact that neither the legislature nor the judiciary has ever given systematic thought to the hodgepodge of definitions that clutter the threshold to protection under hundreds of federal and state protective statutes. If the purpose of the economic reality of dependence test

compelling position that the touchstone of the employment relationship is whether the workers are ""dependent upon finding employment in the business of others."" McLaughlin v. Seafood, Inc., 861 F.2d 450, 452 (5th Cir. 1988).

Judges have expressed this value in denying that the overtime provision of FLSA was designed to supplement the collective bargaining power of highly paid workers. See, e.g., Sherwood v. The Washington Post, 677 F. Supp. 9, 15 (D.D.C. 1988); Mechmet v. Four Seasons Hotel, Ltd., 825 F.2d 1173 (7th Cir. 1987). FLSA in part resolves this problem by excluding executive, administrative and professional employees. 29 U.S.C. § 213(a)(1).


For a discussion of one of the most blatant examples, see infra ch. 6.


is to extend income support to those not subject to traditional control by employers, the process of adjudicating claims is so wastefully fraught with uncertainty that it would be more rational to decouple the entitlement to social protections from the existence of an employment relationship. Until such a step—which would amount to a guaranteed income program to replace all existing income security systems—is taken, a politically much less utopian approach is available to avoid the problems associated with manipulation of the tests of migrants’ status as protected employees.

IV. The Employment Relationship of Migrant Farm Workers

So long as the United States continues to be a true democracy, it will have a serious labor problem.

That approach would be a statutory amendment—or, failing that, a per se judicial rule—that all migrants are employees for purposes of labor-protective legislation. It can be supported by taking the economic reality test to its logical conclusion. In addition, however, even Law & Economics transactional analysis establishes that the only economic rationale underlying an agricultural firm’s characterization of migrants as non-employees would be the unlawful one of evading its statutory obligations as an employer.

A. Why Unskilled Workers Can Never Be Independent Contractors: Short-Circuiting the Economic Reality Test

Farm work performed by the migrant workers is unskilled labor. No argument to the contrary is possible. No special skill,

72 See Linder, The Employment Relationship in Anglo-American Law ch. 7.


74 Late-twentieth-century American legislation is not even as rigorous as a mid-Victorian English law regulating farm labor contractors, which created a presumption that "any gangmaster employing any child, young person, or woman in contravention of this section, and any occupier of land on which such employment takes place, unless he proves that it took place without his knowledge, shall respectively be liable for a penalty not exceeding twenty shillings for each child, young person, or woman so employed." The Agricultural Gangs Act, 1867, 30 & 31 Vict. ch. 130, § 4 (emphasis added).
experience or aptitude is necessary to perform the tasks of pulling vines and weeds, picking cucumbers and cantaloupes, cutting broccoli, or setting plants.\(^7\)

Courts have rejected a per se rule on the ground that "[p]robably it is quite impossible to extract...a rule of thumb to define the limits of the employer-employee relationship" for the purposes of social-protective legislation.\(^76\) Instead, they apply the test factors none (nor the lack of any) of which is supposed to be dispositive of the ultimate issue of whether the workers in question "as a matter of economic reality are dependent upon the business to which they render service."\(^77\) Every case is therefore deemed to require a particularized inquiry into the facts peculiar to it.\(^78\) Yet as the following discussion demonstrates, no particularized analysis is needed in the case of migrants.

The economic-reality-of-dependence-test factors collapse in the case of migrant hand-laborers into one economic chain linked to their unskilled labor.\(^79\) Unskilled hand-laborers by definition use no

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\(^76\)Donovan v. Brandel, 736 F.2d 1114, 1118, 1120 (6th Cir. 1984) (citing Silk, 331 U.S. at 716).

\(^77\)Bartels v. Birmingham, 332 U.S. at 130.

\(^78\)For an early statement of this view, see Turner v. Great Eastern Ry. Co., 38 L.T.N.S. (C.P.) 431, 432 (1875).

\(^79\)Excepted is the criterion of permanence/exclusivity, which can rarely if ever distinguish independence from dependence because they serve to mask rather than to illuminate what dependence means. To the essence of a capitalist economy belong both free enterprise and the free movement of labor. If the mere exercise of the latter freedom--as enshrined in the prohibition on involuntary servitude embodied in the Thirteenth Amendment--were per se an indicium of economic independence, the absurd result would be the presumptive conversion of all seasonal and casual workers and day laborers into independent contractors. Attentiveness to this slippery slope led an federal appellate court to rule that FLSA's remedial purposes "are not defeated merely because essentially fungible piece workers work from time to time for neighboring competitors. Laborers who work for two different employers on alternate days are no less economically dependent on their employers than laborers who work for a single employer." McLaughlin v. Seafood, Inc., 867 F.2d 875, 877 (5th Cir. 1989), modifying 861 F.2d 450 (1988). Congress wrote this policy directly into law on behalf of one very vulnerable group: a domestic worker who works for a different household every day is--with certain de minimis exceptions--nevertheless the employee of each. 29 U.S.C. § 206(f) (FLSA); 26 U.S.C. § 3121(a)(7)(B) (FICA); 26 U.S.C. § 3306(c)(2) (FUTA). Domestic workers and migrants exemplify those who, despite avoiding reliance on a single employer, remain extraordinarily dependent. At the other end of the spectrum are skilled workers who, at the height of the business cycle or when
capital equipment. Consequently, they have no capital investment. Because they have no capital investment, they have nothing to lose and thus no risk of loss. Migrants' work is so unskilled—it can be learned in a few minutes—that it is performed by young children and by such large numbers of other uneducated people that it is one of the few types of employment in the United States still massively and systematically (lawfully and unlawfully) compensated at rates below the federal minimum wage. Because their work is unskilled, it is subject to substantive control and supervision by virtually anyone. In particular, such unskilled workers are subject to control and supervision by agricultural employers in the course and as an integrated unit of whose business they perform the work.

The skill in question is not merely a quality possessed by the worker or even a technical relationship between the worker and nature, but a relational property involving the differential skill levels of the worker and of the business for which he is working. Where the firm has not appropriated this skill, it cannot pass judgment on the independent contractor's methods, which it does not understand—not because independent contractors' skills are inherently incapable of being subordinated to such enterprises, but shortages of skilled workers obtain in certain branches or occupations, can, with impunity, take the risk of being fired because numerous other employers will hire them immediately. Where the risk of unemployment approaches zero, such an employee comes to acquire a certain independence even though he continues to put all his eggs into one employment basket at any one time. At such moments the absorption of the reserve army of the unemployed and the uninhibited access to alternative employment reduce the coercive character of wage labor.

See 12 Fed. Reg. 7966, 7968 (Nov. 27, 1947) (proposed Treasury Reg. 26 C.F.R. §402.204). For a worker with no capital investment, the notion of loss is nonsense. Consequently, the factor of profit/loss may be subsumed under that of capital investment. "If the crop is bad, the loss incurred by the migrant would be a loss in terms of opportunities to pick.... However, this loss translates into a loss of wages, and not a loss of profit." Donovan v. Gillmor, 535 F. Supp. 154, 162 (N.D. Ohio, 1982). For cogent arguments that risk of loss rather than opportunity for profit essentially defines an independent enterprise, see Robert Flannigan, Enterprise Control: The Servant-Independent Contractor Distinction, 37 Toronto LJ. 25, 46-47 (1987).


because the particular firm competes in a different product market and is therefore not organized to produce and reproduce the requisite control and supervision of these specialized skills. It is here that the criterion of whether the work was performed in the course or as part of the integrated unit of the entity's business plays a decisive defining part. The link between control and lack of skill is rooted in this context. Vis-à-vis unskilled employees with "no opportunity to gain or lose except from the work of their hands and...simple tools," the employer, by virtue of the very fact that the employees have neither skill nor capital equipment, is always "in a position to exercise all necessary supervision over their simple tasks."

Migrant farm workers continue to be employed under conditions that guarantee that their employers remain precisely in that position: even if migrants do not use significant means of production, their employers do in those stages of the process of production that precede, follow, and shape those in which migrants are employed. Because of their unique tangible and intangible asset-endowments, agricultural employers are not only formally but also substantively in a position to exercise control over such subordinates. They not only decide what, when, where, how, and whether to plant, but also perform and control all production and marketing operations, which presuppose the possession of agronomic and commercial expertise.

B. The Ambiguous Contribution of Law & Economics

It is curious that the only judge whose imprimatur a per se rule enjoys is Frank Easterbrook, an ardent practitioner of market-knows-best Law & Economics. Although Easterbrook did not find

83 But see Baker v. Dataphase, Inc., 30 Wage & Hour Cas. (BNA) 1189, 1196-97 (D. Utah 1992) (despite conducting essence of employer's business, workers who had no opportunity for profit or risk of loss and no investment were not employees because employer had no office in state where they worked).

84 Silk, 331 U.S. at 717-18. See also Restatement (Second) of Agency § 220 (2) comment i ("Unskilled labor is usually performed by those customarily regarded as servants, and a laborer is almost always a servant in spite of the fact that he may nominally contract to do a specified job for a specified price").

85 Lauritzen, 835 F.2d at 1545 (Easterbrook, J., concurring). But see Fegley v. Higgins, 760 F. Supp. 617, 622 (E.D. Mich. 1991): "Following Judge Easterbrook's suggestion, it makes some sense to say that the FLSA should apply to homeworkers,
it necessary to apply any theory in support of the rule, a critical evaluation of the contribution of transactional analysis within Law & Economics agency doctrine to understanding the distinction between contracting and employing can furnish the requisite theoretical basis. That even a theory radically committed to demonstrating the nefarious consequences of state interference in (labor) markets favors blanket coverage of migrants casts a harsh light on vacillating liberal jurisprudence.

Agency doctrine in general is a body of law governing the commercial execution of tasks by one person or entity (the agent) on behalf of another (the principal). It reflects the division of labor in any economy based on private property in the means of production. Within this comprehensive scope it subsumes the master-servant or employment relationship as one of its subsets. Because that relationship is categorically characterized by a specific class distribution of assets and entitlements to the income generated by the combination of those assets with labor, a legal doctrine that treats the employment relationship merely as one phenomenal form of the principal-agent relationship is constantly in danger of abstracting from the essence of the former. The peculiar twist that Law & Economics has imparted to agency doctrine not only reproduces this conflation, but also expressly denies any difference between contracts for labor and those for any other commodity.

To speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties. Telling an employee to type this letter rather than to file that document is like my telling a grocer to sell me this brand of tuna rather than that brand of bread.

Struggles over the interpretation and enforcement of labor contracts differ fundamentally from those involving other contracts because they are on one view contracts in name only insofar as

regardless of the type of work and the contract under which they work." For a discussion of Easterbrook's concurrence, see infra ch. 6 § IV. Underlying Law and Economics is the assumption that the crucial role played by the common law is the "uncontroversial one" of "making capital investment more profitable." Richard Posner, Economic Analysis of Law 100 (1975 [1972]).

See Restatement (Second) of Agency, §2(1) (1958).

workers give no concrete consideration to employers in exchange for the agreed-upon wage. In either case disputes must arise: in the former because the concrete limits of performance have been left blank; in the latter because the employer has been granted unlimited discretion. Advocates of Law & Economics might respond that it is at least theoretically possible to delineate *ex ante* the concrete consideration or performance that the parties contemplate. Such a possibility would, however, in effect eliminate so-called management prerogatives. It would also tendentially undermine the wage-form as a functionally opaque expression of social relations.

In spite of its fundamentally implausible conceptualization of the difference between authority structures obtaining in employment relations and other commercial relations, the Law & Economics approach to agency has provocatively explored what distinguishes integration into from exchange with a firm. Because this distinction bears closely on the contracting-employing dichotomy, Law & Economics is scrutinized here as the most sophisticated body of doctrine likely to be acceptable to courts in the foreseeable future.

1. Why Firms Vertically Integrate Rather Than Contract with Migrants: Transactional Analysis. The dependence of the unskilled worker is reinforced where the work is "part of the integrated unit of production." Where workers are without skill or capital, the presence of integration is, strictly speaking, unnecessary to a finding

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88Sellers of the singular commodity labor power do not receive payment until after the buyer has consumed its use value. See Karl Marx, *Das Kapital* (Ökonomisches Manuskript 1863-1865), in II:4 text pt. 1 Marx [&] Engels, Gesamtausgabe (MEGA) 6-7 (1988). Analytic Marxism argues that, at the level of abstraction appropriate to the study of 'the laws of motion of capitalism,' it can be assumed that the interpretation and enforcement of contracts—including labor contracts—are costless processes. As a result it concludes that, although in certain contexts it may be useful to examine the struggles that occur over the extraction of surplus labor, at the most general level of abstraction it can be assumed that such extraction is frictionless. John Roemer, *Should Marxists Be Interested in Exploitation?* 14 Phil. & Pub. Aff. 30, 44 (1985); Jon Elster, *Making Sense of Marx* 199-200 (1985). Such an approach obliterates the distinction between independent contractors and employees by dissolving the distinction between labor and other contracts.

89See Karl Renner, *The Institutions of Private Law and Their Social Functions* 162 n.123 (Otto Kahn-Freund ed. 1949) (note added by Kahn-Freund to English ed.).

90Rutherford Food Corp. v. McComb, 331 U.S. at 729.
of employee status. But since its presence can clinch the claim of
dependence even for skilled workers, it is a fortiori true for the
unskilled.

Unskilled workers planting seedlings for a large forestry firm
will illustrate the analysis. As an entity that has acquired all the
available relevant scientific knowledge (including plant genetics), it
knows vastly more about tree planting than the unskilled workers
who plant the seedlings. Even where the firm enters into formal
paper contracts with labor contractors, the enormous gap between its
superior knowledge (of the bio-chemical processes underlying plant-
ing operations and of the physical properties of the wood required
for its end-products) and that of the contractors forces it both to
specify in great detail the precise methods to be used in planting and
to supervise the work with its own employees in order to insure that
the work is done properly. Such control and integration by the
employer--and lack of skill and capital on the part of the em-
ployee--negate any claim that such workers or labor catchers are
independent contractors.

The supposed supersession of the conditions on which the
traditional control test was based implies that under modern forms
of economic organization control is imputed to employers even
where they lack the skills possessed by their employees. Thus Kahn-
Freund asserted that it is unrealistic and grotesque to say of an
airplane pilot that his employer controls his performance. Even if
this particular example is empirically ill chosen, it raises the
important point that it is possible to be formally and unambiguously
an employee ('on the payroll') without being subject to the
employing entity's substantive supervision. Such a situation
commonly arises in the context of highly skilled workers. This lack

91See supra ch. 1 § III. Oilwell fire fighters are a counter example: they are too
specialized to warrant being on any single company's permanent payroll because the
work is generated by emergencies rather than a part of the ordinary on-going course
of business. If such catastrophic accidents occurred with greater frequency, oil
companies might be forced to acquire the requisite technology and skills--together with
the employees--on a full-time basis. Yet even Kuwait did not see fit to do so. See
Thomas Hayes, The Job of Fighting Kuwait's Infernos, N.Y. Times, Feb. 28, 1991, at C1,
col. 3; idem. Gearing Up For Battling Kuwait Infernos, id., C11, col. 1 (nat. ed.).

92Kahn-Freund, Servants and Independent Contractors at 506. In fact, airlines do
test, train, and supervise pilots. Eric Schmitt, Airlines Stress Teamwork in Cockpit, N.Y.
Times, Apr. 1, 1987, at 8, col. 4 (nat. ed.).

93Courts have begun to recognize that "[n]ot every employer is competent to
supervise the details of the work of highly skilled individuals whom he has hired.
of substantive subordination to the employer suggests that the latter has not yet succeeded in rigorously subjecting these employees and their skills to the requirements of profit-maximization.

Law & Economics has conceptualized this disparity as motivating employers’ struggle to overcome opportunistic behavior: "If the employee could still effectively cheat the owner-user of the asset because of his specific ability to maintain the asset, then the problem is that vertical integration of a relevant asset, the employee’s human capital, has not occurred."\(^94\) The processes that underlie the decision whether a firm will structure a transaction through the market with the owner of a factor of production as an independent contractor or (vertically) integrate a factor of production underlie the debate over the nature of the firm.\(^95\) In Coase's original formulation in the 1930s, the crucial question was twofold: (1) why do firms prefer one arrangement to the other? and (2) why do owners of factors of production— in particular, of labor (human capital)—prefer one arrangement to the other? From the standpoint of the firm, vertical integration has been seen as a means of reducing the transaction costs associated with "organizing' production through the price mechanism." Chief among these costs are price-shopping, contract negotiation (especially in connection with repeated short-term contracts for small quantities), and contract enforcement (that is, on-going communication of work specifications). In any concrete instance, "[t]he question always is, will it pay to bring an extra exchange transaction under the organising

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\(^95\) These alternative arrangements reproduce within the employing entity the dynamic transition to formal and then real subsumption of labor under capital that Marx analyzed as a categorical and historical macroeconomic dynamic. Karl Marx, \textit{Zur Kritik der Politischen Ökonomie (Manuskript 1861-1863)}, in II:3 Marx [&] Engels, \textit{Gesamtausgabe} (MEGA), text pt. 6 at 2130-59 (1982); Karl Marx, \textit{Das Kapital (Ökonomisches Manuskript 1863-1865)}, in II:4 text pt. 1 Marx [&] Engels, \textit{Gesamtausgabe} (MEGA) 91-108 (1988). Although intended on the macrosocial level to mark off two historical epochs, the concept also lends itself to analysis of the ontogeny of individual capitals. In this sense, it is questionable whether firms that employ only hand-laboring workers without having attached them to capital have effected the microeconomic transition from formal to real subsumption.
Worst of Both Worlds

In a more modern formulation, vertical integration is a means of economizing on the costs of avoiding risks of appropriation of quasi rents in specialized assets by opportunistic individuals. The advantage of joint ownership of such specialized assets, namely, economizing on contracting costs necessary to insure nonopportunistic behavior, must of course be weighed against the costs of administering a broader range of assets within the firm.

The most salient aspect in the present context is that the transaction costs associated with the employment of migrants are not significant. Employers unilaterally set wages (in line with locally prevailing rates); the labor for which they contract is so simple and self-explanatory that they scarcely need to explain to workers what is required of them. Similarly, enforcement, though not costless, may be considerably cheapened by imposing piece-rates. And even where some negotiation costs are incurred, "[d]aily hiring...seems justified...because it increases anxiety and effort by making dismissal automatic and continued employment discretionary rather than vice versa." Given negligible transaction costs, why would firms not seek to secure authoritative disposition over hand-laborers? In other words, would it not be transactionally irrational for agricultural firms to deal with migrants as independent contractors? Under what circumstances, then, would such a firm ever elect to organize harvesting through the price mechanism of the market rather than through integration of labor as a factor of production?

What would "contracting out" mean in the case of migrants’ clipping onions? The employer would have to negotiate a separate contract with each individual worker specifying the amount of

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97 Klein, Crawford, & Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process at 299.
98 One potential exception is the cost of long-distance recruitment. Some labor catchers specializing in the recruitment (and transportation) of migrants on behalf of agricultural firms might qualify as independent contractors with respect to this particular activity (but not with respect to the workers’ actual employment). In the vast majority of cases, however, labor contractors’ lack of capital forecloses the possibility of such independence. By being forced to “advance” the costs of recruitment and transportation, employers underscore their functionaries’ dependent status.
100 Alternatively, employers could negotiate a contract collectively with the entire work force if it has the requisite “internal structure” to act cohesively. Michael Spence,
acreage he would harvest; the total price or price per (whatever) unit; the minimum standard quality of an acceptably cut onion; the time by which the work would be completed; and a penalty clause in case the contractor did not complete the harvest. In addition, even if the firm regards the contract as a turnkey operation and limits contract enforcement to inspection of the onions on arrival at the packing shed, it would still not have eliminated enforcement costs.

To spell out these alternative contract conditions is to explain why agricultural employers prefer supervision and control over harvesters. Apart from the costs associated with negotiating the numerous individual contracts, the firm would be confronted with one element of uncertainty of potentially catastrophic proportions: could it trust these "independent contractors" to do the work properly? This uncertainty is rooted in the fact that unskilled work so simple that a child can do it is nonetheless work that an adult can botch. Where a considerable portion of a firm's annual revenue derives from the short harvest season of a single crop, it is unlikely to risk such a huge loss by entrusting its core production process to unsupervised workers whose contractual failings it may not discover until they have caused irreparable harm. Moreover, it would be left without a remedy against such judgment-proof parties.

2. Control and Authority: Modelling Migrants. In the original formulation of the theory of the firm, the question for both parties was rooted in authority: Who would obey whose directions and

The Economics of Internal Organization: An Introduction, 6 Bell J. Econ. 163, 165 (1975).

101 Is it conceivable that a railroad in hiring an unskilled man to perform one of the simplest tasks of hard manual labor requiring scarcely more than muscle in its performance, yet one that must be constantly performed in the yards to keep trains moving, would absolutely relinquish all right of control and direction? We hardly think so.


102 This argument does not preclude the possibility of the emergence of firms of migrant harvesters with sufficient agronomic training, skill, expertise, experience, capital equipment, and financial resources (to post an enforcement bond) to be able to conduct turnkey harvest operations. They would then resemble custom combine operators. See Thomas Isern, Custom Combining on the Great Plains: A History (1981); The Gypsies of Harvest, Newsweek, July 4, 1977, at 65. Arguably thousands of farmers have already achieved the status of (stationary) custom-harvesters—for large corporate food processors. See generally, Ewell Roy, Contract Farming, U.S.A. 269-317 (1963).
orders? As the theory evolved, the question as to why a worker decides to remain or to become an independent contractor or an employee became synonymous with the question: "Why is W [the worker] willing to sign a blank check, so to speak, by giving B [the boss] authority over his behavior?" In the version elaborated by Herbert Simon, the theory became more emphatic:

W enters into an employment contract with B when the former agrees to accept the authority of the latter and the latter agrees to pay the former a stated wage (w). This contract differs fundamentally from a sales contract.... In the sales contract each party promises a specific consideration in return for the consideration promised by the other. The buyer (like B) promises to pay a stated sum of money; but the seller (unlike W) promises in return a specified quantity of a completely specified commodity. Moreover, the seller is not interested in the way his commodity is used once it is sold, whereas the worker is interested in what the entrepreneur will want to do....

The worker and the firm then make their decisions based on the following considerations:

W will be willing to enter an employment contract with B only if it does not matter "very much" to him which x [element of the set of all specific actions he performs on the job] (within the agreed-upon area of acceptance) B will choose or if W is compensated in some way for the possibility that B will choose an x that is not desired by W (i.e., that B will ask W to perform an unpleasant task). ... It will be advantageous to B to offer W added compensation for entering into an employment contract if B is unable to predict with certainty, at the time the contract is made, which x will be the optimum, from his standpoint. That is, B will pay for the privilege of postponing, until some time after the contract is made, the selection of x.

Such considerations may affect the decision-making processes involving highly skilled or semi-autonomous workers. But they are irrelevant to the constitution and elaboration of authority relations between migrants and their employers. Such a worker is "willing to sign a blank check" not because "it does not matter to him 'very

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103 Coase, The Nature of the Firm.
104 Herbert Simon, A Formal Theory of the Employment Relation, in idem, Models of Man 185, 184 (1957 [1951]).
105 Id. at 185.
much" what the employer will ask him to do, and certainly not because the farmer will compensate him for the possibility that the farmer "will ask him to perform an unpleasant task." Rather, he subjects himself to the domination of the employer simply because he has no alternative.

Migrants belong to the core of those workers of whom Max Weber observed that it was categorically true that "rational capital calculation" presupposed the presence of workers who "formally voluntarily, in fact forced by the whip of hunger," offered themselves to capitalists who could then calculate product costs ex ante on the basis of piece rates. In contrast, Simon's model, which is designed to explain behavior inexplicable within the framework of traditional economic theory, is unrealistic as applied to migrants. According to orthodox economic theory, once employees sell their labor, "they become completely passive factors of production employed by the entrepreneur in such a way as to maximize profit." Such a one-sided view "abstracts away the most obvious peculiarities of the employment contract...and ignores the most significant features of the administration process, i.e., the process of actually managing the factors of production, including labor." In fact, the traditional model more adequately captures the migrant farm worker-employer relationship. Simon's approach departs even further from the migrant employment relationship by postulating that the parties will not find it advantageous to commit the value of a particular variable to the discretion of one of the parties where there is a sharp conflict of interest between them with respect to the optimum value of a "satisfaction function" or little uncertainty as to the optimum values. Yet extremely authoritarian relations obtain between employers and migrants in spite--if not precisely because--of the presence of a sharp conflict of interest and small degree of uncertainty.

The inappropriateness of Simon's modeling of rational

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106 As archetypical unskilled workers, farm workers have been held by courts to be residual order-takers, obligated to perform any work their employers assign them. H. Wood, A TREATISE ON THE LAWS OF MASTER AND SERVANT 180 (1877).

107 Max Weber, WIRTSCHAFTSGESCHICHTE 240 (1981 [1923]).

108 Simon, A Formal Theory of the Employment Relation at 183, 194. Similarly inappropriate to the coercive character of the relationship between migrants and their employers are theories positing that late twentieth-century capitalism requires and secures the organization of consent by "presenting workers with real choices, however narrowly defined those choices might be." Michael Burawoy, MANUFACTURING CONSENT 27 (1982 [1979]).
behavior to migrants' employment relationships is embedded in the inappropriateness of the larger framework from which the model has been borrowed—the optimal degree of postponement of commitment, in connection with which the employee's time functions as the liquid resource with respect to the economic actors' "liquidity preference." Given migrants' extraordinarily low level of subsistence and lack of alternative employment, their low opportunity costs become socioeconomically constructed as time that has little value to their potential employers and, hence, to themselves. Employers, therefore, need not "pay for the privilege of postponing" the decision as to which unpleasant task they will assign to farm workers because gross disparities in income, capital, and skill confer upon them the privilege of reserving the power to inform their employees of their tasks until after the workers have signed the "blank check."110

In a still more recent elaboration of the theory of the firm, Law & Economics authors deny that authority relations obtain within the firm:

It is common to see the firm characterized by the power to settle issues by fiat, authority, or by disciplinary action superior to that available in the conventional market. This is delusion. The firm does not own all its inputs. It has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people. I can "punish" you only by withholding future business or by seeking redress in the courts.... That is exactly all that any employer can do. He can fire or sue, just as I can fire my grocer by stopping my purchases from him or sue him for delivering faulty products. What then is the content of the presumed power to manage and assign workers to various tasks? Exactly the same as one little consumer's power to assign his grocer to the task of obtaining

109Simon, A Formal Theory of the Employment Relation at 194. The notion of "liquidity preference," one of the psychological pillars of J. Keynes, General Theory of Employment, Interest and Money 166-74 (1936), refers to individual propensities to hold cash rather than interest-bearing assets for precautionary, speculative, or transactional reasons. For a critique of Keynes's use of such propensities, see 1 Marc Linder, Anti-Samuelson 323-32 (1977).

110See supra ch. 1 § I. Klein, Crawford, & Alchian, Vertical Integration, Appropriable Rents, and the Competitive Contracting Process at 314, allude to farmers' vulnerability to a union's threat to strike on the eve of harvesting a perishable crop. Although migrants could exercise such power, the existence of the requisite organization would presumably insure that the problems of classically atomized migrants, which federal protective legislation was designed to alleviate, would no longer be at the top of the union's agenda.
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whatever the consumer can induce the grocer to provide at a price acceptable to both parties. That is precisely all that an employer can do to an employee.¹¹¹

Starting from the allegedly ubiquitous tendency of the owners of labor inputs to "shirk"¹¹² and the corresponding need for employers to "monitor" such shirking, Alchian and Demsetz contend that those engaged in "team production" will agree to appoint one person to specialize in monitoring, who receives title to the residual product, which he earns by reducing the shirking without having any incentive to shirk himself. Instead of exercising authority over employees, such an employer-monitor "acquires special superior information about their productive talents" which he merely "sells...to employee-inputs as he aids them in ascertaining good input combinations for team activity."¹¹³

Alchian and Demsetz have unwittingly recreated as a special case a much more general point common to historically oriented nineteenth-century political economy. Richard Jones, for example, described the transformation of "unhired labourers" maintained by "self-produced wages"¹¹⁴ into employees:

Many large bodies of workmen throughout the world ply the street for customers, and depend for wages on the casual wants of persons who happen at the moment to require their services, or to want the articles they can supply. [I]f they become the workmen of a capitalist..., two things take place. First, they can now labor continuously; and secondly an agent is provided whose office and whose interest it will be to see that they do labor continuously.... They labor daily from morning to night, and are not interrupted by waiting for or seeking the customer.... But the continuity of their

¹¹¹Alchian & Demsetz, Production, Information Costs and Economic Organization at 777. This view also implies the far-reaching denial of a dichotomy between the invisible and visible hand or, as Marx put it, that microeconomic and macroeconomic authority are inversely correlated. Karl Marx, Misère de la Philosophie, in: I:6 Marx [&] Engels, Historisch-Kritische Gesamtausgabe 199 (Adoratskij ed. 1932 [1847]). In the course of the congressional debates on the restoration of the control test to adjudications under the SSA, Sen. Millikin offered a view structurally similar to that of Alchian and Demsetz. 94 Cong. Rec. 7204 (1948).

¹¹²"[I]n the absence of a need to enforce a contract with oneself, the 'own' marginal product is greater than the hired marginal product." Morris Silver & Richard Auster, Entrepreneurship, Profit and Limits on Firm Size, 42 J. Bus. 277, 279 (1969).

¹¹³Alchian and Demsetz, Production, Information Costs and Economic Organization at 782, 793.

labor... is secured and improved by the superintendence of the capitalist. He has advanced their wages; he is to receive the products of their labour. It is his interest and his privilege to see that they do not labor interruptedly or dilatorily. ... Two workmen steadily employed from morning to night, and from year's end to year's end, will probably produce more than 4 desultory workmen....

Jones was describing the transition from formally independent labor to formal subsumption under capital, which, with the introduction of a machine-driven division of labor, develops into real subordination. Like Alchian and Demsetz's capitalist who masquerades as monitor, Jones's capitalist finds his incentive in the institutionalization of this newly acquired labor as his property, which is no longer to be squandered by workers insufficiently disciplined by employers' notions of time management.

The plausibility of the cooperative view of capital-labor relations as developed by Law & Economics derives from the typical absence of extra-economic force under modern conditions. More particularly, this denial merely underscores the fact that an individual worker has the right to leave her employer and to seek another or not to work at all. The cooperative view also neglects the fact that the number and desirability of alternative employment options available to workers significantly affect the quality of the authority relationship obtaining between them and their employer. Where the entire structure of an industry and the tone of its industrial relations are based on the availability of a vast reservoir of impoverished unskilled workers with no alternative to competing with one another for the same kind of minimum-wage work, the

115 RICHARD JONES, TEXT-BOOK OF LECTURES ON THE POLITICAL ECONOMY OF NATIONS, in LITERARY REMAINS at 337, 395-96 (1852).

116 Id. at 397-400.

117 See Marx, Zur Kritik der Politischen Ökonomie (Manuskript 1861-1863) at 1870.

118 See, e.g., James Mirrlees, The Optimal Structure of Incentives and Authority within an Organization, 7 BELL J. ECON. 105, 106 (1976). Williamson implicitly criticized Alchian and Demsetz for failing to recognize that the very existence of "metering intensity" has an impact on transactions—pre-eminently the employment relation—involving self-esteem and perceptions of well-being. OLIVER WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 256, 56 (1975). See also idem, ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, RELATIONAL CONTRACTING 206-72 (1986).

authoritiveness of the commands issued by agricultural employers assumes a particularly critical and consequential character. Competing in a labor market composed in large degree of children and illegal aliens 'willing' to work for less than the minimum wage, migrants—as isolated individuals—rarely perceive themselves as in a position to bargain over coercive wage offers.

In American agriculture wherever the large-scale "industrialized" type of farming is developing...[t]he economic relation..., enforced by courts of law, is the relation of command and obedience. Its historical origin is slavery, where the will of the subordinate is wholly suppressed, but with emancipation comes not the elimination of this legal relation of superior and inferior but the liberty of the inferior, protected by sovereignty, to "run away" and "quit" without giving a reason, and therefore to determine, by a bargaining transaction, the terms and conditions under which the one will obey and the other will command.120

The fact that agricultural employers control migrants without interposing material forms of capital means that authority relations, stripped of the modern phenomenological form of technological necessity, have been reduced to unambiguously transparent personal terms. The pervasive atmosphere of intimidation that characterizes even their short-term relationships stands in sharp contrast to the austere and sanitized models of the employment relation developed by Law & Economics.

One possible source of economists' underestimation of the force of authority relations between atomized migrants and their employers121 lies in reliance on mathematical models of rationality that fail to take into account aspects of maintaining discipline that stand in no discernible quantifiable short-term relation to profit-maximization.122 Another source is that, although farm employers

120 John Commons, The Economics of Collective Action 211 (1951 [1950]).

121 See Oliver Williamson, Michael Wachter, & Jeffrey Harris, Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange, 6 Bell. J. Econ. 250, 264-65 (1975): "That adaptive, sequential decisionmaking can be effectively implemented in sequential spot labor markets which satisfy the low transition cost assumption (as some apparently do, e.g. migrant farm labor), without posing issues that differ in kind from the usual grocer-customer relationship, seems incontestable...."

122 "It is not a question of profit or loss, or of results at all, but of insubordination, which is inconsistent with the relation...." Wood, A Treatise on the Laws of Master and Servant at 225. That some firms still adhere to this principle is abundantly on display in New River Industries, Inc. v. NLRB, 945 F.2d 1290 (4th Cir. 1991) (employer commits no unfair labor practice in discharging employee with fifteen-
may have the legal power and technological expertise to supervise migrants, the importance of their actually exercising that control diminishes as their ability to spell out orders in advance increases. Alternatively, where technological advances in the phases of production preceding and following migrants' work relegate it to such a primitive niche in the division of labor that it can be performed in only way, overt control becomes superfluous. Here payment based on piece rates, which gives workers an incentive to work quickly, may serve to obscure authority relations further.

C. Conclusion

Agricultural firms, like other profit-maximizers, employ—that is, vertically integrate—their labor force where the following conditions are satisfied: (1) the work requires no skill and is performed by hand without capital equipment; (2) the firm alone possesses all the relevant technological expertise required to plan and conduct the operations; (3) the operations in which the workers are engaged constitute the core of the firm's business; (4) the firm alone has a significant capital investment in the land, equipment, and materials required to carry out all the operations that precede and succeed the hand-labor operations; and (5) the firm, on the basis of the foregoing conditions, can, must, and does cheaply supervise these unskilled workers.

Nonagricultural firms vertically integrate their labor force even where they fall far short of these stringent standards. When, despite meeting all of these conditions, agricultural employers insist

\[\text{year unblemished record for typing letter making fun of employer's offer of ice cream cone to employees to celebrate deal with another firm).}\]


\[\text{See infra ch. 6. From the employer's perspective a trade-off may exist between speed and quality in hand-harvesting certain crops. In asparagus, for example, workers who are paid by the pound have an incentive to harvest culls ("brush"); if they are docked for doing so, they will also have no incentive to snap them; as a result, they are left growing, which hinders the growth of marketable asparagus. Employers could enforce quality standards by introducing hourly rates, but this system would eliminate the incentive to harvest quickly. Although neither system can simultaneously achieve the maximum quality and speed and both systems require supervision, piece rates appear to result in considerably lower labor costs. See Leftwich, The Migratory Harvest Labor Market at 184-85, 209-11.}\]
on characterizing their vertically integrated employees as independent contractors or as the employees of almost equally unskilled, capital-less, and agronomically ignorant labor catchers, an irrefutable presumption is created that this characterization does not flow from the logic of production, but from a desire to evade financial liability under FLSA, AWPA, social security, unemployment and workers' compensation, and other protective laws.\textsuperscript{125}

Although migrants' unique socioeconomic context makes it unnecessary to engage in a particularized inquiry to determine whether they are employees,\textsuperscript{126} the next chapter explores how and why the legal system has tolerated efforts by sweatshop agriculture to cast migrants as unprotected entrepreneurs.

\textsuperscript{125}This unlawful shirking of responsibility is not confined to agricultural employers. \textit{Independent Contractors: Hearings Before the Subcomm. on Select Revenue Measures of the House Comm. on Ways and Means}, 96th Cong., 1st Sess. 14-35 (1979) (statement of Donald Lubick, Asst. Sec'y of Treasury).

\textsuperscript{126}Even if the aforementioned restrictive conditions were relaxed, migrants would still be employees—just as, for example, skilled production workers in capital-intensive industry.
Petty-Bourgeois Pickle Pickers?  
A Case Study of the Transmogrification of Proletarians into Entrepreneurs

"You're a petty bourgeois"....
"Is that good or bad?"
"Pretty bad, but not incurable. We liquidate you, then we proletarianize you."

I. In the Beginning Was the Word—But Only the Word

Sharecropping as a system of commodity production arose on southern cotton plantations during the upheaval following the Civil War as a transitional phase between slavery and wage labor. In order to restore control in another form over the emancipated slaves and their labor, plantation owners adopted the institution of

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1Elmer Rice, Imperial City 225 (1937).

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sharecropping. Although bound to remain for the season, some freedmen regarded sharecropping as affording them a degree of independence that gang labor denied them.

Sharecropping, which assumed various forms, depending on whether the workers furnished only their labor or other inputs as well as seed or draft animals, declined precipitously in the wake of the socioeconomic transformation associated with New Deal agricultural programs and the advance of mechanized cotton picking after World War II. Despite its statistical demise in the South,


the pickle industry has often sought to confer the classification on its migrant pickers. So-called sharecropping has, at various times, been imposed on migrants harvesting pickles in Ohio, Michigan, Wisconsin, Minnesota, Iowa, North Carolina, Texas, Colorado, and California as well as cherries in Michigan, onions in Ohio, and strawberries, cabbage, peppers, raspberries, blackberries, string beans, and snow peas in California. 7 Although the practice antedates World War II, 8 as early as the mid-1960s, pickle farmers and processors in Wisconsin "used the word 'sharecropper,' but they were doubtful whether they could defend the use of that term in a court. So, they preferred to say that the pickers were 'self-employed.'” 9

The coincidence that farmers had been paying pickle pickers about fifty percent of the price that they received from processors served as a convenient pretext for calling the employment


6The number of white croppers declined from 383,381 in 1930 to 47,650 in 1959; the corresponding figures for Blacks were 392,897 and 73,387 respectively. 1 BOC, HISTORICAL STATISTICS OF THE UNITED STATES, COLONIAL TIMES TO 1970, series K 135 and K 141 at 465 (bicentennial ed. 1975). In 1959 the BOC stopped classifying croppers separately "because of the decreasing importance of the cropper system in the South.” Id. at 453.


8As early as the 1920s, sugar-beet farmers in Colorado, in order to retain their Mexican laborers, gave them "something new to do"—a "share in the [pickle] crop.” Seasonal Agricultural Laborers from Mexico: Hearings Before the House Comm. on Immigration and Naturalization, 69th Cong., 1st Sess. 66 (1926) (testimony of Fred Cummings, Colorado sugar-beet farmer); U.S. Suit Tests Cucumber Harvest Tradition, (undated news clipping, Booth News Service, dateline Hart, Mich.) (venerability of shares in Michigan).

relationship "sharecropping"; historical precedent from southern cotton farming would have supported other divisions of income as well. But such contingencies are superfluous. Cotton farmers in West Texas for years justified paying their cotton hoers a subminimum wage of $2.50 per hour merely by calling them independent contractors. Sugar-beet farmers in the Plains States have done the same with their piece-rate workers.

Pseudo-sharecropping is part and parcel of a widespread trend to reclassify employees as self-employed entrepreneurs in order to avoid employment taxes. Although it might be intellectually satisfying to demonstrate some inherent economic or socio-technological basis for the proliferation of sharecropping in pickles precisely in the 1970s and 1980s, no tenable explanation has been offered. Neither the economics of the industry nor any unique natural characteristics of the commodity can explain the custom. The argument that the "technoeconomic constraints" on mechanization are the common ground for sharecropping in strawberries and pickles fails when confronted with the fact that mechanization, which was used in the 1960s to frustrate unionization, has actually receded because of the superabundance of cheap labor--in part precisely because of sharecropping. Moreover, since the sharecropping that

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10See, e.g., MYRDAL, AMERICAN DILEMMA at 237; RANSOM & SUTC, ONE KIND OF FREEDOM, tab. 5.5 at 92; Ralph Shlomowitz, The Transition from Slave to Freedman: Labor Arrangements in Southern Agriculture, 1865-1870, at 40-55 (Diss., U. Chicago 1979).


13Miriam Wells, Legal Conflict and Class Structure: The Independent Contractor-Employee Controversy in California Agriculture, 21 LAW & SOC. REV. 49, 53, 76 n.25
has been imposed on migrant farm workers is just a word, it is trivial whether employers use it or the more straightforward practice of simply classifying workers as independent contractors. Finally, while there is some evidence that sharecropping was introduced by strawberry farmers in California to stave off organizing efforts by the United Farm Workers (UFW), in the Midwest, some cucumber growers who treat their pickers as sharecroppers have recognized and collectively bargained with the latter's union.14

The spread of such employment practices has witnessed the creation of strange bedfellows as some Marxist sociologists have taken it seriously as part of an alleged recrudescence of the petty bourgeoisie.15 Whereas Marx identified as the sharecropper's distinguishing characteristic that his claim to part of the product rested not on his being a worker, but rather "his own capitalist," that is, an owner of part of the means of production,16 the epigones assert that "sharecropping is undergoing a revival in the vegetable fields of California as landowners and processors invite workers to assume more responsibility for the quality of production in the interest of 'flexibility.' There proletarians are being transformed into petty commodity producers."17 These same authors contend that farmers

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14See infra § V; Carol Cain, Field of Dreams, Detroit News, July 24, 1989, at D4.


17John Wilson, The Political Economy of Contract Farming, 18 REV. RADICAL POL. ECON. 47, 56 (1986). Wilson relies on the claims of Miriam Wells, who has repeated them ad infinitum in The Resurgence of Sharecropping: Historical Anomaly or Political
who contract with processors for the output of their crops are "petty commodity producers...being transformed into 'semi-proletarians.'" Bizarrely, then, on this view, migrant pickle pickers would be self-employed while pickle farmers would be employees.\(^{19}\)

II. Even Real Sharecroppers May Be Employees

Of all the words which may be used to designate any sort of tenant, the word we heard used least frequently...by...all local human beings white or black, save only new dealers, communists, and various casts of liberal, was the word sharecropper.

In the north, however...sharecropper has...become the generic term...and...absorbed every corruptive odor of inverted snobbery, marxian, journalistic, jewish, and liberal logomachia, emotional blackmail, negrophilia, belated transference, penis-envy, gynecological flurry and fairly good will which the several hundred thousand least habitable and scrupulous minds of this peculiarly psychotic quarter of the continent can supply to it: and it is one of the words a careful man will be watchful of, and by whose use...he may take clear measure of the nature...of the enemy.\(^{20}\)

So long as farm workers were excluded from protective legislation, the fifty-fifty compensation scheme did not undermine compliance with such laws because farm employers had no liability

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\(^{18}\)Wilson, The Political Economy of Contract Farming at 56. That pickle processors have taken their role as joint employers of the pickers seriously is reflected in the fact that when the industry relied heavily on braceros, the processors paid for their transportation from Mexico to Michigan. See Extension of Mexican Farm Labor Program: Hearings Before the Subcomm. on Equipment, Supplies, and Manpower of the House Comm. on Agriculture, 87th Cong., 1st Sess. 177 (1961) (testimony of Paul Wolff, Glaser, Crandell Co., pickle processor).

\(^{19}\)In contrast, a non-Marxist economic theorist who has recently proposed the systemic conversion of private fixed-wage contracts into revenue-sharing contracts between firms and workers in order to eliminate stagflation and unemployement, expressly acknowledges the continued existence of capital-labor relations. Martin Weitzman, The Share Economy (1984).

under them. It was only when farmers became subject to social security tax obligations in the 1950s, and especially to FLSA in 1966, and later to state unemployment insurance and workers’ compensation programs and laws protecting migrants that farmers developed an economic incentive to devise schemes to avoid these costs of doing business. Thus in places, such as parts of Michigan, where fifty-fifty arrangements may have antedated these financial impositions, it is possible that sharecropping had become such a trade custom that its continuation was the product of inertia and only later assumed a less innocent coloration. In other areas, however, where farmers did not introduce sharecropping until after they had felt the impact of their new statutory obligations, a presumption of unlawful original intent is more plausible.

When Congress amended FLSA in 1966 to cover some farm workers, it directly addressed the issue of sharecroppers:

> It is intended that the minimum provisions of the Act be extended to certain sharecroppers and tenant farmers. The test of coverage for these persons will be the same test that is applied to determine whether any other person is an employee or not. ... Coverage is intended in the case of certain so-called sharecroppers or tenants whose work activities are closely guided by the landowner or his agent. These individuals, called sharecroppers and tenants, are employees by another name. Their work is closely directed; discretion is nonexistent. True independent-contractor sharecroppers or tenant farmers will not be covered; they are not employees.

The U.S. Department of Labor (DOL) then adopted these directions almost verbatim in its interpretative bulletin. That in fact many so-called sharecroppers would be entitled to the minimum wage emerged from the hearings held before the House Rules Committee. When asked about this issue by Representative Martin, Represen-

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tative Dent cited the above-quoted passage and the following colloquy ensued:

Mr. Dent. Where they do their own selection of work—they are truly in contractual agreement with an employer, and they are not employees of that farmer.

Mr. Martin. The owner of the farm has control as to when the crop is planted and harvested. It is traditional in this country that many of these people work on a percentage of the crop itself.

Mr. Dent. Where they work on a contract, I believe the law is now clear—and there have never been any problems on it to date.

Mr. Martin. Yes. But you haven't gone into agricultural coverage under fair labor standards before. I think you are opening up a very serious problem. It is going to be difficult to determine.

Mr. Dent. Well, I am hoping it doesn't create the trouble.24

The issue arose again on the floor of the House when Representative Watts of Kentucky, in the course of describing his own personal situation as a tobacco farmer vis-à-vis his three sharecroppers, inquired whether he would be responsible for paying the minimum wage if at the end of the year the tobacco burned up: "If so, it is an atrocious situation."25 To allay his fears, Representative Powell of Harlem cited the committee report:

Testimony indicates that there are large numbers of so-called sharecroppers who are not allowed to make a single economic decision regarding the land upon which they live and work. For example, they do not decide what to plant, when to plant, when to harvest, where to purchase seed, or where to sell the product of their labor. For these people, the term "sharecropping" only denotes a means of compensation; it conveys no connotation of independence, individualism, or self-determination. On the other hand, there are true tenant farmers, who make basic economic decisions up[on] which rest the productivity of the farm and consequently the amount of their compensation. Generally these tenants operate farms owned by absentee landlords. They are unsupervised, make day-to-day decisions necessary to the running of the farm, and share in the profits related to the productivity, for which they are greatly responsible. Such persons are not intended


Even this explanation did not satisfy Watts, who wondered about the consequences of a retired farmer's telling his tenant which field to plow or which crop to grow on the basis of his greater knowledge of the land. Although he appeared relieved to hear Dent tell him that the controlling elements were "whether there is day-by-day supervision...and whether you would make the decision on the sales in conjunction with him or whether you would make the decision as to which fields to plant...," Watts insisted on an answer to his question about whether he was responsible if the crop was destroyed. This insistence appears to have flustered Dent, who replied irrelevantly:

Mr. Dent. That is absolutely not even within the realm of remote possibility. If you are working in an office with a contract for a year's retainer and the office burns down, the owner does not have to pay you, does he?

If a fellow does not open up again, he does not have to pay it, does he?

Mr. Watts. No. But under the bill there is a provision he shall receive the minimum wage for the time he put in.

Mr. Dent. He is then an independent contractor under those conditions.

Powell then intervened to praise Watts for having raised an "excellent" point, which was "exactly correct" and behind which the committee stood. Since Watts had merely asked questions, the only point to which Powell could sensibly have been referring was the absolute obligation to pay the minimum wage. This surmise is strengthened by the rest of the dialog in which Watts acknowledged that:

I can see that the purpose of covering the sharecropper was probably to keep somebody from ducking out from under the law and claiming so-and-so was a sharecropper. That may have been what was in the committee's mind. But...I hope...it is not the intention of this Congress or of this committee that the

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26 Id. (citing H. REP. NO. 1366 at 32).
27 112 Cong. Rec. at 11,623.
28 Id. at 11,624. Dent prejudiced the issue by his claim that if the farmer "has seven sharecroppers, he would not be giving the kind of directions that would be considered to be daily supervision." Id. This is just as false when applied to a classical cotton plantation as it would be with regard to pickle pickers.
sharecropper could then say, "I am sorry it burned, old buddy, but I have put in so many hours, and you have to pay me."

To which Powell again ambiguously replied: "That position I subscribe to." 29

In the Senate, Cooper of Kentucky played foil to Yarborough of Texas. Horrified by the thought that a farmer might have to supplement the wages of a sharecropper (or a sharecropper's employee) if they fell below the minimum wage of $1.00 per hour, Cooper asked whether it would be necessary to determine the sharecropper's status on a case by case basis. The populist senator, who was the prime mover of the bill in the Senate, replied that a sharecropper would not be an employee under the kinds of arrangements that prevailed where he had grown up in Texas. But significantly the cotton sharecropping agreements Yarborough had in mind involved the tenant's furnishing tools, horses, mules, tractors, and food. 30

The year following enactment of the partial inclusion of farm workers under the minimum-wage provision of FLSA, the House Agriculture Committee devoted an entire hearing to the question of sharecropper coverage. In the course of questioning the Assistant Secretary of Labor and the Wage and Hour Administrator, the chair, Representative Poage of Texas, and Representative Abernethy of Mississippi repeatedly expressed their agreement that a sharecropper who provided only labor—who, for example, merely chopped cotton or harvested sugarcane—would be an employee. Indeed, Poage went so far as to state that:

I never heard of that. I will go farther than you did and say that nobody in my country ever rented a piece of land to somebody else and said that they would give him one-half or any part of it if he would just do the chopping and the harvesting. Who planted the land? How did the land get planted—who plowed it? Who cultivated it? Who paid for these items? I never heard of a contract like that which did not require more of a renter than that. Possibly such contracts exist, but surely they are exceptional. 31

When pressed, informants from the Department of Agricul-

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29 Id.
30 Id. at 20,620-21.
ture admitted that such arrangements were not typical. After agreeing with the DOL officials once again that a labor-only sharecropper would be an employee, the chairman asked them whether "it [would] take the curse off if the landlord makes him pay one-half the cost of the insecticides." The Assistant Secretary replied that it would not necessarily so long as the tenant had no opportunity to exercise judgment and foresight or for profit and loss. When Poage insisted that a tenant could "come out the loser" or "make a profit without putting out any money," the Assistant Secretary sought to explain "[t]he whole basic philosophy...of the free enterprise system":

When a man opens a shoeshine parlor, or a peanut stand, he takes the risk—he puts his money and his own initiative and imagination and courage which makes it either work or fail. If this tenant or this employee...does nothing more for the landowner than to go out and hire employees to come in and pick the cotton or the tobacco, whatever it may be, he is an employee, in our opinion. He is not an independent contractor.

Mr. Abernethy. Nobody disagrees with that statement.

But when Poage began to hedge and pointedly asked whether the economic reality test factors controlled or whether the mere fact that a worker provided labor only was in itself dispositive, the Wage and Hour Administrator maintained that Congress had intended the latter.

The history of sharecropping in the South belies the claims that labor-only sharecroppers were atypical. When a worker merely supplied his labor and was controlled by the landlord, he was a cropper, that is, an employee receiving a share of the crop as wages. Because a sharecropper was prohibited by law from disposing of the crop until it had been divided and the landlord had set aside a portion as wages, disputes arose as to whether the cropper was to receive wages in kind (by dividing the crop) or in money (if the proceeds were divided). Even where the share-

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32Id. at 10-11.
33Id. at 11-12.
34Id. at 13.
35Sharecropping has been viewed as an inherently unstable arrangement propelled by increases in capital investment to give way to outright land rental or a wage system. Joseph Stiglitz, Incentives and Risk Sharing in Sharecropping, 41 REV. ECON. STUD. 219, 251 (1974).
36Oscar Zeichner, The Legal Status of the Agricultural Laborer in the South, 55 POL.
cropper supplied all the labor and part or all of the seed and fertilizer, bore all or part of the cost of marketing, and received a share of the crop, often he still worked under close supervision.\footnote{37} Moreover, especially after 1900, sharecropping became a form of piece-rate wage labor and ceased being true tenancy: "Croppers, the most dependent of all tenants, are little more than wage hands."\footnote{38} By the post-World War I period, most black sharecroppers had "practically no voice in deciding what crops to grow, or what methods to follow in cultivation." Thus it was "only by an ironic travesty" that Southern sharecroppers were classified as entrepreneurs. "In reality, the sharecropper was little more than a wage hand being paid in kind.... Essentially, it was a form of debt peonage."\footnote{39}

By the 1930s, nine-tenths of black plantation tenants "[w]ere just ordinary laborers" under supervision.\footnote{40} Moreover, the sharecropper had most of disadvantages of being an independent entrepreneur without any of the rights. Thus, for example--like today's pickle picker--he had to take the landlord's word for the price obtained for the cotton. And more importantly, the sharecropper's "autonomy"--like the pickle picker's--consisted in large part in his ability to make full use of his family's labor.\footnote{41}

As of World....

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War II, the Bureau of the Census observed that:

Most sharecroppers work under close supervision, and the land assigned each cropper by his landlord is often merely a part of a larger agricultural enterprise operated as a single working unit in respect to a central farm headquarters, to the control of labor, and to the managerial and supervisory functions.

Intimating the quasi-feudal character of the relationship, the Bureau added that "[i]n many instances, the croppers or tenants and their families are also wage hands on the 'home farm' of the plantation."42 The analogy to the serfs' duties on the medieval manorial demesne was difficult to overlook.43

Throughout the postbellum period, sharecroppers were considered wage laborers in many jurisdictions. This classification created, to be sure, an ambiguous legal status; for while it entitled croppers to protection under the lien laws, it also subjected them to the oppressive enticement laws that the plantation oligarchy enacted in the wake of emancipation.44 Although Michigan pickle farmers are not the structural-functional homologues of nineteenth-century Mississippi planters, certain aspects of the master-servant relationship pertinent to modern labor-protective legislation are common to both; and if labor-only or closely supervised cotton picking sharecroppers were sufficiently dependent to qualify as employees, then a fortiori in-name-only sharefarming piece-rate pickle pickers must be too.

III. Midwestern Metempsychosis

Sugarbeet is stoop, but it isn't as stooped as this pickle deal. ... It is the most difficult job in agriculture.45

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43See supra ch. 4.

One successful farmer told us that his harvest workers, after reaching up all morning to pick cherries, were delighted to have the chance to spend the afternoon bending down to pick cucumbers.46

The circumstances in which the souls of southern black sharecroppers were expedited to their Hispanic counterparts in the Great Lakes region shaped the initial litigation of the issue of sharecropping in the context of a modern protective statute. This dispute erupted in the wake of the transition from a labor force consisting of Mexican workers imported under the government-organized bracero program to a Texas-Mexican migrant labor force in midwestern cucumber harvesting. Until the mid-1950s, most pickle pickers in Michigan had been domestic migrant workers who also cultivated sugar beets before and after the cucumber harvest.47

But as advancing mechanization reduced the demand for labor in sugar beets, pickle processors began to import braceros. At the peak of the last summer of the bracero program in 1964, 12,800 foreign workers harvested pickles in Michigan as against 3,400 domestic workers.48

For years, pickle processors and farmers had warned Congress that terminating the bracero program would trigger the most dire consequences. The only local workers who showed up, they reported, were either hampered by "a wooden leg" so that the person "had to be carried into and out of the field," or so prissy that they insisted on walking on the vines "because otherwise they would get their feet dirty."49 Even migrants from Texas, who with their children had "worked wonderful" in the strawberry harvest, balked

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49Extension of Mexican Farm Labor Program (House) at 178 (testimony of Paul Wolff, Glaser, Crandell Co., pickle processors).
when it came to "that heavy work" in the pickle fields. The braceros, in contrast, were "[v]ery efficient, very efficient," even though a study done in cooperation with employers revealed that "[w]orkers picking fields which yield less than 200 bushels per acre generally made unsatisfactory wages" at a time when the average yield in Michigan was only 147 bushels. Against the background of average bracero earnings of eighty-seven cents per hour, the National Pickle Growers Association informed Congress that "irrespective of what rates of pay, within reason at least, we offer to domestic workers," it would be unable to recruit enough to carry any substantial amount of pickle harvest in Michigan.

Yet, at the height of the summer after the bracero program expired, 11,600 domestic (and no foreign) workers picked pickles in Michigan. By 1966 production had already exceeded the level attained in the last year of the bracero program. Contrary to the self-serving predictions of processors and farmers, the supply of labor proved to be elastic. The real problem with domestic laborers was that, by 1967, employers were required to pay the federal minimum wage of one dollar and social security taxes. Yet experience during the bracero program had shown that dividing the proceeds fifty-fifty between the farmer and workers had failed to generate even the seventy-five cent per hour prevailing rate fixed by the DOL.

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50Id. at 183 (testimony of Herbert Turner, Michigan pickle farmer); id. at 179 (testimony of Paul Wolff); Noel Stuckman, Michigan Pickling Cucumbers--The Grower, the Picker and the WYRF, Mich. State U. Agric. Experiment Station Quarterly Bull. No. 42:1, at 2, 4 (1959).

51Extension of Mexican Farm Labor Program at 179, 185 (testimony of Robert Ford, Nat'l Pickle Growers Ass'n).


Because employers' continuing attachment to sharecropping would therefore inevitably conflict with their statutory obligations, it was not coincidental that that the first court case arose out of a dispute between a farmer and the IRS over payment of Federal Insurance Contributions Act (FICA) taxes. That the major midwestern sharecropping litigation involved farmers rather than processors had more to do with the federal government's narrow conception of who qualifies as an employer than with the realities of pickle production. As the author of a dissertation on the Michigan pickle growing industry observed, like the sugar-beet refiner, after which it modeled itself, "the processor, not the farmer, is the employer of harvest labor":

Corporate processors are so actively and intimately involved in the planting, care, and harvesting of the crop that pickle farming in this State presents labor problems similar to those characteristic of large-scale corporate farming in the Southwest and California. [T]he processor contracts in advance of the planting season with a grower for all the pickles produced on an agreed upon plot of land and at an agreed upon price per unit of output. Moreover, the processor normally provides the seed, and sometimes the fertilizer, the insecticides, and the fungicides. In a few instances, the processor provides the necessary farm machinery, and in still others he undertakes the tasks of planting and thinning. Finally, the processor recruits the harvest workers, distributes them among farms, often houses them, maintains the payroll records, and pays them. The activities of the processor relative to labor are performed in the name of a growers' association, made up of the growers under contract to a single processor and whose business is conducted by an employee of the processor.

54Growers' associations copied the 50-50 arrangement from the sugar-beet industry, where processors and farmers shared the proceeds equally. Gallardo, An Evaluation of the United States Department of Labor Policy Regarding Wages Paid Mexican Nationals at 112-13 n.33. The president of the Michigan Pickling Cucumber Growers' Ass'n implausibly informed Congress that "[t]he main reason for this sort of contract is because the season is not long enough to divide the labor into crews of equal skill, so the fairest way to pay them is to give them one-half of the pickle crop which each individual harvests." Migratory Labor Hearings Before the Subcomm. on Migratory Labor of the Senate Comm. on Labor and Public Welfare, 86th Cong., 1st Sess., pt. 1 at 202 (1960) (letter of Art Shoultes).


Mr. and Mrs. Sachs employed migrants to cultivate and harvest sugar beets, tomatoes, and pickling cucumbers on their 800-acre farm in northwestern Ohio in 1971. Mr. Sachs recruited them in Texas as he had in the past and paid for their travel expenses to Ohio. He paid them by the hour for cultivating sugar beets and tomatoes; by the piece for harvesting tomatoes; and half the receipts for the cucumbers. With the exception of hoes, Sachs furnished all the tools and materials and "informed them of the proper way to pick tomatoes and cucumbers." Whereas Sachs treated the payments for the tomato and sugar beet work as wages and paid FICA taxes on them, he treated the workers as "share farmers" with respect to the cucumber work and did not withhold FICA taxes. After protesting and paying the assessment of FICA taxes, a penalty, and interest, the Sachs's sued the IRS.

They alleged that the Internal Revenue Code (IRC) excepted from the definition of covered employment the relationship of a farm owner to a share farmer, who was responsible for self-employment taxes under the IRC. In order to prevail, the farmer had to show that the pickle picking was service performed by an individual under an arrangement with the owner or tenant of land pursuant to which—

(A) such individual undertakes to produce agricultural...commodities...on such land,

(B) the agricultural...commodities produced by such individuals, or the proceeds therefrom, are to be divided between

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Farm Enterprise, 2 WEST. ECON. J. 183, 191 n.11 (1964).

57 Although braceros were not used in Ohio, considerable concern developed over the possible insufficient supply of agricultural laborers after the termination of the bracero program in 1964. Alvar Carlson, Specialty Agriculture and Migrant Laborers in Northwestern Ohio, 75 J. GEOGRAPHY 292, 298 (1976).

58 Sachs, 422 F. Supp. at 1093.

59 Id. at 1094. Sachs also filed for a refund of the employment taxes paid for the tomato and sugar beet compensation on the ground that it had been paid to the family heads as self-employed crew leaders under 26 U.S.C. § 3121(o). The court ruled against the farmers on the ground that the fathers did not fit the statutory definition of a crew leader inasmuch as they did not "recruit" their own children and wives—rather Sachs performed that task. Sachs, 422 F. Supp. at 1098, aff'd, No. 77-3128, slip op. (6th Cir. Jan. 8, 1979); Farm Labor Contractor Registration Act, 7 U.S.C. § 2042(b).

60 § 1402(c)(2)(B). Yet curiously, the parties agreed that the migrants were common-law employees. Sachs, 422 F. Supp. at 1095.
such individual and such owner or tenant, and
(C) the amount of such individual's share depends on the
amount of the agricultural...commodities produced.  

Because the IRS did not contest that criteria (B) and (C) had
been satisfied, 62 the case ultimately turned on the meaning of the
phrase "undertakes to produce," which the IRS interpreted as
meaning that the workers assumed the responsibility for performing
substantially all the physical labor from the inception to harvesting
of the crop. 63 Although the court acknowledged that the workers did
not meet this requirement, it found the statutory language suf­
ficiently ambiguous to warrant recourse to the legislative history,
which revealed that Congress added § (b)(16) in 1956 in order
to dispel doubt as to the intent of the Congress since persons who
operate farms under a share-farming arrangement with the owner
or tenant have some characteristics of employees and some
characteristics of self-employed persons. For example, in some
instances the landowner may direct the share farmer to nearly the
same extent, on an overall basis, as he does individuals who clearly
are employees. On the other hand, share farmers participate
directly in the risk of farming; their return from the undertaking is
dependent upon the amount of the crop...produced. The provisions
of the bill would remove any doubt as to whether the services
performed by the share farmer are rendered as an employee or as
a self-employed person by statutorily defining such services to be
self-employment. This definition is believed to be consistent with
the actual relationships existing under share-farming arrangements
in the majority of cases. 64

The court correctly identified the statutory intent "to place the
emphasis on the risk sharing element," but it completely missed the

61§ 3121(b)(16).

62The IRS's position is puzzling since (c) is manifestly intended as an indicium of
risk-taking: whereas an employer owes wages to an employee regardless of whether the
employer can sell the commodities produced by the employee, a share farmer is
presumed to share the immediate risks of non-sale. Yet there was no evidence that
these—or any other—pickle pickers ever assumed or were deemed by the farmer to have
assumed such a risk. WADE ANDREWS & SAAD NAGI, MIGRANT AGRICULTURAL
LABOR IN OHIO 15 (Ohio Agric. Experiment Station Research Bull. 780, Sept. 1956),
are misleading when they state that "In harvesting pickles the workers receive a half
share of the crop instead of wages.

63Sachs, 422 F. Supp. at 1095.

64S. REP. No. 2133, 84th Cong., 2d Sess. (1956), as reprinted in 1956 U.S. CODE
CONG. & ADMIN. NEWS 3877, 3883-84 (emphasis added).
point in ruling that Sachs's "exercise of a degree of control over the direction of the migrants is not dispositive." For if the threshold issue was whether the workers "operate" a farm, it was inappropriate to find that migrants who merely trained vines and picked pickles were operating Sachs's farm.

Although the court was also correct in stating that Congress intended to give statutory effect to the interpretation that the IRS had issued before the amendment was enacted, the court failed to see the crucial difference between the fact situation depicted in that Revenue Ruling and that of the migrants. The Revenue Ruling contemplated an entirely different socioeconomic situation in which the farmer makes available a house as a residence at which "[e]ach share-farmer is offered the use of a garden plot and is allowed to keep livestock and poultry on his premises." With regard to the costs and risk of production, the share-farmer "agrees to pay a proportionate share of the costs of the fertilizer and insecticides" and enters into an agreement with the owner as to the types and locations of crops grown. Referring only to the similarities between the two—in particular to the element of control, which it had just characterized as not dispositive—the court then distorted the record by asserting that "[t]he remaining terms of the agreement were substantially similar to the arrangement between Mr. Sachs and the migrant workers...." On this basis the court then held the cucumber harvesters to be share farmers.

In the aftermath of the decision, the Ohio Bureau of Employment Services relied on Sachs to rule that service performed by such sharecroppers was self-employment and thus not covered employment for state unemployment compensation purposes.

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65Sachs, 422 F. Supp. at 1096.
67Sachs, 422 F. Supp. at 1096.
68Interoffice communication from A. Walter, Ass't Unemp. Comp. Dir., Contributions, to D. Russell, Chief, Contribution Dep't, and J. Hardway, Chief, Compliance Dep't (Mar. 20, 1978) (copy in author's possession). The IRS decided that "[b]ecause the issue is widespread and of some administrative importance due to the potential for large revenue loss, we believe the Service should continue to litigate this issue. However, we are...doubtful as to the chance of prevailing on appeal. It appears more prudent to develop another case...." Action on Decision CC-1977-87, Reference: CC:RL-492-75, May 20, 1977 (LEXIS). In 1985 the IRS issued Rev. Rul. 85-85, 1985-25 I.R.B. 9, in which it announced its disagreement with Sachs. Emphasizing that operating a farm is the threshold issue, the IRS noted that:
Several years later, when given the opportunity to revisit the issue of pickle sharecropping under FLSA in a factual setting "very similar to" Sachs, the same judge would "not allow form to triumph over substance." In deciding that pickle pickers were employees in a child labor case, he ruled that Sachs was not precedent because the statutory purposes of the IRC differed from those underlying FLSA. Because the former served to collect taxes and the latter to eliminate low wages, a worker's status could vary from statute to statute.

The court applied the economic reality test factors—control, opportunity for profit or loss, investment, permanence, and skill—making the following fact findings: The farmer owned or rented all the land and all the expensive mechanical equipment, including tractors, cultivator, plow sprayers and irrigation system; decided when to plow and when and where to plant and cultivate cucumber crops; paid for the seed, decided whether to use, applied, and paid for fertilizer, pesticide and insecticide. All of this activity preceded the migrants' arrival. They, on the other hand, were housed by the farmer at his expense, worked on other crops than pickles, provided no tools except hoes, and had no control over the price of the pickles or any say in the choice of a buyer. On this basis the court found "overwhelming control" by the farmer, who had significant investment, and no investment by the unskilled workers. Of potentially greatest significance were twin findings concerning profit and loss. Because the workers "exercise[d] no entrepreneurial discretion whatsoever," higher piece wages achieved through working faster or more could not be bootstrapped into "profit." By the same token, the migrants assumed no risk of loss because "they have not invested anything in which to lose": "If the pickle crop is bad, the loss incurred by the migrant would be a loss in terms of opportunities to

The typical share farmer has responsibility for a wide range of farming activities, including participation in the initial planning for the operation, and incurs out-of-pocket business-related expenses.... On the other hand, the migrant workers...as [sic] hired to perform only specific tasks. They do not undertake [sic] to produce the crop and they incur no business expenses. They are not operators of the farm merely because they perform certain tasks relating to the cultivation and harvest of the cucumber crop.


Since the court had found in Sachs that the migrants were employees under the common law but nevertheless sharecroppers for purposes of the IRC, it was illogical to have considered that case "irrelevant and inapposite." Id. at 160. Since the facts were the same and the FLSA economic realities test of employment the same as that developed in the cases cited by the Sachs court, Sachs was in fact stare decisis.
Petty-Bourgeois Pickle Pickers?

pick pickles. However, this loss translates into a loss of wages, and not a loss of profit."71

While this litigation was in progress, the DOL sued pickle farmers in Michigan for violations of the child labor and record-keeping provisions of FLSA. In two companion cases decided in 1983, a federal trial court there set the stage for renewed appellate review by ruling that because the pickle pickers were not employees, the farmers had not illegally employed children.72 The following year the Court of Appeals for the Sixth Circuit in the closely watched Brandel case furnished the first solid judicial support for sharecropping, which turned out to be the high-water mark in agricultural employers' efforts to persuade the courts that unskilled and capital-less workers are not employees.73

Crucial to understanding how the Sixth Circuit came to condone this practice is the fact that the evidentiary record was confused by the intervention of nine migrants whom the defendant-farmer had induced to proclaim their status as independent contractors.74 Relevant, too, is that Brandel was not presented as a minimum-wage case involving extreme and outrageous exploitation. The trial judge stated that "it might just as likely be said that Brandel is economically dependent upon the harvesters. There is no indication that these harvesters are in need of the protection of the Act. They work neither long hours nor earn low wages." The Sixth Circuit not only accepted this finding, but asserted that the workers had earned "the equivalent of $6.00-$9.00 per hour."75 The record-keeping violations committed by the defendant, however, made it unclear whether such hourly wages were not in reality earned by a

71Gillmor, 535 F. Supp. at 161, 152. The court omitted the factor of integration into the alleged employer's business. The Sixth Circuit dismissed the farmer's appeal on the grounds that it lacked jurisdiction to entertain an appeal of an order that was not final. 708 F.2d 723 (6th Cir. 1982).


whole family. Moreover, the DOL committed a tactical error in failing to raise the issue of whether the children were Brandel's employees regardless of the relationship between their parents and Brandel. This approach made it easier for the Sixth Circuit to justify its decision by accepting the trial judge's characterization of the children's "progress gradually to an active role in the harvesting" as merely the achievement of the parents' primary purpose in "develop[ing] their basic skills and family unity."

In spite of the virtually identical fundamental structural relationships in both cases, just as the court in Gillmor found that every economic-reality-test factor pointed towards an employer-employee relationship, the Sixth Circuit found that no factor supported such a finding in Brandel. The essential facts as found by the lower court and adopted by the Sixth Circuit were as follows. Although the court mentioned in passing that Brandel's contracts "required that all harvesting be done by family members," it never reflected on the extraordinary character of such an invasive restriction of the putative independent contractors' entrepreneurial freedom. If employers are permitted to impose the biological limits of family size on the migrants' ability to exploit labor, they are in effect making it virtually impossible for migrants to accumulate sufficient capital to climb the "agricultural ladder...through tenancy to...

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76 Petition for Rehearing and Suggestion for Rehearing en Banc on behalf of the Secretary of Labor, at 14 n.9, Donovan v. Brandel, 760 F.2d 126 (6th Cir. 1984). When the DOL belatedly raised the issue in its petition for rehearing, Brandel weakly responded that he had never "asserted that the children of the migrants are each, individually, independent contractors. ... Each child is, simply, solely, and realistically, a member of his or her family functioning within the family environment." Id. at 2 n.3; Appellee's Response to Appellant's Petition for Rehearing and Suggestion for Rehearing En Banc, at 7. The court ruled, without prejudice, that the issue had been raised inappropriately. Donovan v. Brandel, 760 F.2d 126 (6th Cir. 1984).

77 Brandel, 736 F.2d at 1117. Another weakness in the conduct of the Brandel litigation was DOL's failure to argue that, because Congress intended FLSA to protect even some real southern sharecroppers, a fortiori sham sharecroppers were covered. The Brief of Amicus Curiae FLOC et al. on the petition for rehearing to the Sixth Circuit alluded to, but did not develop, this issue. Brief at 19. Because the amici concentrated their efforts on showing the vast historical differences between cotton sharecroppers and pickle pickers in order to divest the word "sharecropper" of any legal relevance to the migrants, they could no longer plausibly marshal the arguments that inferred the latter's employee status from the former's. Id. at 13-17.

78 Brandel, 736 F.2d at 1116 n.4. Sharecropping contracts run the gamut from the naive to the crude. One stated that the owners employed "el peon" and provided for withholding for social security. Even the more sophisticated versions include the prohibition on furnishing non-family labor. Copies in author's possession.
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ownership. Such a constraint should in itself disqualify the arrangement as independent contracting. Moreover, in the real world of employment such a restriction is manifestly designed to create the prerequisites for the unbridled exploitation of the family's children. The farmer, by detaching himself from the employment nexus and assigning the family members to the father—who is legally privileged to engage in exploitation prohibited to strangers—appropriates additional labor time at an extraordinarily low cost. The incentive to the family lies in the additional piece-rate earnings it obtains through the children's labor.

The appellate court's finding that "[t]he price for pickles is set unilaterally by the processors in advance of the harvest season" did not prompt it to explore whether in economic reality the migrants might be employees of the processor—an important consideration since a few large firms such as Campbell (through its subsidiary, Vlasic Foods), General Foods (now part of Philip Morris), and Heinz control the industry. The parties themselves had stipulated that "each individual harvester's capital investment in their work with Brandel consisted of their pails and gloves," whereas "Brandel had a substantial capital investment in specialized equipment for his pickle farming operations" including tractors, irrigation equipment, trucks, and a grading station. Brandel also contractually agreed to prepare the land, plant, cultivate, hoe, and spray the crop, furnish the seed and fertilizer, "to pay any other costs incurred in growing of the crop," to furnish all receptacles used for harvesting, and to transport the pickles to the receiving station. The agreement did not even pretend that the pickers were involved in

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79 Memorandum to Paul Appleby, Office of the Sec'y of Labor, from A. Black, Chief, Bureau of Agric. Econ., June 4, 1937 (copy furnished by Wayne Rasmussen, Chief, Agric. Hist. Branch, USDA).

80 Z. Rowe & J. Kohlmeyer, Migrant Farm Labor in Indiana 13 (Purdue U. Agric. Experiment Station Bull. 543, 1949), offer an intriguing distortion of this scenario: Because "Mexicans" and farmers differ as to the age at which children can work as productively as adults, piece rates are used to "lessen[] the difficulty of determining wage rates for the younger workers...."

81 Brandel, 736 F.2d at 1116.


83 Brandel, 736 F.2d at 1118 & n.8.
the decisions concerning the sale of the crop.84

The court then recited this reason for employers' adoption of sharecropping:

This method of "subcontracting" was found to have been implemented because of the unique aspects of pickle marketing. Unlike most other crops, the market price of the pickles does not increase proportionately with their size, i.e., there are seven specific grades, and the smaller pickles bring a higher price per pound than larger pickles. Paying harvesters on a piecework basis had proved to be less profitable because of the extensive and ineffective supervision it required.85

This description cannot withstand scrutiny. The hand-harvesting of many crops is a simple task that requires supervision only because the combination of low hourly wages and arduousness invites "shirking"; where, consequently, the quality or the standard of the output is as costly to monitor as the quantity of the labor input, it may become cheaper for employers to dispense with direct supervision altogether by introducing piece rates.86 The obvious advantage of the piece-rate system is that it forces the employee to internalize the price-discipline and concomitant self-monitoring that

84"Share the Pickle Crop--Partnership Agreement" (1976) (copy in author's possession).
85Brandel, 736 F.2d at 1116.
86Employers will prefer a piece-rate to an hourly rate if checking output costs less than enforcing input. However with piece rates the worker is inclined to be "sloppy" and produce products of lower quality. Thus a piece-rate contract will be less preferable if the physical attributes of the products are such that it is relatively costly to police a specified standard.

STEVEN CHEUNG, THE THEORY OF SHARE TENANCY 67 n. 12 (1969). Judge Posner used the same criteria to distinguish independent contractors from employees. Anderson v. Marathon Petroleum Co., 801 F.2d 936, 938-39 (7th Cir. 1986). In the real world of migrant farm work, employers are not quite so at the mercy of their alternately "shirking" and "sloppy" hand-harvesters. On the contrary, they often whipsaw their employees between hourly and piece rates, paying the minimum wage at the peak of the harvest when the picking is relatively easy and then, when the crop begins to thin out and productivity declines, putting workers on a piece rate, which frequently results in subminimum wages. Those who complain are commonly fired. On such "opportunistic" behavior, i.e., "self-disbelieved promises regarding future conduct," see Oliver Williamson, Michael Wachter, and Jeffrey Harris, Understanding the Employment Relation: The Analysis of Idiosyncratic Exchange 6 BELL. J. ECON. 250, 258-59 (1975).
the market normally imposes on the firm. Some pickle farmers have achieved this result by establishing a piece rate differentiated according to the size of the pickle, which "meter[s] the effort and the results in a tangible way." The grading machine in effect replaces the field supervisor. What farmers have done, however, is merely to call the internalized piece-rate system "sharecropping" because the piece rate happens to approximate fifty percent of the crop price that they receive from the processor--provided they do not pay social security or unemployment insurance taxes or workers' compensation premiums. Pickle picking and sharecropping have no necessary relationship to each other: earlier, farmers paid pickers on a fifty-fifty basis while treating them as employees, and some still do. In sum, sharecropping contributes nothing to the elimination of the costs associated with supervision or to the creation of disincentives for picking large pickles that a graded piece rate does not achieve.

Ignoring these realities, the appellate court embarked upon its march through the economic-reality-test factors, beginning with the least coherent and intelligible one--the permanence of the relationship. Viewing the possible spectrum from temporary to permanent employment--with the former apparently contradicting


88Extension of Mexican Farm Labor Program: Hearings Before a Subcomm. of the Senate Comm. on Agriculture and Forestry at 122 (testimony of A. Hildebrand, Heinz Growers Employment Comm.).

89Brandel's own expert witness at trial admitted that it was merely a "sophisticated form of piece rate." Prof. Shapley, tr. 527, cited in Brief of Amicus Curiae at 17. Two authors of dissertations on the wages of pickle harvesters in Michigan referred to "the traditional piece rate of 50 per cent of the value of the crop" or to "the simple 50-50 pay system" without ever using the term sharecropping. Gallardo, Economics of the Demand for Harvest Labor at 189 n.7; Mason, The Aftermath of the Bracero at 208-209.

90Sharecropping Contract Lowers Workers' Wages, UNDER THE BURNING SUN (Berrien Springs, Mich.), July 1976, at 1. In many areas pickle pickers are treated as employees and paid on a piece rate. E.g., Washington v. Miller, 721 F.2d 797 (11th Cir. 1983); Alzalde v. Ocanas, 580 F. Supp. 1394 (D. Col. 1984); telephone interview with Baldemar Velasquez, President, FLOC (May 22, 1989). Asparagus hand-harvesters must also be selective because they are docked for culls and yet have not been subjected to sharecropping, while strawberries are not graded but have been the object of sharecropping. A difference in quality may exist between strawberries for the fresh and frozen markets, but they are not grown in the same field at the same time. David Runsten, Competition in Strawberries, in MARKETING CALIFORNIA SPECIALTY CROPS at 47, 50-51; Donovan v. Brandel, FLOC, Amicus Brief at 18.
and the latter supporting a conclusion of employee status—the court accepted the trial judge’s finding of a temporary relationship. It also embraced his meaningless ruling—designed to undercut the DOL’s argument that annually repeated engagements constituted permanence—that such re-engagement “was a product of a mutually satisfactory arrangement rather than the permanent relationship between them.” Such a ruling underscores the need to jettison the factor of permanence because it obfuscates the meaning of dependence.92

In analyzing the central factor of skill, the Sixth Circuit misconceived the role that it plays in identifying economic dependence. Skill refers both to some absolute level required by the task and to the relative skill levels as between the worker and the entity for which he is working. A low level or absence of skill is synonymous with dependent employment because it implies that every entity has the knowledge to supervise the worker.93 The appellate court’s affirmance of the trial court’s finding that “an experienced harvester possesses a degree of skill in both the care of the pickle plants and judgment in the picking of the fruit itself,” designifies "skill" so that any worker who can become faster and more proficient at even the most unskilled tasks—for example, ditch-digging—would qualify as "skilled." This possibility not only is irrelevant to a finding of economic independence but also overlooks the fundamental fact that work that seven-year-olds routinely perform competently—such as being able to tell the difference between big and small cucumbers—cannot be skilled.95

The court sought to downplay the enormous disparity between Brandel’s sizable investment in equipment and facilities and the migrants’ “investment in...their pails and gloves” by stating that it was not determinative because Brandel had little invested directly in the harvesting process.96 By the same crabbed logic the worker who uses a five-dollar broom to sweep the floor of a hundred million dollar factory would be an independent contractor because none of the hundred million dollars was invested in sweeping. Moreover, this view disregards the key function that investment fulfills with

91 Brandel, 736 F.2d at 1117.
92 See supra ch. 5.
93 Id.
94 Brandel, 736 F.2d at 1117.
95 Appellant’s Brief at 30, Donovan v. Brandel, 736 F.2d 1114 (6th Cir. 1984).
96 Brandel, 736 F.2d at 1118.
regard to the opportunity for profit and the risk of loss.

In its only implied criticism of the lower court, the Sixth Circuit conceded that the record did not "support the finding that these workers are actually exposed to any risk of loss." Since Brandel had paid the harvesters for their pickles in 1980 even though he had been unable to sell them,97 this concession should have disposed of the whole case. Yet despite the fact that the risk of loss rather than the chance for profit essentially defines an independent enterprise, the court created unnecessary confusion by the unsupported assertion "that the opportunity for greater earnings based upon management of the fields...is not solely a function of a piecework method of compensation."98 The court sought to rest this conclusion on the claim that each family had its field under its own "dominion." But it failed to mention that some pickers remained for only five of the seven or more pickings.99 Yet the fact that when families regularly left the harvest early--either to enable their children to return to Texas to school or because the yields were decreasing--the farmers assigned other families to pick those fields, was crucial because it pointed to a run-of-the-mill employment relationship.

The appeals court also upheld the lower court's finding that Brandel lacked the right to control the details of the harvesting. It arrived at this conclusion by disregarding the pervasive control that the farmer exercised over the entire operation in which the pickers were but a cog. The court also neglected the venerable judicial insight that an employer cannot bootstrap his employee into independent contractor status by relying on the fact that the work is so simple that it requires no supervision.100 Both courts viewed the defendant's alleged "design to relinquish control of the harvesting to the migrant worker" as part of "the trend towards subcontracting major aspects of farming operations such as plowing, crop-dusting and grain harvesting."101 This conclusion, adopted verbatim from the trial court's opinion, omitted mention of the latter's major premise: "For at least 40 years, the only profitable method of harvesting

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97Id. at 1119.
98Brandel, 736 F.2d at 1119.
100See, e.g., Brock v. Superior Care, Inc., 840 F.2d 1054, 1060 (2d Cir. 1988).
101Brandel, 736 F.2d at 1119 & n.9.
pickles has been by subcontracting to "independent contractors." 102 Yet various methods of compensating pickle pickers, including hourly and graded and ungraded piece rates for direct employees, have coexisted for years in the Midwest. Moreover, no plausible inferences can be drawn from these custom machine operations because they all represent specialized, capital intensive, skilled, and independent operations that are not integrated into the farmer's business. The migrants, by contrast, "were not specialists called in to solve a special problem, but unskilled laborers who performed the essential everyday chores of [defendant's] operation." 103

Although the court was constrained to imply that the workers were an integral part of Brandel's operation, it quickly shifted ground to deny that the migrants were economically dependent on Brandel. The reasons it adduced were jejune. First, Brandel did not control the pickle prices to which their pay was directly related. By this logic virtually no farmer would be an employer. Second, the migrants could find similar work elsewhere. 104 Again, by this logic no worker except an immobile resident of a company town would qualify as an employee. As the ad absurdum arguments demonstrate, the issue is not whether a worker is economically dependent on a particular employer, but on "finding employment in the business of others" 105—rather than in his own independent business.

Brandel's triumphant manipulation of the economic-reality-test factors has had a significant real-world impact, strengthening pickle farmers' demands in Michigan (and Ohio) that workers submit to the loss of their rights to minimum wages and unemployment insurance benefits. 106 Resistance has, however, supervened in the form of worker self-help rather than legal skirmishes; now that the Farm Labor Organizing Committee (FLOC) has secured collective bargaining agreements covering half of Ohio's pickle growers, processors, and pickers, it has negotiated the elimination of sharecropping by 1993, which it considers "the root of our problems." 107

103 McLaughlin v. Seafood, Inc., 867 F.2d at 876-77.
104 Brandel, 736 F.2d at 1120.
105 Fahs v. Tree-Gold Coop Growers of Florida, 166 F.2d at 44.
106 In Texas, too, a federal judge mechanistically applied the findings of Brandel to relieve an agricultural employer of liability. Gonzalez v. Puente, 705 F. Supp. 331 (W.D. Tex. 1988).
107 FLOC, Share-Cropping Is the Root of Our Problem (n.d. [ca.] 1984); Keith
IV. Law and Economics to the Rescue of the Pickle Proletariat

Mr. Burton. In other words, by bringing you under the minimum wage bill we encouraged a whole proliferation of small free enterprise.

Mr. Knaus. Right.

Mr. Burton. We made independent entrepreneurs out of these men.

Mr. Knaus. Right.

Mr. Burton. And, therefore, we have broadened...the small business community base...108

Shortly after the Sixth Circuit handed down Brandel, the DOL filed suit against a pickle grower in Wisconsin, where sharecropping was enjoying an upsurge inspired by the farmers' judicial successes in Ohio and Michigan. Lauritzen Farms was represented by Brandel's counsel and its litigation expenses were in part borne by a pickle growers' association in those states. Although the original complaint alleged minimum-wage violations, these were eventually dropped, in large part because of evidentiary problems, leaving the child labor and recordkeeping violations intact. The work situation was essentially the same as in Brandel.109 The trial

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109One twist involved a regulation promulgated pursuant to the Wisconsin Migrant Law, which prescribes the signing of a Migrant Work Agreement and minimum guaranteed hours. Wis. Stat. Ann. § 103.90-103.97. Because the Wisconsin Attorney General had already interpreted the Act's provisions to be incompatible with sharecropping agreements, Lauritzen's work agreements stated the wage rate as "50% 335 P.H.," which the court interpreted to mean a guarantee of the minimum wage where the sharecropping arrangement did not meet the minimum wage. 71 Op. Atty. Gen. Wis. 92 (1982); Brock v. Lauritzen, 624 F. Supp. 966, 967 (E.D. Wis. 1986).
judge, finding that every factor pointed toward employee status, disagreed with Brandel because "it disregarded the economic reality of migrant cucumber pickers," who were "completely dependent upon Lauritzen..." \(^{110}\) After the court granted an injunction the next year, \(^{111}\) Lauritzen appealed to the Seventh Circuit, which issued a rather staid rehearsal of the facts as processed through the economic-reality-test factors, all of which suggested that the workers were employees. Although the Seventh Circuit directly engaged the Sixth Circuit's interpretation and found it wanting on every point, the only remarkable aspect of the opinion was the closing observation, which obliquely exposed sharecropping as a sham:

> The basic arrangement between defendants and the pickle pickers which, according to the defendants, produces the highest economic return for both grower and picker, need not be altered. All that need change is the label which the defendants apply to the arrangement. The defendants need only think of the proceeds paid to the pickle pickers as wages.... \(^{112}\)

Unprecedented, however, was Judge Frank Easterbrook's concurring opinion, in which this leading practitioner of Law & Economics subjected the economic reality test to its first judicial meta-critique. Written in the witty and pithy style that he and his colleague, Richard Posner, rejuvenating the tradition of Holmes and Learned Hand, have used to enliven judicial pronouncements, the concurrence dripped irony and sarcasm. Thus Easterbrook found it "comforting to know that 'economic reality' is the touchstone. One cringes to think that courts might decide these cases on the basis of economic fantasy." His engagement appears to have been prompted by his irritation that a half-century after enactment of FLSA, "no ascertainable legal rule determin[ing] a unique outcome" had yet emerged that would eliminate costly and risky litigation over the issue of employee status. The balancing test of economic realities he


\(^{111}\) Brock v. Lauritzen, 649 F. Supp. 16 (E.D. Wis. 1986).

\(^{112}\) Secretary of Labor v. Lauritzen, 835 F.2d 1529, 1536-39 (7th Cir. 1987) (emphasis added).
viewed as symptomatic of this breakdown because it offered little guidance and begged the crucial questions. In particular, Easterbrook noted that enjoining courts to identify "'those who as a matter of economic reality are dependent upon the business to which they render service'...does not help to isolate the elements of 'reality' that matter." Shorn of their cute paradoxical tone, his remarks boil down to this: the notion has been so drained of rigor that it has become conflated with economic interdependence, a relationship that, because it defines virtually all economic agents, cannot distinguish between employees and independent contractors.113

Easterbrook took aim at the individual test factors with sniper shots, some of which were little more than glib debating points while others were more telling. In response to the court's ruling that the overriding consideration in determining control was the farmer's "'right to control...the entire pickle-farming operation,'" Easterbrook countered: "If this is so, Pittsburgh Plate Glass must be an 'employee' of General Motors because GM controls 'the entire automobile manufacturing process' in which windshields from PPG are used. This method of analysis makes everyone an employee."114 For one as attuned to neoclassical economics as Easterbrook, his disregard of the crucial fact that PPG and GM produce for different final product markets seems disingenuous. After all, pickle-picking is obviously an integrated part of pickle-farming in a way that glass-making is not vis-à-vis automobile manufacture. Although GM could (vertically) integrate glass-making into its operations--just as Ford did for many years with steel manufacture--it has not chosen to do so while PPG uses numerous technologies to manufacture many different kinds of glass for various product markets. Thus in the abstract the notion that glass makers could be GM employees is hardly far-fetched; it all depends on the concrete relationships--and in the pickle context the pickers' lack of skill together with their complete integration into the farm's operations is dispositive of the issue of control.

While implicitly agreeing with the court that the migrants risked no loss, Easterbrook quibbled over whether they had an opportunity for profit. He managed to do this only by analogizing the family head to a manager deploying labor "in a hierarchical organization." If the father parasitically lived on the income gen-

113Id. at 1539-40, 1542-43 quoting Bartels v. Birmingham, 332 U.S. at 130.
114Lauritzen, 835 F.2d at 1540.
Migrant Workers and Minimum Wages

erated by the exploitation of his wife and children, the analogy might have risen above the status of a joke, but as it stood, the comparison to a consultant without capital was shallow. Although Easterbrook readily agreed that the migrants possessed no physical capital, he objected again that the same was true of many real independent contractors who, however, have heavily invested in "human capital"—such as lawyers. Though surely not incorrect, the reference to human capital is but another way of referring to the next factor, skill, on which, Easterbrook agreed, migrants are short—especially since a ten-year-old learned how to pick in five minutes. The permanence or duration of the relationship he regarded as incoherent and irrelevant since no one-to-one relationship necessarily obtains between it and employment status.115

If until this point the tenor of Easterbrook's critique prompted bafflement at what remained for him to concur in, here the surprise began.116 His call for a new beginning, rooted in FLSA's policy "to correct and as rapidly as practical to eliminate" "the 'labor conditions detrimental to the maintenance of the minimum standard of living necessary to health, efficiency, and general well-being of workers,'" was reminiscent of the nineteenth-century economic-reality-of-poverty test.117 He then quickly moved

115Easterbrook also chided the court for confusing the (meaningless) "integral part of the employer's business" with "part of integrated operation," but failed to see why such integration is relevant. Id. at 1540-41, 1533.

116Easterbrook also made the (factually unfounded) complaint that the court overlooked the "wrinkle" that "the migrants share the market risk with Lauritzen." Id. at 1542. Since the price is set at the beginning of the season and constitutes a guarantee from the grower to the picker, it is only the grower who bears the risk of price changes. By the end of the concurrence Easterbrook recanted:

The link of the migrants' compensation to the market price of pickles is not fundamentally different from piecework compensation. Just as the piecework rate may be adjusted in response to the market..., imposing the market risk on piecework laborers, so the migrants' percentage share may be adjusted in response to the market in order to relieve them of market risk. Through such adjustments Lauritzen may end up bearing the whole market risk, and in the long run must do so to attract workers.

Id. at 1545.

117Id. at 1543, citing 29 U.S.C. § 202. Even at this juncture Easterbrook halted again to interject his market-knows-best skepticism about whether such purposes might actually harm those they are intended to benefit "by foreclosing desirable packages of incentives." Since FLSA excludes agricultural employees from overtime, Easterbrook revealed a curious ignorance of the facts and the law in referring to the overtime provisions of FLSA as "the important ones here." 835 F.2d at 1543.
toward an unprecedented judicial denouement. Because FLSA "was designed to protect workers without substantial human capital, who therefore earn the lowest wages," it was also "designed to defeat rather than implement contractual arrangements" that undermine the paternalistic purpose of FLSA.

The migrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend. This does not belittle their skills. Willingness to work hard, dedication to a job, honesty, and good health, are valuable traits and all too scarce. ... But those to whom the FLSA applies must include workers who possess only dedication, honesty, and good health. ...

There are hard cases under the approach I have limned, but this is not one of them. Migrant farm hands are "employees" under the FLSA—without regard to the crop and the contract in each case.118

That the only judge who, in a quarter-century of federal migrant labor law litigation, has been candid enough to state the obvious--namely, that if anyone remains a certified protected proletarian, migrant farm workers do--advocates repeal of such legislation,119 is a devastating commentary on how sanitized and devoid of passion (and compassion) liberal judicial opinions have become since the heyday of paternalistic-humanitarian interpretations in the 1940s.120

In part because of the unambiguous direction in which Lauritzen pointed, and in part because of the vigorous enforcement of state law,121 sharecropping appears to have been euthanized in

118Id. at 1542, 1543, 1545.
119Taking his cue from Posner’s unprecedented critique of FLSA in Mechmet v. Four Seasons Hotels, Ltd., 825 F.2d 1173, 1176 (7th Cir. 1987), Easterbrook closed his opinion on this note: “Once they know how the FLSA works, employers, workers, and Congress have their options. The longer we keep these people in the dark, the more chancy both the interpretive and the amending process become.” Lauritzen, 835 F.2d at 1545.
Wisconsin. In its wake, even farmers in Michigan have begun to reconsider the prudence of imposing the title on their workers.\textsuperscript{122}

V. California: Straw Men and Strawberries

We on the land have always recognized that California labor requirements made impossible to those people ['the Chinaman...the Japanese...the Mexican...and the Filipino'] so employed the full efforts of American citizenship and the possibility of partaking of our normal standards of life.\textsuperscript{123}

A. A Meta-Marxist Interlude

"When the sharefarmers get paid, they find that they are paid far less than minimum wage. In fact, sometimes, they owe the grower...."\textsuperscript{124}

To understand the peculiarities of sharecropping in California, it is necessary to distinguish among three distinct though related phenomena. First, some pickle and strawberry farmers have resorted to the same purely nominal arrangement that pickle growers in the Midwest adopted: merely calling their employees another name in order to reduce the costs of doing business.\textsuperscript{125} Second, California has also witnessed the rise of a variety of strawberry sharecropping in which family heads (together with their


\textsuperscript{125}As one of these employers put it: "If we go 50-50 and pay the benefits, we're not going to have any profits." Burns, State Court Shakes up Farm System, Santa Barbara News-Press, Apr. 30, 1989, at A1, A14, col. 3. See generally, Hager, Legal Challenge Before Court to Test "Sharefarming" Concept," L.A. Times, Oct. 30, 1988, pt. I, at 3, col. 1; Pryor, Fair Share?, CAL. FARMER, Nov. 5, 1988, at 30, 56.
employers) co-exploit not only members of their nuclear family but also relatives, friends, and, to some extent, others. Finally, tenant farming has emerged in the Santa Maria Valley where some strawberry farm owners have leased their land outright to persons who then, in turn, engage sharecroppers of the first category. While the last phenomenon is of very recent vintage and to some extent involves both tenants who had been small businessmen in Mexico and former sharecroppers, the former two have been dated back to the early 1970s, having been implemented because they "proved effective in frustrating attempts to organize field workers."\(^1\)

A social scientist specializing in the study of California strawberry sharecroppers has misconceived the issue at stake by failing to distinguish between make-believe sharecroppers and potentially real ones. Although Miriam Wells correctly observes that strawberry farmers were motivated to convert their wage laborers into sharecroppers in order to avoid their obligations as employers, she has fallen victim to the illusion fostered by the farmers that they have actually reorganized production. The only piece of evidence that she has adduced in support of any change in organization refers to the fact that in reaction to a court decision, one farmer made a loan to some sharecroppers to buy a small tractor.\(^1\) In fact, farmers have not introduced sharecropping, but merely called their employees "sharecroppers." In seeking to bolster her thesis, Wells has also mischaracterized the political-economic and social-psychological forces leading to the workers’ acquiescence in their paper conversion into sharecroppers. First, in some areas, such as the Santa Maria Valley, where seasonally sharecropping strawberries is the only way for farmworkers to make a living, economic coercion is the most plausible motivation.\(^1\) Second, in many instances workers are not sufficiently aware of the statutory protections afforded employees or of the tax obligations of the self-employed to

\(^{126}\)Letter from Steven Belasco, attorney, Cal. Rural Legal Assistance (CRLA), to Ralph Faust, Agric. Labor Relations Bd. (ALRB) (Dec. 13, 1976) (copy in author’s possession). See also Wells, Resurgence of Sharecropping at 14-16; information from Prof. Juan Palerm, Center for Chicano Studies, U. Cal. Santa Barbara; Burns, Some Immigrants Can Reap Success, Santa Barbara News-Press, Apr. 30, 1989. Strawberry sharecropping or perhaps tenancy existed before World War II among Japanese families in a significantly different form. Wells, Resurgence of Sharecropping at 8-11; idem, What is a Worker? at 317 n.24.

\(^{127}\)Wells, Legal Conflict at 76.

\(^{128}\)Information furnished by Jeannie Barrett, attorney, CRLA, Santa Maria (telephone conversation of May 26, 1989).
be in a position to make an informed decision as to the potential trade-offs between the two statuses.

Wells's own theoretical ambivalence is reflected in the much more plausible position she has adopted distinguishing among share tenancy, sharecropping, and share labor. The first term refers to independent grain farm operators who rent farmland for a share of the crop in the Midwest; the second to "the most coercive, paternalistic systems" involving blacks in the South; and the last to pickle and strawberry pickers. Whereas the sharecroppers "were not free wage laborers," "strawberry sharecroppers...are more like wage laborers with a share feature to their labor contract. That is, their share constitutes wages paid by the landowner for the use of their labor." In fact, Wells's own descriptions of the working conditions of the sharecroppers and share laborers reveal that the latter are subject to greater economic control by employers than were nineteenth-century black cotton sharecroppers.¹²⁹

The vacillation reappears in the unwarranted significance that Wells imputes to a written contract in establishing whether a worker is a sharecropper and with respect to whether it explicitly characterizes the worker as a sharecropper: "Perhaps most importantly, the contract identifies sharecroppers explicitly as independent contractors, rather than employees...."¹³⁰ Because covered workers cannot waive their rights under FLSA, for enforcement purposes the DOL does not even consider "an employer's self-serving label of workers as independent contractors"¹³¹ and the Supreme Court provides the macroeconomic and social-psychological basis for that policy:

[T]he purposes of the Act require that it be applied even to those who would decline its protections. If an exception to the Act were carved out for employees willing to testify that they performed work "voluntarily," employers might be able to use superior bargaining power to coerce employees to make such assertions, or to waive their protections under the Act. Such exceptions to coverage would affect many more people than those workers directly at issue...and would be likely to exert a general downward pressure on wages in competing businesses.¹³²

¹²⁹Wells, Sharecropping in the United States at 238-39, 226-27, 232-33. The "foreman exerts considerable control over strawberry cultivation and harvest, especially in operations requiring business judgment." Wells, What is a Worker? at 305.

¹³⁰Id. at 304. See also Wells, Legal Conflict at 59, 66.

¹³¹Brock v. Superior Care, Inc., 840 F.2d at 1059.

And although Wells cites a French Marxist’s cautionary statements as to the dangers of accepting juridical status as indicative of class boundaries, she neglects the one respect in which the contract is congruent with reality: the workers bear no risk of loss of capital.133

The gravamen of Wells’s analysis is that these ambiguities in status are objective and account for the workers’ subjective ambivalence: "This simultaneous holding of contradictory views of class status and interest reflects the interstitial nature of sharecroppers’ structural niche." Thus sharecroppers define themselves as "small capitalists" in part because "[l]egally, they possess many of the juridical prerogatives of capital; economically they enjoy economic possession in that they have legal standing as the employers of labor power and are contractually empowered to direct the labor process." And even though their involvement in economic ownership is "very limited," so that they "cannot be considered unequivocally bourgeois," their "legal tax status...reinforces their bourgeois standing, since they have historically represented themselves as self-employed."134

On the other hand, because sharecroppers are "heavily supervised" and "charged with a limited range of tasks that are virtually identical to those performed by wage laborers in the industry," "they, like sharecroppers in other regions, can easily be viewed as piece-rate wage workers in a system in which the piece rate is variable." Moreover, "sharecroppers also think and act in ways that indicate an identification with the proletariat" such as supporting the UFW. If under these circumstances "they are a form of disguised wage labor,"135 who has not yet seen through the disguise?

The only evidence that Wells adduces in support of the claim that these workers function as capitalists is that "[d]uring the harvest all sharecroppers hire additional workers, usually illegal immigrants who are friends or relatives.... It is in their relations with these hired helpers that sharecroppers experience the autonomy they are otherwise denied." Yet this analysis fails to do justice to the background even as delineated by Wells--namely, that sharecroppers cite as a primary benefit the opportunity "to maximize the income

133Wells, What is a Worker? at 313.
134Id. at 312-13, 309. The last remark is circular since contesting their status with the IRS would be tantamount to challenging the non-employee status the owner has imposed on them—a battle that only few are in a position to take up.
135Id. at 310-12.
producing potential of wives and children...and to ‘become [one’s] own boss.’ The opportunity to co-exploit and tyrannize others is manifestly not the autonomy they seek—which is freedom from the oppressive sort of subordination typical of backward, paternalistic capital-labor relations. This false equation of wanting to be one's own boss with wanting to boss others conforms to Wells’s assertion that "in terms of the political and ideological dimensions of the productive process, sharecroppers occupy the contradictory position of the petite bourgeoisie, dominating and exploiting labor in some situations but also being dominated by capital themselves." Yet many if not most petty bourgeois neither supervise nor are supervised. Moreover, in the United States, as the most highly developed capitalist society without a socialist labor movement, resistance to what is perceived as oppressive working conditions has, even among core industrial surplus-value-producing workers, often assumed the form of (fantasized) escapism into self-employment. If farm workers' putative conversion into non-employees rests on any informed, consensual agreement, they share it with marginalized workers elsewhere who, for lack of other sources of income, enter into sub-proletarian forms of self-employment.

By the same token, Wells inexplicably denies the kind of intrafamilial exploitation that is in fact the driving force behind workers' acquiescence in the loss of their protected status—the opportunity to press their own children unlawfully into service: because "little child labor is used in the industry...evasion of FLSA child labor laws is not a motivation for strawberry sharecropping." This claim, which is factually erroneous, contradicts Wells's explanation of the attraction of sharecropping to workers. To the

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136 Wells, Resurgence of Sharecropping at 18.
137 By one account "most of the abuses are committed by sharecroppers against their own employees." Burns, State Court Shakes up Farm System at A14, col. 2.
138 Wells, What is a Worker? at 311.
139 See Eli Chino, Automobile Workers and the American Dream (1955); Marc Linder, Farewell to the Self-Employed: Deconstructing a Socioeconomic and Legal Solipsism (1992).
140 Wells, Resurgence of Sharecropping at 19.
141 Burns, State Court Shakes up Farm System; information furnished by Jeannie Echenique, former reporter with the Salinas Californian, who has reported on strawberry sharecropping and witnessed large numbers of children working (telephone conversation of May 24, 1989); information furnished by Jeannie Barrett, attorney, CRLA, Santa Maria (telephone conversation, May 26, 1989).
extent that the workers try to evade the state's ban on such activities by consenting adults, they are in effect seeking to slip back into a phase of original self-accumulation that the working class (and part of the employing class) succeeded in outlawing precisely because of its macrosocial Sisyphus-like character: while a few might manage to make a living or even to accumulate enough to rise into the hemi-demi-semi petty bourgeoisie, the standards of the lowest stratum of the working class would be degraded. Much like the southern black cotton sharecropper, today's share-farmer can boast of "autonomy" only to the extent that he can make full use of his family's labor.

On balance, then, the image that most clearly emerges from Wells's account of the family head is that of a crewleader who combines the functions of labor recruiter and working foreman on a piece rate. In this context it is of subsidiary importance whether the workers whom he co-exploits are relatives or strangers. That Wells's explanation of sharecropping in California suffers from overdetermination and underdetermination emerges from a comparison with its analogs in the Rio Grande Valley of Texas.

Although the proximity of a porous border and the absence of union organizing provide agricultural employers with unimpeded access to and control over huge numbers of impoverished and desperate workers, farmers in South Texas nevertheless engage in a whole range of identical or similar unlawful practices even in crops--such as onions--the machine-harvesting of which already competes with hand labor. That aggregate familial labor power is compensated at sub-minimum wages on a piece rate rather than through sharecropping is secondary. Moreover, in one prominent variant of pickle sharecropping, the packing shed, which organizes the harvest on behalf of the farmers under contract with it, makes it a condition of employment that the family head register as a farm labor contractor despite the fact that one who engages in farm labor

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142 Wells indirectly concedes this point; What is a Worker? at 308.
143 In the 1980s, Hidalgo County, Texas ranked first or second in terms of cucumber acreage. BOC, 1987 CENSUS OF AGRICULTURE, 2 SUBJECT SERIES, pt. 3: RANKING STATES AND COUNTIES, tab. 67 at 80 (1990).
144 Wells asserts that by adopting sharecropping the growers "altered the social and economic relations among social strata" in part because sharecroppers, unlike wage laborers, "work as families on a set plot of land...." Wells, Legal Conflict at 74. Yet, many families do this as piece-rate laborers in Texas. Wells offers no information on what the remaining wage laborers do and how their work differs from the sharecroppers'.
contracting activity exclusively vis-à-vis immediate family members is statutorily not a farm labor contractor. The purported reason for this condition is to protect the shed and the farmers against the claim of using an unregistered crewleader should the family head employ non-immediate-family workers, while the real reason is to buttress the contention that the family head is an independent contractor.\textsuperscript{145} Fantasy then gives birth to reality as some family heads, involuntarily armed with their crewleader cards, permit non-relatives--whom the shed refuses to hire directly--more as a personal favor than as a business transaction, to work with the family, thus extending the universe of workers available to the ultimate employer for exploitation at sub-minimum wages and without payment of employment taxes.

The crucial point for the family head--whether he is harvesting pickles in Texas or Michigan or strawberries in California or hoeing cotton in Texas or sugar beets in Wyoming--however, is that the family unit secure as much work, as many rows, as many acres as possible so that as many--especially children's--hands as possible contribute regardless of the depressive impact on the effective hourly rate of pay.\textsuperscript{146} Such workers with few or no alternative opportunities and hence low or no opportunity costs are accustomed to a reservation wage significantly below the lawful minimum; living on a margin informed by a short time-horizon, they set their sights on an existential household bottom line that does not consider hours worked let alone equivalent hourly wages.

In an artfully phrased understatement Wells concedes that unlawful self-exploitation is the key: "The element of anticipated self-direction is especially important to sharecroppers, because they do not always make more money than farm laborers. ... In general, long-term sharecroppers report that as a family they make more than they did as farm laborers, although their per person return is below the standard rate for wage labor in the area."\textsuperscript{147} Indeed, their income qualifies them as "among the poorest of Santa Maria's poor":


\textsuperscript{146}In the mid-1980s, numerous migrant families from Texas declined to participate in litigation seeking to limit the scope of the lawful compensation of children sixteen and under at below the minimum wage for fear that, if the suit were successful, the employers would stop employing such children to work.

\textsuperscript{147}Wells, Resurgence of Sharecropping at 18.
“There’s very few sharecroppers that have gone to the middle class.”

Wells sees the practice of sharecropping on several thousand acres in California at the end of the twentieth century as undermining the tenability of nineteenth-century economic doctrines that viewed sharecropping as incompatible with modern capitalist production. Yet the sharecropping that nineteenth-century economists analyzed was not labor-only pseudo-sharecropping, but a transitional form of ground rent, in which the tenant's share in part represented compensation for having furnished part of the working capital, just as the landowner's share included interest on the capital he provided. Because, in contrast, strawberry harvesters are merely agricultural sweatshop laborers—"quasi wage laborers" "in a two-class production system"—it remains unclear in what sense "[s]harecropping is a new means of controlling and utilizing labor..."

Ultimately Wells offers no "new" explanation as to why farmers retain sharecropping at all. For if it is true that: (1) growers considered braceros on hourly wages under close supervision the most efficient and inexpensive labor; (2) the productivity of wage laborers and sharecroppers is comparable; (3) growers still maintain fundamental control over all inputs and basic decisions and supervise sharecroppers closely; and (4) the decline of the UFW and the steady increase of readily available illegal and legalized workers have recreated a large pool of easily exploitable laborers: then in what sense can it be said that "the organizational principles of

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[148] Burns, State Court Shakes up Farm System at A14, cols. 1, 4-5.

[149] Among the proponents of this thesis she includes not only "[t]raditional Marxist scholars," that is, Marx and Lenin, but also the "[c]lassical economists" Smith, Mill and Marshall, whom she also characterizes as "neoclassical economists." Wells, Resurgence of Sharecropping at 5, 21; Sharecropping in the United States at 213. Interestingly, by asserting that sharecropping would not necessarily be inefficient if the landlord regulated the labor, Marshall in effect conceded that it would have to constitute dependent employment. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS 642-45 (8th ed. 1920). To be sure, evidence exists that sharecropping, especially in the Third World, has been adapted to developing the forces of production. E.g., Pranab Bardhan, Marxist Ideas in Development Economics: An Evaluation, in ANALYTIC MARXISM 64, 70-71 (John Roemer ed. 1986).

[150] 3:2 MARX, DAS KAPITAL at 337.


sharecropping are used...to perform vital functions that cannot be
accomplished at the same cost under the expected capitalist system
of wage labor."\textsuperscript{153}—except that the label facilitates the unlawful
reduction of wages and payroll taxes?

B. \textit{Strawberry Fields of Exploitation Forever}\textsuperscript{154}

We pause here to note the remarkable fact that it is rare
for the seller of labor to appeal to the courts for the preservation
of his inalienable rights to labor. This inestimable privilege is
generally the object of the buyer's disinterested solicitude.\textsuperscript{155}

By the latter half of the 1970s sharecropping was already
under attack in California.\textsuperscript{156} A much cited federal case that became
the leading decision, \textit{Real v. Driscoll Strawberry Associates, Inc.}, was
handed down by the Ninth Circuit in 1979.\textsuperscript{157} It is an object lesson
in the divergence between judicial pronouncement and real imple­
mentation. \textit{Real} came before that court as an appeal from a dis­
missal on summary judgment. The appellants had filed a class action
against Driscoll Strawberry Associates and Donald Driscoll d/b/a
Driscoll Berry Farms for failure to pay the minimum wage, which
the district court dismissed on the grounds that they were not
employees under FLSA.\textsuperscript{158} The original complaint, which the plain­
tiffs had brought expressly as independent contractors, alleged

\textsuperscript{153}Wells, \textit{Resurgence of Sharecropping} at 13, 17, 22.

\textsuperscript{154}On early employment practices in strawberry harvesting, see O. \textsc{Schleussner}
& J. \textsc{Gilbert}, \textit{Marketing and Distribution of Strawberries in 1915} (USDA

\textsuperscript{155}State v. J.J. Newman Lumber Co., 103 Miss. 263, 60 So. 215, 217 (1913).

Bd. determined that the compensation of cucumber and strawberry pickers was not
covered wages because "the grower is dependent upon the picker's interest, managerial
ability, and skills..., experience, and cooperation" and "has little or no control over the
manner in which the cucumbers are picked or the vines cared for." Two years later,
the Appeals Bd. ruled that "[t]o find that the petitioner had relinquished its right to
total would require this Board to close its eyes to the reality of the working

\textsuperscript{157}603 F.2d 748 (9th Cir. 1979).

\textsuperscript{158}Although workers must affirmatively opt into collective or representative actions
under FLSA, the reason for the confusion in the opinion, which never reached this
issue because employment status was the only issue on appeal, may lie in the fact that
the case was not originally brought as a FLSA action.
antitrust and contract violations by the defendants. An amended
complaint, alleging that the agreements were a "sham," stated that
the plaintiffs were employees and owed back wages. Although the
workers did not drop their commercial causes of action, they did not
appeal their dismissal.

Driscoll Associates, which held patents on certain varieties of
strawberries, contracted with Driscoll Farms to grow them. The
adhesion contracts--"so one-sided it's difficult to keep them on your
desktop"--characterized the workers as patent sublicensees of
Driscoll. Whereas the farmer undertook to plant the berries, the
workers agreed to care for the plants during the growing season and
to harvest, sort, grade, and pack the berries. Apart from hand hoes,
shovels, clippers, and hand carts, the farmer contracted to furnish all
the necessary tools and materials for these labor tasks. Despite the
contractual recital, the farmer in fact paid the workers a piece rate
to plant the plants according to directions. Although much of the
description of control was couched in terms of "recommendations"
from the patent holder and the farmer to the workers, the workers
testified that the farm foreman even prescribed the precise hours of
picking. The patent holder retained complete discretion to market
the berries, which were packed in crates bearing the farmer's name,
and paid the workers a fixed percentage of the net proceeds
weekly.

In its brisk promenade through the economic-reality-test
factors, the Ninth Circuit found that Driscoll exercised control, while
the workers had little or no opportunity for profit or loss,
investment, or skill, and were an integral part of Driscoll operations
"rather than an independently viable enterprise." Indeed, the court
went so far as to state that it had not even been shown that the
farmer was an independent contractor vis-à-vis the patent holder.
The court remanded the case for trial, but before those proceedings
were resumed, the case was settled in 1981. According to the
eponymous sharecropper, Alonzo Real, each worker-plaintiff who

159Real, 603 F.2d at 750.
160Letter from Steven Belasco, attorney, CRLA, to Richard Pearl, CRLA (July 27,
1977, copy in author's possession) (referring to similar contemporaneous strawberry
sharecropper contracts).
161Real, 603 F.2d at 750-52, 753 n.11. In addition, during the four to five months
that elapsed between planting and picking, the workers did "not need to work in their
fields daily" whereas farm employees inspected the fields daily. Id. at 752 n.7.
162Id. at 755, 756.
remained in the suit received $1,600 after attorneys fees.\textsuperscript{163}

The \textit{Real} workers' behavior has been ethnographically analyzed as an expression of the "contradictory class consciousness" congruent with occupation of a "contradictory location" that "straddles the boundary between the bourgeoisie and the proletariat."\textsuperscript{164} Yet, a more plausible and coherent account suggests instead that the workers were torn between opting for their statutory rights as employees and for the increased total family income that they could generate by acquiescing in a level of exploitation and engaging in a kind of self-exploitation prohibited in an employer-employee relationship. Indeed, many of the workers--like many migrants--were insufficiently integrated into the civic culture of the United States to be aware of the rights (such as social security, unemployment insurance benefits, and workers' compensation) of which they were being deprived by virtue of their alleged self-employed status.\textsuperscript{165}

In sharp contrast to Wells's unmediated description of the sharecroppers, who suddenly appear on the historical horizon without a prehistory,\textsuperscript{166} Alonzo Real reported that before working as a sharecropper for Driscoll, he and his wife had worked as hourly employees at another strawberry operation. They shifted to Driscoll for two reasons. First, they hoped to earn more money; and second, they had foreseen union-related turbulence, which they wanted to avoid: although they did not want to be "scabs," they did not wish to be blacklisted and to lose their livelihoods either. Very soon after starting work for Driscoll they realized that they were earning even less than they had as hourly workers, but remained because they saw no future at the other farms. Real noted that he performed exactly the same tasks at Driscoll that he had performed as an hourly employee with one unpleasant exception: he had to purchase a pesticide backpack for about $250, about which he had not known before signing up. He was not given proper training in how to use

\textsuperscript{163} Wells, \textit{Legal Conflict and Class Structure} at 73; telephone interview with Alonzo Real of May 22, 1989.

\textsuperscript{164} Wells, \textit{Legal Conflict and Class Structure} at 75; \textit{idem}, \textit{What is a Worker?} at 313.

\textsuperscript{165} A contemporaneous study in Michigan revealed that ninety per cent of covered migrants were unaware of their entitlement to compensation for injury or unemployment. Valdés, \textit{El Norte} at 206.

\textsuperscript{166} Wells, \textit{Legal Conflict} at 64, does briefly allude to the fact that many of the \textit{Real} plaintiffs "had previously been braceros, or wage laborers, on the same farm," but does not analyze this transition or seek to incorporate it into her account.
it, and workers on neighboring fields tended to spray one another and
themselves since they were given no protective equipment.

Although only Real and his wife worked, most of the other
families had children working—children too young to have worked
lawfully had the parents retained their classification as employees;
indeed, he confirmed that this opportunity to make use of children’s
labor was perhaps the primary attraction of sharecropping. The
"independence" to which some workers also aspired meant for them
not financial independence but freedom from a boss standing over
them. But even this dream was destined to be shattered; since
Driscoll did not consider the workers competent to operate the farm
on their own, he supervised them closely. While it is true that the
workers were dissatisfied with the discrepancy between the amount
of money they were earning and the prices for which they saw the
berries being sold, at no point did they wish to receive a share of the
crop or to assume the risk of selling it on their own as entre-
preneurs. They merely wanted more money, a fact that impressed
itself on them when they realized that they were earning less than
they had as hourly employees. The one or two workers whom Real
did hire were relatives to whom he paid the minimum wage even
though he himself was earning less than the minimum wage. Even
at the time he realized that he was an employee—a status that he
recognized as superior to being an independent contractor.167

C. Sharecropping: Old-Fashioned Familial Sweatshopping or
A Law-Mediated, Dialectically New Class Relationship?

As sharecroppers, we were independent in name only.168

From Real Wells concludes that "legal structures and conflicts
play a key role in the evolution of modern class structures" while law
itself "has become one of the forces of production."169 She contends,

167 Telephone conversation with Alonzo Real (May 22, 1989).
168 Burns, Hurt Sharecropper Fights for Disability Benefits, Santa Barbara News-
169 Wells, Legal Conflict and Class Structure at 49. Because Wells was manifestly
without benefit of legal training, it may seem unfair to criticize her for errors against
the commission of which even a few days of law school would have immunized her.
Yet in view of the grandiose theoretical claims she advances about the law as well as
the self-touting as to her extensive case-law research (id. at 52 n.2), she has subjected
Migrant Workers and Minimum Wages

for example, that as a result of variations in coverage definitions among statutes, "employers' claims that their workers are exempt...tend to be accepted until challenged in the courts." This claim illustrates how Wells's impatience with approaches that treat the legal system as a means of maintaining "dominant economic interests" has blinded her to a conspicuous example of precisely such real-world instrumentalism.170 An employer's power to "make the initial determination as to whether a person performing services for him is an employee"171--and thus to shift to the worker the burden of overcoming this initial presumption--has nothing to do with semantics and everything to do with the fact that:

Typically, the worker as an individual has to accept the conditions which the employer offers. [T]he relation between an employer and

herself to the canons of scholarship. She asserts, for example, that Sachs was the controlling case (id. at 59-60), unaware that the IRS, not acquiescing in district court decisions, had issued a new revenue ruling on pickle pickers. She does not know that the legislative history on sharecroppers under FLSA has been codified in the DOL's regulations; id. at 60. She incorrectly asserts that the meaning of "employee" for the purposes of FLSA "has been established...through the application of certain common law tests." Id. The Supreme Court and the subordinate federal judiciary have in fact for more than four decades uniformly held that the common law is not relevant to FLSA. Without any authority or argument she asserts that among the common-law distinctions that have been modified "is the stipulation that the independent contractor status under the FLSA is more inclusive than the common law principles generally applied under the SSA, so that an individual deemed an employee under the FLSA may yet be found an independent contractor under the SSA." Id. at 61. Apart from the incorrect use of the term "stipulation," as a matter of logic her conclusion cannot follow: a more inclusive definition means a broader one. She cites a provision of the NLRA as containing a definition of independent contractor that it does not contain. Id. at 62. Wells cites a 1979 case as having established that sharecroppers cannot join unions because they have the power to hire and fire. Id. at 52 n.2 and 63. Yet the case was merely an unreported review of dismissal by the general counsel of the California ALRB; statutorily unappealable to the Board or to a court, it remains without any precedential value whatsoever. In fact, the ALRB has never resolved this issue. Information from Don Presley, assistant general counsel, ALRB (telephone conversations of May 23 and 26, 1989).

170Wells, Legal Conflict at 63. As an instantiation of the "dialectical relationship between the law and class struggle" Wells cites the fact that Real "has already been used by public interest lawyers attempting to establish the employee status of cucumber sharecroppers in the Midwest." Id. at 74, 76. Ironically, this characterization of the manifestly class-neutral and politically indifferent use of precedent in briefs and decisions underscores the shallowness of Wells's own attempt to view the law instrumentally.

an isolated employee or worker is typically a relation between a
bearer of power and one who is not a bearer of power. In its
inception it is an act of submission, in its operation it is a condition
of subordination, however much the submission and the
subordination may be concealed by the indispensable figment of the
legal mind known as the "contract of employment." 172

It is, of course, open to a worker at the hiring stage to
contest his employer’s classification of him as an independent
contractor, although experience suggests that this might not be the
way for a worker to put his best foot forward at a nonunion place of
employment. There is also no inherent reason why a labor-
protective statute could not create a rebuttable presumption that all
workers are employees, placing the burden on the employer to
contest and overcome that presumption. 173 Indeed, administrative
procedures are conceivable that would make it more difficult for
employers--at least outside the so-called informal economy--to use
self-help methods to circumvent the aforementioned presumption. 174
Yet even where such a reversal has been legislatively imple-
mented--albeit in very modest form--in the real world of non-self-
enforcing law, the worker must still take the initiative to vindicate
his status. 175 Where unorganized and atomized workers are more


173See Linder, Employees, Not-So-Independent Contractors, and the Case of Migrant
Farmworkers at 472 n.162.

174An important link in such a mechanism would involve withdrawing from
employers the initial unilateral authority to issue IRS Form-1099. See Linder,
Involuntary Conversion of Employees into Self-Employed. Britain established such a
mechanism in the 1970s in order to curb analogous subterfuges regarding labor-only
subcontractors construction. Finance Act, 1971, ch. 68, §§ 29-30; Finance (No. 2) Act,
1975, ch. 45, §§ 39, 68-71, and Schedule 12; Report of the Committee of Inquiry
under Phelps Brown at 107-58.

175The unemployment compensation statutes in three-fourths of the states include
a provision to the effect that

any services performed by an individual for wages shall be deemed to be
employment subject to this Act unless and until it is shown to the
satisfaction of the Commission that such individual has been and will
continue to be free from control or direction over the performance of such
services both under his contract of service and in fact.

Tex. Stat. Ann. art. 5221b-17(g)(1)(Vernon 1987)(emphasis added). In spite of this
statutory presumption, if the employer issues Form-1099 to the worker classifying him
as an independent contractor and fails to pay Federal Unemployment Tax Act and
state unemployment insurance taxes, the worker’s claim would initially be invalid until
fungible than their employers, who appropriate the work product and pay the workers, they have historically had to rely on the paternalistic intervention of the state to enforce their already existing rights on their behalf. Sharecropping litigation is but the latest instance of such defensive intercession designed to restore a protective (paper) status quo ante.

Similarly, the proposition that employee status determinations have "become a part of class resources" fails to reflect the fact that less competitive or profitable employers have for some time now been known to try to restrict the scope of the class of workers on whom the state has paternalistically conferred benefits such as the minimum wage that they could not achieve through their own collective action. Because the Driscoll workers were, by precedent, already entitled to the minimum wage, theirs was a purely defensive action designed merely to achieve the restoration of the status quo, which the farmers had unlawfully undone.

Wells portrays the real import of Real as pivoting on the "divergence between the contractual representation of the sharecroppers' independence and their experience of day-to-day dependence...." Under the rubric, "The Dialectics of Legal Struggle," Wells argues that this contractual "representation as independent," though initially to the advantage of the owners, "was appropriated in its meaning by workers, and ultimately spurred workers to challenge the economic and legal relationship." "[T]he actual process of litigation altered" their perceptions of their status, leaving them even years later "with what could be called a 'contradictory' class consciousness." In reality what occurred sequentially was that (1) the workers were economically coerced or deluded into accepting independent-contractor status; and (2) their lawyer, enlightening them as to the unlawfulness of their paper conversion, persuaded them to accept their original and only status as employees. One dialectic which Wells fails to elucidate is how workers can be "militant" and yet permit a piece of paper calling them sharecroppers to undermine their categorical proletarian consciousness.

If in arguing that law (such as the application of FLSA to farm workers in 1966) "has become one of the forces of production" and a "determinant of class relationships," Wells means that "the

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the agency determines that an employer-employee relationship existed.

176Wells, Legal Conflict at 78.

177Id. at 74, 75, 77, 59.
potential benefits of utilizing nonemployee, independent contractors are considerable," it is undeniable that violating the law in order to lower costs at the expense of defenseless employees without an alternative has always had its allures. But no subtle sociological theorizing is required to understand that the enactment of laws imposing burdens on employers (or non-employing taxpayers for that matter) has always created incentives to stimulate every employer's trivial urge to violate those laws in order to avoid the additional costs. Alternatively, Wells's claim can also be more plausibly and less grandiosely restated to mean that state enforcement of a minimum wage can lead and has often led to a real reorganization in the form of labor-saving mechanization.

As further evidence "that the law bears a more complex relationship to class conflict" than "instrumental and determinist" "Marxist approaches" can comprehend, Wells points to the emergence "in some periods" of lawyers "who are advocates for the lower classes." This focus on the privately retained lawyer as deus ex machina to the exclusion of the more than 100 specialized migrant legal services lawyers who, financed by ten million dollars from the federal government, file many suits like Real every year, distorts migrants' relationship and access to the law. Perhaps even more difficult to reconcile with Wells's analysis of the class content of law is that some of the most important employee-status cases have been prosecuted by the state itself. Not even during the Reagan administration did the DOL ever take the position that sharecropping was anything but a sham; indeed, DOL litigation has contributed to its suppression in certain areas.

Ultimately the most problematic aspect about Wells's analysis involves translating her conclusions into the rigidly binary world of social-welfare legislation, which must affirm or deny a worker's status as a covered employee. If the workers' alleged subjective ambivalence corresponds to their objectively ambiguous status, what guidance can Wells's approach--especially in light of her own turgidions--furnish legislators, judges, and administrators, who are charged with drawing bright either-or lines? Yet Wells has adduced no evidence to support the claim that sharecroppers' working con-

178 Id. at 77, 59.
179 Id. at 51.
180 See, e.g., GAO, LEGAL SERVICES CORPORATION: GRANTEE ATTORNEYS' HANDLING OF MIGRANT FARMWORKER DISPUTES WITH GROWERS (HRD-90-144, 1990).
ditions or income warrant characterizing such workers as even "penny capitalists" or "lumpen-capitalists."\textsuperscript{181} That even well-meaning social scientists, imprisoned by academic constructs, can generate employer-friendly theses to the effect that "marginal producers hurled into existence by depression, underemployment or simple poverty"\textsuperscript{182} are petty bourgeois, underscores the need to move away from an employment-based, case-by-case statutory benefits system toward a guaranteed income.\textsuperscript{183}

D. The Growers Get into a Pickle

Although strawberry sharecropping apparently declined to some extent after \textit{Real}, it survived in other crops in California virtually as if the case had never been decided. Why neither the DOL nor legal services organizations sought to enforce the rights that \textit{Real} had inchoately vindicated for farm workers on the Pacific Coast is unclear.\textsuperscript{184} In large part the answer may lie in the sharecroppers' ignorance of their rights or their reluctance to jeopardize whatever meager employment and income they had. In other words, rather than false consciousness, the vulnerability associated with the lack of an alternative way of filling an empty stomach may have inhibited the workers. Farmers, on the other hand, while cynically passing off sub-minimum-wage earnings as "giv[ing] the farmworker a business opportunity...that's the American way," concede that they

\textsuperscript{181}John Benson, \textit{The Penny Capitalists: A Study of Nineteenth-Century Working Class Entrepreneurs} 3-4 (1983); Chris Gerry & Birkbeck, \textit{The Petty Commodity Producer in Third World Cities: Petit Bourgeois or "Disguised" Proletarians?} in \textit{The Petite Bourgeoisie} at 121, 141.


\textsuperscript{183}See infra ch. 7.

\textsuperscript{184}Wells, \textit{Legal Conflict} at 75. Driscoll asserted almost a decade later that: "We haven't changed any of our practices since then. We settled out of court with the farm workers for next to nothing. They probably lost their shirts in the case." Jeannie Echenique, \textit{Court's Decision Gives Farmer Backing to Use Contract Growing}, Salinas Californian, Aug. 30, 1988, at 2A, col. 4. Several lawyers at CRLA have stated that Driscoll did in fact stop using sharecropping after \textit{Real}. Jeannie Barrett, attorney, CRLA, Santa Maria, stated that for some years CRLA was persuaded by clients who sharecropped that it was better to reform than to destroy sharecropping. Telephone conversation (May 26, 1989).
"like the sharecropping because it saves them costs for keeping track of payroll requirements such as unemployment insurance, withholding taxes, disability contributions, Social Security contributions and deductions."185

In the event, the next sharecropping battle came almost fortuitously. In 1985, the California Department of Industrial Relations (DIR) prohibited Borello & Sons, a pickle grower in Gilroy, from using employee labor until it secured workers' compensation coverage for its fifty cucumber harvesters. The Division of Labor Standards Enforcement affirmed the order based on the control that Borello exerted over the entire operation, the contractual prohibition on the workers' use of non-family members, and on the workers' lack of investment.186 When Borello filed a writ petition in superior court to overturn the administrative orders, the evidence presented to that court included the adhesion contract that Vlasic Foods, "the only commercial cucumber grower in the area," imposed on the farmer and his workers. The contractual recitals and the real working conditions were very similar to those prevailing in the Midwest. A significant wrinkle was that Vlasic maintained weekly picker summaries showing how many pounds each worker picked of each grade and the amount paid; on that basis Vlasic then issued checks directly to each worker. Borello's subordination to Vlasic was so pervasive that Borello may merely have been Vlasic's dependent contract farmer or farm labor contractor and foreman. Finding that the evidence supported the Division's order, the trial court denied the writ in January 1986.187

In California, as in most states, the courts have interpreted the employer-employee relationship in the workers' compensation statute by reference not to the economic reality of dependence test developed under FLSA, but rather to the so-called control test.188

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185 O'Sullivan, Court Ruling Should Ease Sharecrop Woes, Telegram-Tribune (San Luis Obispo County), Aug. 12, 1988, at C-6 (citing Richard Quandt, a lawyer in Santa Maria representing farmers); Jeannie Echenique, Family Farms the Hard Way, Salinas Californian, Aug. 30, 1988, at 2A, col. 1 (family of eight earning $1,000 per week equaling $20 per person per day).


188 See LINDER, THE EMPLOYMENT RELATIONSHIP IN ANGLO-AMERICAN LAW ch. 5.
The lower court had held that sufficient control was shown to meet the test; the appellate court unanimously disagreed and reversed although it stated that the facts were undisputed. Because facts enter into the articulation of law and law into the social construction and perception of facts, distinguishing between law and facts is, over a broad range of circumstances, a futile undertaking.189 This interpenetration protrudes sharply from the appeals court's opinion, making a mockery of its claim that it was merely resolving "a question of law": "The share farmers were free to utilize their own methods and set their own hours. Although...Vlasic's pricing schedule was an economic incentive to pick the cucumbers while they were small, the share farmers were free to pick them at any stage of maturity."190 This approach was subjected to scathing judicial parody long ago:

Under such circumstances although the employer's "relinquishment" of his right to control has no factual significance whatever, legally it may be regarded as decisive. Thus laborers are employed to empty a carload of coal. The employer insists that he does not control them, that he did not hire their "services" but only contracted for the "result," an empty car. The means of unloading, he says, are their own, i.e., they can shovel right-handed or left-handed, start at one end of the car or the other. The administration of an act designed to relieve human want should not be made to depend on our resolution of such verbal antics. ... The laborer with shovel in hand remains an employee even though the employer, under the spur of tax or other liability, solemnly recites to him a legal jingle: "I no longer control you. Shovel according to your own methods. I hold you responsible only for the ultimate result, a pile of coal. You render me no services, but you rather sell me a product: a pile of coal from an emptied car."191

All five factors that the appeals court adduced to support its finding that the farmer did not control the workers have already been shown to be at best irrelevant: (1) Borello had no authority to terminate the workers at will (even if true, millions of non at-will employees are still employees); (2) the workers were required to furnish their own tools (so are millions of employees); (3) the work

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190 Borello, 242 Cal. Rptr. at 557, 558.

was of limited duration; (4) the pay was based on results rather than time worked (piece-rate workers are employees); and (5) the parties believed they were creating an independent contractor relationship (workers cannot waive their rights). In an effort to deny that the workers were performing a detail task within a larger operation controlled by Borello, the court meaninglessly asserted that it was necessary to "distinguish between authoritative control and...necessary co-operation where the work furnished is part of a larger undertaking."192

Instead of granting the DIR's request to decertify the publication of the appeals court's decision, the California Supreme Court, on its own motion, "granted" review in March of 1988 although neither party wished to litigate the matter further.193 The majority opinion is structured differently than earlier sharecropping decisions. The first, very brief part provides a lay prolegomenon; the second part discusses the control test; and the last can be regarded as an extended dictum on the economic reality test. It stated the outcome succinctly:

The grower controls the agricultural operations on its premises from planting to sale of the crops. It simply chooses to accomplish one integrated step in the production of one such crop by means of worker incentives rather than direct supervision. It thereby retains all necessary control over a job which can be done only one way. ... In no practical sense are the "sharefarmers" entrepreneurs operating independent businesses for their own accounts; they and their families are obvious members of the broad class to which workers' compensation protection is intended to apply.194

Although this skeletal reasoning in itself met the control test

192Borello, 242 Cal. Rptr. at 558 (citations omitted).
193Pursuant to Rule 28(a)(1), California Rules of Court; 248 Cal. Rptr. 69, 755 P.2d 253 (1988). The court requested that the DIR brief "[t]he manner and extent to which the decision of the Court of Appeal, and the criteria by which independent contractor status is to be distinguished from an employer-employee relationship, may affect the enforcement of remedial legislation other than the Workers' Compensation Law in the State of California." No. S003956, filed March 30, 1988. The California press provided what was probably unprecedented coverage of an employee-independent contractor adjudication. E.g., Echenique, Children's Harvest, S.F. Chronicle, This World, Feb. 19, 1989, at 10; Leland, Where Landmarks Come From, CAL. LAWYER, Dec. 1988, at 34; Siegel, Sharecropping: Local Challenge a Serious Threat, Santa Maria Times, Sept. 16, 1988, at 1.
standard, the majority noted that while the right to control was paramount, other secondary indicators were also relevant especially in conjunction with the need to interpret the employment relationship against the background of the purposes of the statute—the overriding purpose being "to ensure that the cost of industrial injuries will be part of the cost of goods rather than a burden on society." Here the majority exhibited ambivalence towards the control test.

It emphasized that whereas the common-law distinction between independent contractors and employees was developed in the context of vicarious liability in order to determine an employer's liability for injuries caused by his employee, the issue in workers' compensation is whether the employer is liable for injuries to his employee. Yet when the court came to spell out the difference between the two regimes, it disappeared. For just as the employer's power to supervise is deemed relevant to the former inquiry, the exclusion of independent contractors from workers' compensation has been justified by the self-employed's having "primary power over work safety." To be sure, the majority also added to the list of the criteria pertinent to workers' compensation the self-employed's being "best situated to distribute the risk and cost of injury as an expense of his own business," and having "independently chosen the burdens and benefits of self-employment." These additional factors, however, transcend the framework not only of the control test, but tendentially even that of the economic reality of dependence test. They suggest instead the applicability of the inchoate economic-reality-of-class-poverty test developed by nineteenth-century English

\[195\] Id. at 345, 256 Cal. Rptr. at 548-49, 769 P.2d at 404-405.

\[196\] This ambivalence is also reflected on the doctrinal level. On the one hand the majority adopted a realistic view in holding that: "A business entity may not avoid its statutory obligations by carving up its production process into minute steps, then asserting that it lacks 'control' over the exact means by which one such step is performed by the responsible worker." \textit{Id.} at 357, 256 Cal. Rptr. at 552, 769 P.2d at 408. On the other hand, it failed to perceive the asymmetric relationship between the requirements of a determination that a worker is an employee and those of one that he is an independent contractor. Since the burden was on Borello to prove that the workers were independent contractors, the court overlooked the crucial fact that— even in the common-law setting—whereas the presence of control dispositively identifies an employee, the converse is not valid: its mere absence does not necessarily identify an independent contractor. In other words, the latter determination is a much more complicated undertaking because it requires examination of all factors, no single factor being dispositive.

\[197\] Id. at 352, 354, 350, Cal Rptr. at 549, 547, 550, 769 P.2d at 405, 403, 406.
courts in interpreting the Truck Acts.198

Such a test is more appropriate to workers' compensation than to any other modern labor-protective legislation. Since the workers to be protected are those who without coverage would bear the full economic burden of work-related accidents, the purpose of the statute can best be effectuated by interpreting "employee" to encompass all those unable to channel the costs either through an employer to the final consumer or directly to the latter.199 Thus a worker who cannot self-insure for medical and disability protection or pass the costs on, should be presumed to be a covered employee. These are only seemingly distinct issues. The financial ability to purchase insurance is a relatively simple quantitative determination; whether a worker can pass on the costs is a more complicated question, which would have to be resolved by reference to the extent of his integration into the alleged employer's business. But even if it were determined that the alleged employer were the consumer--in this case, that Borello purchased pickle-picking services--if the economic reality of that relationship is such that the picker cannot bargain for sufficient compensation to buy comparable insurance on his own, then the issue again reduces to financial ability.

Without expressly forging all the foregoing links, the majority appears to have taken this very radical step--albeit in dictum. It stated that the workers

have no practical opportunity to insure themselves or their families against loss of income caused by nontortious work injuries. If Borello is not their employer, they themselves, and society at large, thus assume the entire financial burden when such injuries occur. Without doubt, they are a class of workers to whom the protection of the Act is intended to extend.200

To be sure, the court achieved this change in the law not through

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198 See supra ch. 5.

199 See 8 ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 43.51 (1987).

200 Borello, 48 Cal.3d at 358, 256 Cal. Rptr. at 553, 769 P.2d at 409. According to William Hoerger, who wrote an amicus brief on behalf of CRLA, the conservative members of the majority made it clear at oral argument that they did not want to see state welfare expenditures increase because private enterprise was failing to pay its own way. Telephone interview (May 22, 1989). The dissenters were so preoccupied fulminating against the majority's empirically "gratuitous assumptions that the sharefarmers do not obtain insurance coverage for themselves," that they failed to notice this more momentous legal innovation. Id. at 361 n.2, 256 Cal. Rptr. at 555 n.2, 769 P.2d at 411 n.2.
application of the control test, but by anonymous reference to the economic reality of dependence test. Its frank declaration that "[b]y any applicable test, we must dismiss the growers' claims," was valid for the decision as a whole, but not for the specific shortcut it used to reach the same conclusion. For that end required delineation of the aforementioned economic-reality-of-class-poverty orientation.

The dissent cast a bright light on the difference between self-reflective realistic Law & Economics as practiced by Easterbrook and mere ideological atavism to Lochner-era dogmatism. It lambasted the majority opinion as "a wholly unnecessary and inappropriate intermeddling in the affairs of and curtailment of the liberties of California's residents," which would "end up harming the very persons it is paternalistically intended to help" and who had found cucumber sharecropping "satisfactory." In faulting the majority's characterization of sharecropping as "a nefarious subterfuge" without an "iota of evidence," the dissent failed to provide an adequate epistemological framework for its implicit thesis that economic and cultural coercion create an appropriate basis for consensual activities that debase a worker's long-term life chances as well as those of the class of similar workers: "[T]here is no law establishing that a person's decision to enter into a transaction is involuntary unless he or she has been offered alternative arrangements." In its unreconstructed Lochnerism, the dissent appeared oblivious to the fact that the entire edifice of modern protective legislation is rooted in that very "law"—namely, that certain kinds of exploitation are intolerable. Instead, the dissent jettisoned the concept of exploitation altogether in a Fourth-of-Julyism that extinguished all of

201 Borello., 256 Cal. Rptr. at 551, 769 P.2d at 407.

202 The Fourth Circuit recently hinted at such an approach in deciding "whether an individual who does not fit within the traditional concept of employee should nevertheless be considered an employee in the context of ERISA [Employee Retirement Income Security Act]": "implicit in the congressional statement of purpose is the recognition that the persons to be aided by the statute lacked sufficient economic bargaining power to obtain contractual rights to nonforfeitable benefits." Darden v. Nationwide Mut. Ins. Co., 796 F.2d 701, 706-707 (4th Cir. 1986). The Supreme Court unanimously rejected this view; Nationwide Mut. Ins. Co. v. Darden, 60 U.S.L.W. 4242 (U.S. Mar. 24, 1992).

203 Id. at 360, 361 n.2, 364, Cal. Rptr. at 554-55, 555 n.2, 558, 769 P.2d at 410-11, 411 n.2, 414. The only evidence offered for the assertion that sharecropping "is preferred by the sharefarmer families" was the self-serving testimony of the Borellos. Id. at 362, 256 Cal. Rptr. at 556, 769 P.2d at 412.

204 E.g., Emile Durkheim, Leçons de sociologie 235 (2d ed. 1969 [1950]).
economic science's elaborated distinction between labor and capital:

They invest the value of their labor. That may be insignificant to the majority but it is no doubt significant to the sharefarmers, as it is to me. The value of one's labor is ultimately the source of all capital. Many generations of American immigrants have become successful entrepreneurs doing just that—investing the only asset at their command, the value of their labor.205

Two days after Borello was handed down, farmers went to the fields to tell sharecroppers that they were hourly employees. Such swift renunciation of principle may have been dictated by the growers' strategy of seeking legislative reversal of Borello in keeping with their disingenuous position that the decision outlawed all independent contracting.206 Legal services attorneys promptly filed a class action on behalf of sharecroppers at a large strawberry farm, pleading both statutory minimum wage, workers' compensation, unemployment compensation, social security, and sanitary facilities claims and breach of employment and land-rental contracts, quantum meruit, leasehold, unfair competition, and fraud causes of action. The complaint is striking refutation of Wells's thesis that the alleged ambivalence of sharecropper-plaintiffs reflects the underlying ambiguity of their "contradictory class location." Instead, this dual-track litigation—alleging both that their designation as independent contractors was "fictitious" and that the farmer nevertheless breached the sharecrop contracts—symbolizes the consistently pragmatic behavior that the sharecroppers have always displayed. The same subjective maximizing behavior that induced many workers to try sharecropping in order to earn more than the minimum wage led them to file suit in order to recover the minimum wage. Perhaps

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205Borello, 48 Cal.3d at 364, 256 Cal. Rptr. at 557, 769 P.2d at 413.
206See, e.g., letter of Apr. 11, 1989, from Furukawa Farms, Inc. to its "growers" (copy in possession of author); Burns, Workers Won't Get Share of Harvest, Santa Barbara News-Press, Apr. 13, 1989, at A1, at A8 (Furukawa began paying workers $4.65/hour plus seventy cents per box); Duman, Court Case on Sharecropping Sows Confusion among Farmers, San Luis Obispo County Telegram-Tribune, Apr. 14, 1989, at C-7, col. 1; Keckler, Sharecropping Fallout: "Wait and See," PACKER, Apr. 15, 1989, at 3A. The Grower-Shipper Vegetable Ass'n of Santa Barbara and San Luis Obispo Counties held a "legal briefing" at which one of the "[a]lternatives for responding to...Borello" was "[t]he 'find an alternative labor avoidance device' approach." The Future of Sharecropping Following the Borello Decision (agenda of Mar. 30, 1989 [copy in author's possession]). See also Duman, State Moves Ahead on Sharecrop Ruling, San Luis Obispo County Telegram-Tribune, Apr. 28, 1989, at C-6 (labor comm'r denies request by state legislators to delay implementation of Borello).
most significantly, these selfsame newly emancipated sharecroppers chose the UFW as their collective bargaining representative in an Agricultural Labor Relations Board election.207

VI. Prolegomena to Any Future Sharecropping: Individual Choice or Collective Coercion?

With more than nine-tenths of the labor force in formal employee status, Lincolanian notions of democratic social mobility can no longer underwrite—as they did in the mid-nineteenth century—the trope that wage labor normally functions as a stepping stone to self-employment. Consequently, the trend towards dependent employment has ceased to have the moral shock-value that it once did.208 Conversely, despite an unprecedented public relations celebration of free enterprise orchestrated by the Reagan administration, neither the judicial branch of Law & Economics nor the majority of the appointees of a right-wing governor could take seriously the claim that pickle pickers are anything but employees par excellence.209 Not even Brandel resurrected a judicial ideology glorifying the entrepreneurial spirit of impoverished immigrants that a paternalistic state was unconstitutionally seeking to suppress.210

In the late-nineteenth and early twentieth century, the segmented-labor-market counterparts of today’s migrants—women, children, and men in certain extraordinarily dangerous or unhealthy trades—were often rebuffed by a pre-welfare state judiciary in their efforts to secure by state intervention what they could not through direct demands to employers. The problem confronting today’s sharecroppers, by contrast, is not atavistic judicial attitudes. It is

207 Gonzalez v. Furukawa Farms, Inc., No. SM62038, at 1 (Super. Ct. Santa Barbara filed May 10, 1989); Burns, State Court Shakes up Farm System at A14, col. 6; information furnished by W. Hoerger, CRLA (telephone conversation, May 22, 1989).


210 See, e.g., In re Jacobs, 98 N.Y. 98 (1885).
Some truth attaches to claims that some strawberry sharecroppers have been able to earn and accumulate enough money to create a standard of living above that of the average migrant or even to become farmers in their own right. But there is nothing extraordinary about this scenario: the process of capital accumulation is continuously thrusting up from the ranks of wage laborers some individuals who manage to become entrepreneurs. By the same token, the fact that at the height of the Depression of the 1930s, more than a third of families cultivating sugar beets paid non-family members to do part of the work under their "contract" did not mislead contemporary observers to classify them as entrepreneurs. The mere fact that a minuscule percentage of workers can, through unlawful exploitation and self-exploitation, rise marginally above or out of their class, cannot justify sacrificing the rest of the class on the altar of uninhibited individual self-enrichment. On the contrary, until that class is sufficiently cohesive "to coerce others to choose collective interests over those of the individual," the state will have to intervene to prohibit pseudo-consenting adults from undermining their own life chances as well as those of their children and their class.

This necessity of counterposing collective coercion to economic coercion will play an important part in ensuring that the Latin Americanization of the migrant labor force in the United States is not accompanied by the Latin Americanization of hand-harvest wages. Such an effort must include the prohibition and penalization of practices such as pseudo-sharecropping. But, as the


212 See Cohen, *The Structure of Proletarian Unfreedom*. Even in mid-Victorian England, Marx noted that individual crew leaders, who sweated piece-rate harvesters, had climbed the agricultural ladder from farm laborer to tenant owning 500 acres. 1 Marx, *Das Kapital*, in 23 Marx [&] Engels, Werke at 723 n.173.


concluding chapter will show, it must incorporate many other measures as well.
A Second Reconstruction for Farm Workers

Labour...is a commodity which attaches in a peculiar manner to the person of man. Hence restrictions may need to be placed on the sale of this commodity which would be unnecessary in other cases, in order to prevent labour from being sold under conditions which make it impossible for the person selling it ever to become a free contributor to social good in any form.¹

The brightest hope for the welfare of seasonal agricultural workers lies with the elimination of the jobs upon which they now depend.²

A key to understanding migrant farm workers' predicament is that whereas "most minimum wage jobs are for entry level positions...[that] are occupied for only a short time by workers who rapidly begin to climb the economic ladder of...more highly paying positions,"³ migrants are permanently immobilized in theirs.⁴ The

²FISHER, THE HARVEST LABOR MARKET IN CALIFORNIA at 148.
⁴Referring to "Corn Belt youngsters, chosen for their tolerance for field conditions and the monotony," the president of a hybrid seed corn firm characterized detasseling
creation of this lifelong agricultural proletariat has been based on the incorporation of a labor force "from a country with a living standard fundamentally lower than that of the United States." By continuously replenishing that supply and ensuring the formation of Third World enclaves in the United States, the state has perpetuated an atavistic form of domination. It is therefore unsurprising that state paternalism has reproduced the sector in which these workers are exploited as structurally impervious to the automatically corrosive effects that market forces are reputed to exert on pockets of local and historically contingent disequilibria.

That migrants' wages rank at the bottom of the scale of wage rates in the United States is not open to dispute. Even the reasons are uncontroversial. The fact that their labor-intensive work is as "hard work, but it's a good first job for these kids." Job Has Kids up to Their Ears in Corn, Chicago Tribune, July 20, 1987, Bus. § at 7 (NEXIS). Were its implications for policy not so pernicious, the following claim could be dismissed as irony:

The harvest labor market has an earnings pattern similar to professional sports: high-wage years are typically followed by lower earnings. A rational wage-earner who realized that his or her earnings will decline with age would save from current high earnings or acquire other skills likely to enhance earnings in the next career.


6In this regard socioeconomic paternalism may be similar to the promotion of single-member electoral districts with cohesive, bloc-voting black or Hispanic majorities. See Voting Rights Act of 1965, 42 U.S.C. § 1973 (Supp. 1989); Thornburg v. Gingles, 478 U.S. 30 (1986); ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS (1987). Designed to overcome the effects of generations of racial discrimination, both presumably rest on the notion that they will become superfluous when substantive equality of opportunity is achieved. The suggestion that such intervention might be required in perpetuity would be tantamount to an admission that discrimination is not merely historical, but inherent in the political economy of the United States—or, alternatively, that the historical impact is ineradicable. Neither of these claims would be compatible with liberal theories of morally neutral, market-driven society. See, e.g., DAVID GAUTHIER, MORALS BY AGREEMENT 83-112 (1987 [1986]).

7The largest employer of farm workers in the Rio Grande Valley, whose firm pays "the minimum" and has operated in Mexico since the 1940s, admits that the loss of agricultural jobs to Mexico is no "great loss because so much of agricultural work is seasonal...and minimum wage work that it does not provide an adequate standard of living..." COMM’N ON AGRICULTURAL WORKERS, HEARINGS 282, 281 (Weslaco, Tex., Jan. 17, 1991) (testimony of Othal Brand).
unskilled means that it can be and is performed by workers with no education (including children). The lack of skill, undergirded by the virtual absence of physical capital, translates, through the characteristic mechanisms of the sweatshop, into a low and stagnant level of productivity, which in turn narrows the scope for higher wages. The unorganized state of the supply side of the labor market means that the only power that unskilled workers have traditionally had at their disposal to enforce higher wages is unavailable. The permanent presence of a huge reserve army of the unemployed means that labor market forces inexorably press down on the wage level, "reflecting the low degree of compulsion they can bring to the bargaining process, as compared to the compulsion brought to bear by the employer." In a vicious circle, the low wages and physically hard work attract only the most desperate and vulnerable workers, who are least able to defend themselves.

In light of the failure of socioeconomic paternalism to attain its self-liquidating ends, it is necessary to consider the alternative to this self-perpetuating but feckless guardianship. The immediate problem is that in the face of continuing hand-harvest labor market imperfections leveraged to lopsidedness by overreaching employers, the traditional approach has not been coercively paternalistic enough to break up the structural barriers to the normalization of migrant agricultural labor relations. Neither the state nor worker representatives have, for different reasons, been willing to articulate the distinctly antiliberal truth that regulation of this labor market will, for the foreseeable future, require much more intrusive methods to prevent employers from taking advantage of those unable to refuse coercive wage offers or to extricate themselves from the web of

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8Paul Miller, The Role of Farm Labor Market Institutions in the Lower Rio Grande Valley of Texas tab. 2-2 at 48 (1971), found that more than half of the farm worker household heads he surveyed had completed less than one year of school.

9Robert Hale, Bargaining, Duress, and Economic Liberty, 43 Colum. L. Rev. 603, 627 (1943). In an alternative formulation: "The structural effect of constant labor surpluses is not to depress the 'floor' of wages...but, instead, to depress the 'mean wage level' by allowing employers who offer wages well below the 'standard' offer to continue to attract workers, compensating for their high turnover by drawdowns on the surplus of workers." Ed Kissam & David Griffith, Final Report: The Farm Labor Supply Study: 1989-1990—Findings and Recommendations 103 (1991).

10For a good journalistic description, see Dianna Solis, On the Move: From Farm to Farm, Migrant Workers Struggle to Survive: Texans and Illegal Hispanics Vie for Jobs Paying Below Minimum Wage, Wall St. J., May 15, 1985, at 1, col. 1.
"desperation bidding."\textsuperscript{11}

Breaking out of this Sisyphean circle would require administering a strong shock to the system. Direct action might achieve this result if, like unique and highly paid athletes, migrants could 'sit out the season.' If, for example, migrants concertedly remained in the Lower Rio Grande Valley one year, fruit and vegetable farmers and processors might be forced to reconsider their labor practices. They might try to recruit local workers, but to coax such workers into the fields they would have to offer significantly higher wages than migrants receive. Unless agricultural employers were willing to compete in urban labor markets for unskilled labor--as wheat farmers once were\textsuperscript{12}--it is unlikely that they would be able to secure a reliable labor force for the long term. If state action also blocked access to children and aliens, employers would have to invest more heavily in labor-saving mechanization and biotechnology. But it is precisely the implausibility of the mass sit-out scenario that makes state intervention necessary in the first place.

The proposed shock to be administered by the state would be a doubling of the minimum wage for migrants. Migrants' wages form such a small share of farmers' total receipts for most fruits and vegetables, which in turn constitute such a small share of retail prices that an increase in harvest labor wages, even if completely passed through, should not trigger significant retail price increases.\textsuperscript{13} If, however, wages in certain crops accounted for such a large share of consumer prices that farmers could not absorb the cost increases (without losing their livelihoods),\textsuperscript{14} the minimum wage shock would

\textsuperscript{11}Robert Goodin, Reasons for Welfare: The Political Theory of the Welfare State 133, 168, 367 and passim (1988); idem, Protecting the Vulnerable: A Re-Analysis of Our Social Responsibilities (1985). A recent monograph that challenges the belief that migrants have been the "helpless victims of unscrupulous employers" nevertheless also documents that helplessness unremittingly. Valdés, Al Norte at viii.

\textsuperscript{12}See supra ch. 1 § I.

\textsuperscript{13}S. Rep. No. 1487, 89th Cong., 2d Sess., reprinted in 1966 U.S. Code Cong. & Admin. News 3002, 3022; National Comm'n on Food Processing, Cost Components of Farm-Retail Price Spreads for Foods tab. 2 at 4 (Technical Study No. 9, 1966); supra ch. 3 § V.

\textsuperscript{14}Fruit and vegetable producers are a heterogeneous group whose market power varies greatly depending not only on their size and whether they are members of cooperatives or are subject to marketing orders, but also on whether they are integrated grower-shipper. Processors' superior market power is so great that it is
Second Reconstruction for Farm Workers

be inconsistent with the basis of cheap food policy but only because the latter's linchpin—unacceptably cheap labor—makes what should be quasi-luxury commodities affordable to a mass market. If the wage-price-profit matrix of this sector of the economy were such that significantly increased wages brought in their wake higher consumer prices and required consumers to devote a greater percentage of their budgets to food consumption and a smaller share to other items (reversing the secular trend of Engel's law), then economic logic suggests that previously consumers must have been benefiting from the exploitation of farm workers.15

Alternatively, consumers might decide that, once the subsidy furnished by migrants, which they had taken for granted, was withdrawn and they were forced to pay the full social costs of producing that food, it was no longer 'worth' it to them; they might then buy smaller quantities of fruits and vegetables for the same total expenditure. If, on the other hand, instead of agribusiness's importing Latin American farm workers, consumers bought Latin American farm products (in part produced by United States agri-capital reinvested in Latin America), the problem would merely be externalized.16 The imposition of tariffs could eliminate the in-


16The program pursued by the Arizona Farmworkers Union of organizing Mexican farm workers in cooperatives in Mexico that would compete with U.S. producers is one
centive that United States agribusiness might extend to consumers to share in the exploitation of even lower-paid Latin American workers.17

The ensuing revaluation of wage-price-profit relationships and redistribution of national income might entail that certain agricultural products would become luxury commodities. Public discussion of these consequences would present a rare opportunity for discussion between consumers and producers of the 'disutility' that the latter must undergo to satisfy the former's needs. From such debate might emerge a new structure of perceived needs.18 If lifelong assignment to the unnecessarily hard labor of hand-harvesting fruits and vegetables is inappropriate to an unprecedentedly wealthy "post-industrial" society, then mechanizing such jobs out of existence should be welcomed.19

The flanking measures necessary to sustain an increase in the agricultural minimum wage would amount to a comprehensive program of state intervention to restructure the labor market for, and to strengthen the bargaining power of, migrants in order to

way to deal with these externalities. Philip Martin & Alan Olmstead, The Agricultural Mechanization Controversy, in SCIENCE, Feb. 8, 1985, at 601, 606, have proposed an integrated plan of systematic mechanization, imports of fruits and vegetables that cannot be mechanized, and a fund for displaced farm workers to be financed by a ten per cent payroll tax on farmers who employ foreign workers. For an example of U.S. agribusiness in Latin America, see Ernest Feder, Strawberry Imperialism: An Enquiry into the Mechanisms of Dependency in Mexican Agriculture (1977).

17Such tariffs would presumably have to be considerably higher than current rates of duty. See 19 U.S.C. § 1202, sched. 1, pt. 8-9 (1978). Alternatively, a plan could be applied to agriculture along the lines of the proposed Fair Trade Wages Act of 1985, which would have amended FLSA to levy an earnings parity fee on articles imported into the United States that had been produced outside the United States by U.S. firms "for the purpose of equalizing foreign direct labor earnings paid...to the foreign...workers...with the prevailing earnings paid...to United States...workers H.R. 3407, § 201, 99th Cong., 1st Sess. (1985).


19"The answer to the social problems incident to migrancy is to continue...the investment by farmers in the new machinery...necessary to reduce handwork employment in agriculture." Registration of Farm Labor Contractors: Hearings Before the General Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 8 (1963) (statement of Matt Triggs, asst. leg. dir., Am. Farm Bur. Fed.).
suppress the "forced sale" of their labor.\textsuperscript{20} The principal measures would be designed to reduce the supply of labor; eliminate labor contracting; extend the coverage of protective laws; eliminate atavistic forms of fraud; and facilitate or mandate self-organization. Some of the proposals that follow are unique and all of them taken together go far beyond previous sets of recommendations. That less radical proposals of earlier generations were stillborn does not augur well for prompt adoption of more radical ones.\textsuperscript{21}

1. **Restructuring the Labor Market**

   **Reducing the Supply of Labor.** Because migrants' low annual income is as much a function of sporadic employment as of low wage rates, it may not be possible to raise the minimum wage sufficiently to induce parents, through purely market forces, to refrain from causing their children to work.\textsuperscript{22} Therefore an absolute prohibition


\textsuperscript{21}A half-century ago Sen. La Follette and Sen. Thomas offered what remains the most ambitious set of proposals. Among the measures that have still not been adopted are an agricultural wage board, incorporation of farm workers into the NLRA, and coverage under the minimum wage and overtime provisions of FLSA of all farmers with more than four employees at any time during the year. 88 Cong. Rec. 8320-38 (1942). An astonishingly timid and regressive set of recommendations was offered by Elizabeth Raushenbush, who, as the daughter of Louis Brandeis, had had a half-century of experience with minimum wage laws. Based on a study of families of pickle pickers, who worked fluctuating hours on a piece rate, she recommended, only three months before Congress finally brought farm workers within the straight hourly minimum wage provisions of FLSA irrespective of their mode of payment, that FLSA be amended to offer farm employers the option of paying workers $1.25 per hour, $8.00 per day "regardless of hours worked," or $20.00 per day for a family of three with $5.00 per day for each additional working member. She in effect warned Congress that "[t]o require the employer to make up the difference between piece-rate earnings and the legal minimum...is virtually an incentive [to workers] to take it easy." **Elizabeth Raushenbush, A Study of Migratory Workers in Cucumber Harvesting: Waushara County, Wisconsin 1964**, at 34 (June 1966).

\textsuperscript{22}Early proponents of the application of minimum wages to agriculture believed that such coverage in itself would eliminate the "dilemma" for parents. **SUBCOM. ON MIGRATORY LABOR OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 86TH CONG., 2D SESS., THE MIGRANT FARMWORKER IN AMERICA: BACKGROUND DATA ON THE MIGRANT WORKER SITUATION IN THE UNITED STATES TODAY** 56 (1960); **SCOTT NEARING, THE SOLUTION OF THE CHILD LABOR PROBLEM** 126-45 (1913 [1911]). When, at the time of the original FLSA hearings, a witness (who opposed the bill as a communist conspiracy) asserted that child labor would disappear in industry when
of child labor below the age of sixteen should be enacted. All statutory authorization to import foreign workers should also be repealed. The employment of illegal aliens should be discouraged by imposing additional penalties on their agricultural employers when they violate labor-protective legislation.

Faced with a smaller potential labor force, agricultural employers would presumably be forced to pay higher wages and to provide better working conditions. Improved terms for workers might in turn induce employers to increase their utilization of labor-saving machinery, which would be associated with a rise in the required level of skill. This enforced recalibration of supply and demand would mimic the effects of unionization which, by bringing about a smaller and structured supply of higher-waged labor, also

parents earned "a wage high enough that they will not feel that they need the labor of their children to contribute to the family budget," Rep. Schneider replied that he was "talking about a Utopia that is far off." *FLSA Hearings* at 985. Just how far off is suggested by a petition by strawberry sharecroppers calling on the governor of California to "overthrow" Borello: "Without this form of employment, there is no chance for our children to assist us after school and on days off." Finucane, *Sharecroppers Learn Import of Court Pay Puling*, Santa Barbara News-Press, Apr. 11, 1989, at B3.

Ironically, migrants are already replacing local white children—for example, in detasseling in the Midwest and harvesting potatoes in northern Maine in the fall. See *Changes On Horizon In Fields of Potatoes*, N.Y. Times, Dec. 21, 1989, at 19, col. 6 (nat. ed.).

The ban could be bolstered by adding such employment to the catalog of violations subject to civil penalties and injunctions under the so-called hot goods provision of FLSA. 29 U.S.C. § 215 (1965), § 216(e) (Supp. 1989), § 217 (1985). Wallace Huffman, *International Trade in Labor versus Commodities: U.S.-Mexican Agriculture*, 64 Am. J. Agric. Econ. 989, 996-97 (1982), proposes to "remove[] the labor market disequilibrium between the United States and Mexico" by permitting free entry on the one hand but subjecting guest workers to such draconian measures as higher income tax rates and sub-citizen rights and entitlements. But since even these steps would leave an enormous wage gap between the two countries, the result would be that only the most vulnerable workers would enter the United States (that is, those who would still find it "rewarding to arbitrage these international labor markets"), providing employers with even cheaper labor. One of the determinants of the powerlessness of migrants is that so few are integrated into the political and civic culture of the United States. The passivity of those without a long-run stake is also characteristic of permanent resident aliens who are in effect commuters. One way of combating this phenomenon would be to confer citizenship on those lacking it.

makes mechanization profitable. When the long-heralded spread of mechanization from processed to fresh-market fruits and vegetables does finally take place, the evidence from those crops that have been mechanized suggests that the outcome may be regularization of employment and increased income for a much smaller but more stable group of non-migratory workers in a more traditional industrial labor relations setting. Mechanization unaccompanied by a reduction in the supply of migrant labor, however, might not result in higher wage levels.

**Abolishing the Labor Contracting System.** The experience of a half-century of federal efforts—and even older state laws—to

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29 Because wage rates for stoop labor in the [Rio Grande] Valley were $0.60 per hour, the overhang of supply enabled a grower-canner in Illinois to pay migrants who performed semi-mechanized planting for which few were qualified the same wages it paid hand-hoers. See Leftwich, *The Migratory Harvest Labor Market* at 148, 99-101, 282.
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regulate crew leaders and to suppress the abuses inherent in the private recruiting system demonstrates that making labor catchers the centerpiece of enforcement is inefficient. Precisely because labor contractors as "body-brokers" are typically intellectually, morally, and financially incapable of complying with the law, enforcement would be promoted by focusing on the real employers.

More than two decades elapsed between submission of the first bills in Congress to regulate crew leaders and passage of the Farm Labor Contractor Registration Act (FLCRA) in 1963. See To Regulate Private Employment Agencies Engaged in Interstate Commerce: Hearings before a Subcomm. of the House Comm. on Labor on H.R. 5510, 77th Cong., 1st Sess. (1941); Note, A Defense of the Farm Labor Contractor Registration Act, 59 Tex. L. Rev. 531 (1981). The historically proprietary purpose, function, and spirit of state farm contractor laws—particularly in the South—were spelled out by counsel for the Tex. Citrus & Vegetable Growers & Shippers in testimony before Congress. Referring to migrants as "our workers," he described the Texas labor contractor registration statute, which he had written in 1943, as requiring labor recruiters operating on behalf of

out-of-state employers to be bonded and licensed so that if our workers were taken to other states with the promise of employment, and on arrival found that work was not available or that housing, wages and working conditions were not as promised, they would not be stranded far from home without means of getting back to their places of permanent residence.

Oversight Hearings on the Farm Labor Contractor Registration Act: Hearings Before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 94th Cong., 1st Sess. 67 (1976) (statement of Scott Toothaker). But see SUZANNE VAUPEL & PHILIP MARTIN, ACTIVITY AND REGULATION OF FARM LABOR CONTRACTORS 17 (Giannini Infor. Ser. No. 86-3, 1986) (recommending reliance on crew leader sanctions). The Nebraska Farm Labor Contractors Act (FLCA) illustrates this tradition of labor catcher-oriented protective legislation. At first blush it appears to create a rigorous regime: by erecting relatively high financial thresholds in the form of a $750 annual licensing fee and a surety bond of at least $5,000 to satisfy wage claims, FLCA serves to screen out economically irresponsible contractors. NEB. REV. STAT. § 48-1710(5) and § 48-1705 (1987). Yet a contractor with a crew of 100 workers could be the conduit (for a seed corn company) for a weekly payroll in excess of $25,000 or $100,000 for a whole season. At these levels, a $5,000 bond would not satisfy wage claims. Nor would more careful legislative drafting avoid these problems; they are inherent in any system of regulation that is centered on crew leaders.

Administration of Laws Affecting Farmworkers: Hearing before a Subcomm. of the House Comm. on Government Operations, 96th Cong., 1st Sess. 3 (1980) (statement of Perry Elsworth, exec. dir., Nat'l Council Agric. Employers). See also Warren Flick, The Wood Dealer System in Mississippi, in J. FOREST HIST. Jan. 1985, at 131, 135-36. Marx made a similar observation about mid-Victorian crew leaders. 1 MARX, DAS KAPITAL at 723-25. The president of the Vegetable Growers Ass'n of Am. perversely opposed enactment of FLCRA because the average crew leader was too uneducated to fill out the forms required by the Act. Migratory Labor Hearings Before the Select
These firms already operate according to routinized bureaucratic record-keeping and payroll procedures that can guarantee prompt, accurate, and full payment of wages. To force migrants to rely upon the vagaries of an intermediary's cash-flow (and moral integrity) for their meager wages when the real employer is hiding behind a civil outlaw is not only unjust but unnecessary.  

The abuses of the contracting system could be significantly reduced by amending federal and state statutes to preclude a labor contractor from ever being considered migrants' sole employer: a fixed-situs producer--seed company, forest owner, farmer, or processor--should always be liable for wage payments, written disclosures, contract compliance, recordkeeping, and other statutory obligations. If Congress amended FLSA and AWPA (as well as the social security, unemployment, and tax laws) to make such entities farm workers' employers even where they use labor catchers, they would have little incentive to interpose judgment-proof intermediaries between themselves and their workers.  

For their own reasons, some large agricultural employers have embraced this approach:  

Let us assume...that an itinerant farm labor contractor were hired each year by an agricultural employer as a regular seasonal employee to perform [sic] the function of field foreman. ... He would be a direct employee of the employer. The workers he would supervise would be the direct employees of the employer.... The corporate employer by making this individual a "full-time or regular employee" assumes full responsibility for his acts...and for any violations of the law the employee may commit. The corporate employer has a fixed situs. It is amenable to legal process and subject to law enforcement procedures.... The corporate employer also, be it a farmer, processor, packer, or whatever, presumably has assets and is financially responsible. [U]nder these circumstances the agricultural employee has far greater protection against abuses or exploitation than he would have if he were required to look to


32For an economically unrealistic account of the crew leader-farmer relationship, see William Friedland & Dorothy Nelkin, Migrant: Agricultural Workers in America's Northeast 71-75 (1971).  

33See generally, Linder, The Joint Employment Doctrine. The Iowa Wage Payment Collection Law, for example, makes seed producers the employers of last resort of detassleers. IOWA CODE § 91A.3.7 (1987). The DOL has disastrously undermined enforcement by its policy of focusing investigations initially on crew leaders rather than on real agricultural employers.
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an itinerant farm labor contractor, whether that farm labor contractor were registered or not. ... The net result would be the elimination of the crew leader as such, and that is not all bad.34

The Citrus Industrial Council agreed that "there should be incentives provided to encourage employers to cause all workers to become their own employees...and...to encourage them to pay each worker directly by check rather than paying off in cash to someone who would thereby have an opportunity to skim...."35

An outright statutory ban on agricultural labor contracting would not only eliminate an elusive and evasive source of "petty graft and exploitation"36 by labor catchers, but, by focusing attention on the real agricultural employer, would make the system of exploitation more transparent to workers. Because legislators have repeatedly observed that the labor contracting system is incorrigible--"[t]here is something in the whole idea of contracting human labor...that is feudalistic and less than human, and...maybe we...don't need a lot of regulators but a law to abolish it"--prohibition may be politically feasible.37

34 Administration of Laws Affecting Farmworkers at 75 (letter from Perry Elsworth, exec. V.P., Nat'l Council of Agric. Employers, to Rep. Collins). Employers' proposals to take responsibility for crew leaders' acts were in part motivated by the desire to avoid registration under the Farm Labor Contractor Registration Act, 7 U.S.C. §§ 2041-2058, repealed by AWPA, Pub. L. No. 97-470, 96 Stat. 2584 (1983). Although agricultural employers were ultimately exempted from the registration requirements of AWPA, 29 U.S.C. § 1802(7), Congress did not succeed in closing all the loopholes in prescribing status as joint employers. See Linder, The Doctrine of Joint Employment.


36 Ross & Liss, The Labor Contractor System in Agriculture at 1034.

37 Farm Labor Contractor Registration Act Amendments of 1973: Hearings on H.R. 7597 before the Subcomm. on Agricultural Labor of the House Comm. on Education and Labor, 93d Cong., 1st Sess. 88 (1973) (statement of Rep. Lehman). Edward Tuddenham, The False Promise of Legalized Immigration in Agriculture, in 8 In Defense of the Alien 37, 40 (Lydio Tomasi ed. 1985), displays a puzzling attachment to keeping only the bathwater when he expresses dismay at the possibility that state-organized labor-import programs might disrupt the crew leader system. A recent study prepared for the DOL, which assumes that it is neither economically nor politically feasible to revamp agricultural labor relations, recommends intensifying and improving labor contracting: "Farm labor policy based on the romantic concept of the special relationship between the small family farmer and his or her 'hired hands' has served to reify the mythology that labor contractors and crewleaders are 'destined' or
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Decasualizing the Labor Market. The same central authority that restricts the supply of labor to agriculture should also register and regulate the hiring process. A combination of public employment services, labor organizations, and agricultural employer associations should assume the functions currently performed by crew leaders. If large agricultural associations can recruit harvest workers from Mexico, Jamaica, and other countries through governmental agencies, recruitment could be similarly organized in the United States. To be effective, such recruitment would have to be coupled with the creation of a coordinated interstate employment and referral service imposing on the federal government joint liability for processing job offers the terms of which employers breached. Crucial to such a regime would be an array of substantive guarantees of wages and working and living conditions similar (but superior) to those currently mandated for temporary foreign workers, but shorn of the oppressive controls that intimidate the latter. Of especial significance would be the enforcement of a

inevitably committed to being exploitative manipulators of indentured workers." 1 Kissam & Griffith, Farm Labor Supply Study at 191. The study misconceives the alternative model as crew leaders "interfer[ing] in the direct relationship between workers and employers." Id. at 135. In fact, exploitation by employers and crewleaders complement each other. See supra ch. I § III.


39Under the Wagner-Peyser Act, 29 U.S.C. §§ 49-491 (Supp. 1989) & 20 C.F.R. § 653 (1991), the obligations of the Employment & Training Adm'n and of the U.S. Employment Serv. of DOL are very circumscribed; neither they nor the cooperating state agencies are "guarantors of the accuracy or truthfulness of information contained on job orders submitted by employers." 20 C.F.R. § 653.501(a). As an example of government involvement: in the 1940s, officials of the Employment Service actually accompanied from California to Oregon 200 families whom it had recruited on behalf of farmers. McWilliams, Ill Fares the Land at 360-62.

guaranteed minimum number of hours in order to discipline agricultural employers not to request workers before they are willing to provide them paid employment.\footnote{Employers who request temporary labor certification for temporary foreign workers are required to "guarantee to offer the worker employment for at least three-fourths of the workdays of the total periods during which the work contract" is in effect. 20 C.F.R. § 655.102(b)(6)(i) (1991). For documentation that the DOL actually conspires with sugar companies to evade this requirement, see Staff of House Comm. on Education and Labor, 102d Cong., 1st Sess., Report on the Use of Temporary Foreign Workers in the Florida Sugar Cane Industry 14-15 (Ser. No. 102-J, 1991). The disclosure provision of AWPA, 29 U.S.C. § 1821(a), should also be expanded to include certified payroll data for the employer's previous three seasons showing length of season, average hourly wages, and average weekly hours as well as total acreage and number of hours of employment available for the current season together with the maximum number of workers to be recruited. \textit{See} 1 Kissam & Griffith, Farm Labor Supply Study at 195.}

2. \textit{Raising Wages}

\textit{Increasing the Minimum Wage for Migrants}.\footnote{See Linder, \textit{Farm Workers and the Fair Labor Standards Act} at 1335-36, 1381-82.} So long as the underlying labor supply and demand forces generate the desperation and vulnerability that prevent workers from defending their own working conditions--let alone from acting in concert with others--a state-enforced wage increase would presuppose a continuation of the old paternalistic regime. Until migrants are in a position to enforce their paper rights themselves, such an approach would not differ qualitatively from current practice. Thus the proposed doubling of the agricultural minimum wage--which presumably would attract additional labor market applicants--would have to be accompanied by a reduction in the supply of labor until employers responded by increasing the capital intensity of harvesting. Another necessary flanking measure would be a significantly higher level of enforcement of FLSA and AWPA by a Department of Labor staffed by compliance officers subjectively committed to the eradication at the very least of unlawful exploitation.\footnote{"The best administrative machinery in the world will break down utterly if intrusted to incompetent officials." Standing Comm. on Legal Aid Work, \textit{First Draft Of a Model Statute for Facilitating Enforcement of Wage Claims}, Commentary on § 6, Farmworker Justice News, Spring 1990 (issue devoted to H-2A workers in the Florida sugar cane industry).}
Establishing an Agricultural Wage Board. This specialized wage board for the farm sector would not supplant FLSA, but would create a differentiated scale of wages in excess of the statutory minimum. It could be patterned after the industry committees that Congress created in 1938 in order to phase in the minimum wage under FLSA. A still more appropriate model is Senator LaFollette's proposal to create a board to "bring the essentials of collective bargaining on wages to an industry" in which "[t]he mere protection of labor's right to organize and bargain collectively" would not be able to prevail over entrenched employers "except after a considerable struggle." If local committees are composed of public members in addition to representatives of employees and employers, they would combine the functions of collective bargaining and arbitration. In recommending "fair and reasonable wages for the area and commodities" to the board, the committees would take into consideration: (1) the cost of living; (2) local economic conditions; (3) the value of services rendered; and (4) the wages for work of a comparable character established by collective bargaining or employers who voluntarily maintain fair wage standards.

Applying the Premium Overtime Provision of FLSA. Shortly after enactment of FLSA, which totally excluded agricultural employees, hired farm laborers worked an average of ten hours per day and fifty-seven hours per week. The chief difficulty, according to the DOL, in applying the maximum hours provision lay in "the highly seasonal character of many agricultural operations which must be performed within brief periods of time to avoid serious economic losses...." "On the other hand," the DOL conceded,

there can be no doubt but that many farm laborers work unreasonably long hours which are not justified by the normal demands for labor. The dependence of farm work upon natural conditions is generally limited to certain parts of the year.... The working hours of some farm workers probably reflect in part the


§§ 5 & 8, 52 Stat. at 1062, 1064.


For an extended argument that the exclusion of farm workers from the overtime provision of FLSA is unconstitutional because Congress intended to discriminate against nonwhite workers, see Linder, *Farm Workers and the Fair Labor Standards Act.*
same economic disadvantages and weaknesses in bargaining position as is sometimes the case with industrial workers.

It then asserted "that the hours requirements of the present Act could not be applied to agriculture. Different hours requirements would have to be devised for farm workers and...would have to be sufficiently flexible and provide adequate latitude in hours exemptions during seasonal operations." Why the DOL considered such an amended provision necessary is puzzling in light of the fact that the original FLSA then in effect already contained precisely such a provision. Even if such seasonality exemptions applied, the DOL argued that:

Since a very large proportion of the workers on large scale farms are employed only during seasonal operations, the benefits of hours limitations would not extend to them. It is quite probable that the benefits from reasonably flexible hours standards would accrue to a minority of farm workers and then only to a part of their employment period.

There is, however, nothing specific to agriculture about these claims. First, such considerations did not deter Congress from exempting other similarly situated seasonal employees. Second, such a restrictive application of the overtime provision would have been a financial boon rather than a burden to the affected farmers. And finally and most importantly, as one senator explained at the original hearings: "Of course, our purpose is to put on more help and absorb some of the unemployed by shortening the hours." In other words, even if agricultural employees had been neither completely nor partially (that is, seasonally) exempt, and even if those already employed had been deprived of all work in excess of forty-four hours per week because farmers preferred hiring additional employees in order to avoid paying statutory overtime compensation, they would still have been in no worse situation than covered industrial em-

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48 § 7(b)(3), 52 Stat. at 1063. See also § 7(c) (similar exemptions for cotton ginning, canning, etc.).

49 *National Farm Labor Problem* at 1031.

50 *FLSA Hearings* at 1104 (remarks of Sen. Lee).
ployees: "In a period of widespread unemployment and small profits, the economy inherent in avoiding extra pay was expected [by Congress] to have an appreciable effect in [sic] the distribution of available work."\(^{51}\) And with more than 300,000 unemployed experienced farm laborers still seeking work as late as 1940,\(^{52}\) there would have been no shortage of labor forthcoming—at the minimum wage.

Opponents of the extension of the maximum hours provision of FLSA to farm workers continue to advance the argument that in agriculture "encouraging peak seasonal employment expansion through an overtime penalty wage may be detrimental to maximizing the seasonal earnings of already employed short-term workers" if employers hire additional workers to offset wage rate increases resulting from the premium overtime rate. The argument has not improved with age.\(^{53}\) The vast amount of unemployment and underemployment among migrants means that more than an additional 100,000 workers would be required to perform the work in excess of forty hours performed by workers subject to the minimum wage provision of FLSA. Consequently, overtime coverage of farm workers would promote the original purpose of the premium penalty—encouraging employers to hire additional workers—without burdening farmers financially.\(^{54}\) For all these reasons it is under-

\(^{51}\) Overnight Motor Transportation Co. v. Missel, 316 U.S. 572, 578 (1942).


\(^{53}\) 1 REPORT OF THE MINIMUM WAGE STUDY COMM’N 107, 118, 127 (1981). See also 1 HARRY KANTOR, PROBLEMS INVOLVED IN APPLYING A FEDERAL MINIMUM WAGE TO AGRICULTURAL WORKERS 202 (DOL 1959). The argument becomes even weaker when is coupled with a conflicting (as well as unsubstantiated and misleading) claim: "Since most of the hours worked in excess of 40 were worked by year round employees it is very likely that compensatory short workdays prevail during slack seasons." Conrad Fritsch, Exemptions from the Fair Labor Standards Act: Agriculture, Agricultural Services and Related Industries, 4 REPORT OF THE MINIMUM WAGE STUDY COMM’N 97, 121 (1981). See also 1 REPORT OF THE MINIMUM WAGE STUDY COMM’N at 127-28.

\(^{54}\) The 100,000 workers would have been the equivalent of an expansion by 15.8 percent of the farm work force subject to the minimum wage provision of FLSA in July 1980. Holt, Elterich, & Burton, Coverage and Exemption of Agricultural Employment under the Fair Labor Standards Act at 456; and calculated according to data in id., tab. 8.6 at 459. Even if no additional workers had been hired and the overtime premium had been paid for all overtime hours, the total weekly farm payroll (during the week in July, 1980 when the Minimum Wage Study Comm’n study was conducted)
standable that even the Secretary of Labor in the Eisenhower administration supported some form of statutory overtime payment for farm workers.\footnote{An Interview with Secretary Mitchell, The Reporter, Jan. 22, 1959, at 20. H.R. 10948, 91st Cong., 1st Sess. § 5(b)(6) (1970), would have repealed the agricultural overtime exclusion.}

One economic justification for penalty wages is that they bring employers' marginal private costs in line with the full marginal social costs of working overtime.\footnote{Ronald Ehrenberg & Paul Schumann, The Overtime Pay Provisions of the Fair Labor Standards Act, in The Economics of Legal Minimum Wages 264, 265-66, 287-88 (Simon Rottenberg ed. 1981); To Revise the Overtime Compensation Requirements of the Fair Labor Standards Act of 1938: Hearings Before the Subcomm. on Labor Standards of the House Comm. on Labor & Education, 96th Cong., 1st Sess. 189 (1979) (prepared statement of David Gordon).} This step toward greater market rationality nevertheless represents a codification of capitalist time management to the extent that workers accept the fundamental premise that money can compensate (for) all detriments. But just as monetarily internalizing externalities in the environment proves inadequate beyond the point of irreversibly damage to nature, so too in the case of human beings. For this reason restoration of the outright prohibitions of overtime enacted by the states before the New Deal should be considered.\footnote{See generally, ELMAR ALTVATER, DIE ZUKUNFT DES MARKTES: EIN ESSAY ÜBER DIE REGULATION VON GELD UND NATUR NACH DEM SCHEITERN DES "REAL EXISTIERENDEN SOZIALISMUS" (1991). Such laws were restricted to women and children; where adult men were covered, the purpose was to protect not them but the public, which was harmed by the consequences of their fatigue. The major exception was a very radical statute in Alaska, which prohibited even self-employed from working more than eight hours per day; it was promptly held unconstitutional. 1917 Alaska Sess. Laws ch. 55; United States v. Northern Commercial Co., 6 Alaska 94 (1918).}

Finally, in a related area, the provision in the Portal-to-Portal Act that relieves employers of FLSA liability for travel to and from the place of employment should, at the very least, be amended to exempt farm workers who are transported by their employers. Although it is true that Congress enacted this provision in a broad and vindictive spirit to teach unions of highly paid workers a lesson, because farm workers were wholly excluded from FLSA at the time, the legislature never contemplated the hardship that the Portal-to-
Portal Act has come to license. It defies belief that even a significant minority of the electorate, if confronted with the fact, would approve of employers who "haul" subminimum-wage workers as many as six hours daily without any compensation because they refuse to provide housing at the remote locations at which they insist on growing crops.58 A precedent for the proposed reform is Representative Mikva's Day Laborer Protection Act of 1971, which would have included as compensable hours worked under FLSA all "travel time between the job site and the temporary help service...and one-half the time spent awaiting assignment at the temporary help service prior to being sent to a job site."59 Since farm workers are typically hired on a day-to-day basis through intermediaries, that bill's intended remedies would also fit their situation.

Eliminating the Exclusion of Employees of Small Farm Employers from FLSA. The economic situation of farm workers is well captured by the fact that, despite the manifest inadequacy of the minimum wage as a living wage, sixty-two per cent of nonsupervisory employees in agriculture are statutorily excluded from even this meager level of protection. This degree of exclusion is almost five times higher than that for the civilian labor force as a whole and even twice as high as that for private household employees.60

In advising Congress as to an appropriate cut-off point for coverage in terms of farm size,61 the DOL took the position that it was unnecessary to impose the minimum wage on small farmers. Instead, it suggested that it would be "preferable to bring the wages paid by the smaller users of farm labor into closer relationship with wages paid by those subject to the law through market pressure on wage-offers...."62 In the event, more than a quarter-century after this

58 29 U.S.C. § 254(a)(1); Linder, Class Struggle at the Door, supra ch. 1 § I.
61 See, e.g., DOL, HIRED FARM WORKERS: A STUDY TO EVALUATE THE FEASIBILITY OF EXTENDING THE MINIMUM WAGE UNDER THE FAIR LABOR STANDARDS ACT 35 (1966) (estimating that covering two per cent of farms—a total of 67,000—employing at least 300 man-days of labor in the peak quarter would afford the minimum wage to fifty-two percent of farm workers).
62 1 KANTOR, PROBLEMS INVOLVED IN APPLYING A FEDERAL MINIMUM WAGE TO AGRICULTURAL WORKERS at 116-17.
partial incorporation of agriculture, this hope has not been realized: the reserves of underemployed laborers are so enormous that many uncovered farms are under no pressure to pay the minimum wage in order to secure workers.

Most farm workers are excluded from FLSA by virtue of working for a family farm—that is, "an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor."\(^\text{63}\) The 500 person-day standard, however, is a poor surrogate definition of the family farm as one "operated by the farm family as a way of life, rather than primarily for profit...."\(^\text{64}\) In an extreme case, an exempt farmer who employed exactly 500 person-days of labor during each quarter of the year and himself worked 300 days per year, would be performing only thirteen per cent of the total labor on the farm. A more relevant definition of a farm family—but still within the logic of agricultural exceptionalism--entitled to exploit its hired laborers as intensively as it does itself would require the family to perform at least one-half of all the labor performed on the farm.\(^\text{65}\) Such a

\(^{63}\) 29 U.S.C. § 213(a)(6)(A) (Supp. 1991). The Minimum Wage Study Comm’n recommended that the threshold be reduced to 300 man-days. 1 REPORT OF THE MINIMUM WAGE STUDY COMM’N at 126. This coverage was proposed as early as 1949. Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Comm. on Education and Labor, 81st Cong., 1st Sess. 9 (1949) (H.R. 2033). Although out of context this provision may seem to afford even the largest agricultural employer a start-up year free of FLSA liability, the legislative history shows that the only purpose of using the previous year’s employment record was to enable the employer to "know before each quarter begins whether he will be required to pay the minimum wage.” DOL, ANNUAL REPORT FISCAL YEAR 1948, at 145 (1949). Therefore as soon as a large employer in its first quarter of operation crosses the person-day threshold, its employees should be covered. Similarly lacking any justification are the exclusions of seasonal-commuter and child hand-harvest piece-rate workers. 29 U.S.C. § 213(a)(6)(C) and (D) (Supp. 1991). The Minimum Wage Study Comm’n supported elimination of both of these exclusions. 1 REPORT OF THE MINIMUM WAGE STUDY COMM’N at 126.

\(^{64}\) DOL, ANNUAL REPORT FISCAL YEAR 1948 at 138. Fruit and vegetable farms can be quite large. In 1987, the last year for which census data are available, 2.5 per cent of all vegetable and 1.6 per cent of all fruit farms sold products valued at more $1,000,000 compared with only 0.5% of all types of farms. Calculated according to data in 1 BOC, 1987 CENSUS OF AGRICULTURE: GEOGRAPHIC AREA SERIES, pt. 51: UNITED STATES tab. 52 at 104 (1989). Forty-three vegetable farms and 51 fruit farms accounted for ten per cent of all sales of such farms in 1987. Calculated according to data in id., tab. 47 at 43.

\(^{65}\) Luther Tweeten, Has the Family Farm Been Unjustly Treated? in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM? 212 (Gary Comstock ed. 1987), defines a family farm as one on which the operator and family provide more than half
standard would create a sliding scale: larger working farm families would be permitted to exploit correspondingly larger numbers of workers. To alleviate the economic pressures on family farm employers, the state could adopt measures to encourage collective action among farm families to place limits on self-exploitation.66

But even this rationalized version of exceptionalism can lay no claim to moral or economic justification. If a farm family is unable or unwilling to conduct its business through self-exploitation and chooses to hire others to perform the extraordinarily unpleasant work of weeding its cotton or harvesting its onions, asparagus, or apples, it has ceased to be a family farm and should be subject to the general societal limitations on the exploitation of others' labor.67

There is no legitimate reason for compelling the poorest stratum of workers in the United States to subsidize smaller farmers by working for subminimum wages. If the original justification for the exemption was grounded in the claim that many workers on small farms were themselves local farmers or future farmers who, "[t]o a certain extent...are protected from exploitation by community feeling," it is obviously irrelevant to migrants.68 If such farmers are unable to pay standard wages while retaining enough income to provide a livelihood for themselves, the basic principle of national wage regulation dictates that they be replaced by larger and more efficient producers who can afford such wages.69 Moreover, the fact that, for example, the Texas Minimum Wage Act, which until 1987 imposed an hourly wage of only $1.40 and was so ridden with exclusions and loopholes that it covered scarcely any farm workers, now includes virtually all migrant and seasonal farm workers at the federal level.67


67"The idea of a family farm is jeopardized by supposing that the farm family might be simply the guardians...of crops...harvested by seasonal workers." Wendell Berry, A Defense of the Family Farm, in IS THERE A MORAL OBLIGATION TO SAVE THE FAMILY FARM? at 347, 348. Sue Headlee, The Political Economy of the Family Farm: THE AGRARIAN ROOTS OF AMERICAN CAPITALISM 46 (1991), fails to explain why a family farm hiring large numbers of harvesters does not become a "business farm."

68DOL, ANNUAL REPORT FISCAL YEAR 1948 at 138.

69"Without a minimum wage in agriculture, the continuing existence of a large labor surplus provides disincentives for utilizing farm workers at higher levels of productivity." 1 Kantor, PROBLEMS INVOLVED IN APPLYING A FEDERAL MINIMUM WAGE TO AGRICULTURAL WORKERS at viii-ix.
minimum wage, suggests that universal coverage does not bring about the immediate demise of small farmers.70

3. Suppressing Atavistic Lawlessness

Criminalizing Theft of Labor. Failure to pay migrants their wages at the time they are due should be recognized as the criminal act it is: theft of labor. To be sure, the Model Penal Code inaugurated a wave of enactments criminalizing such acts in the 1960s. Experience indicates, however, that local police and prosecutors take shoplifting considerably more seriously than laborlifting.71 Although FLSA provides for imprisonment (for not more than six months) of employers who have previously been convicted of violating the minimum wage, overtime, or child labor provision of the Act, these

70TEX. REV. CIV. STAT. ANN. art. 5159d § 6 (Vernon Supp. 1991). Precisely the same considerations apply to the partial and total exclusions of farm workers from unemployment compensation and workers' compensation systems. Migrants also receive few or no private benefits. Although L. Dunn, Nonpecuniary Job Preferences and Welfare Losses among Migrant Agricultural Workers, 67 AM. J. AGRIC. ECON. 257 (1985), has shown empirically that the monetary value that migrants attach to certain benefits--such as water and toilet facilities and an on-site nurse--exceeds the cost to employers of providing them, he does not resolve the question as to whether the existence of a rigid mandatory minimum wage prevents migrants from trading off monetary wages for such benefits. Dunn also fails to explain how a migrant earning merely the minimum wage could afford such trade-offs. Finally, Dunn does not reveal the basis of his calculation that providing "nonarbitrary and impartial work rules" would cost an employer only twenty-one cents per worker per season. Id. at 260, tab. 1 at 261.

71MODEL PENAL CODE § 223.7 (1980). The American Law Institute, in motivating this innovation in Anglo-American law, specifically mentioned only doctors, engineers, and (of course) lawyers as persons whose services consumers had previously been able to obtain without paying with impunity. MODEL PENAL CODE § 206.7 comment at 91 (Tent. Draft No. 2, 1954). The wording of the provision, however, which stresses an intent to obtain services by deception, creates a possible loophole for employers who may brazenly assert that at the time of obtaining the services, they had every intention of paying, but later decided not to pay. E.g., TEX. REV. CIV. STAT. ANN. art. 5155 § 5A (Vernon Supp. 1992). Recourse to this gap may be foreclosed by MODEL PENAL CODE § 223.7(1): "Where compensation for services is ordinarily paid immediately upon the rendering of such services, as in the case of hotels and restaurants, refusal to pay or absconding without payment or offer to pay gives rise to a presumption that the service was obtained by deception as to intention to pay." As an example of state adoption, see IOWA CODE § 714.1(3) (1991). At one time the attorney general of New Jersey supported "more jail terms for those convicted of running sweatshops and exploiting migrant farm help." Pat Read, Attorney General Battles Obscurity, N.Y. Times, Aug. 2, 1981, § 11 at 1, col. 5 (NEXIS).
sanctions are "rarely used."

Both the criminal sanctions of FLSA and state theft of labor statutes should be strengthened and vigorously enforced. If a social prejudice is created against this form of economic crime, the increased probability of being caught and the increased penalty incurred will force employers to rethink the calculus of noncompliance.

Probationary Pre-Payment of Minimum Wages. In the normal case, employees give their employers an interest-free "credit...before receiving pay for work done." This sequence of withholding payment until services or goods have been provided has traditionally been justified on the ground that the employer is a better credit risk than his employees. But the same high jurisprudential authority also offered a remarkable variant explanation:

No doubt this custom arose because of the superior economic position of the employers—the "masters". [T]he risk of giving something for nothing...will usually be borne by the one whose needs are the greater. [I]t is superior economic position that makes wage-earning possible. Superior economic position is often resented by others. They may take steps to destroy it, either by violence or by votes. ... It is possible that the contrary system of payment, the system of paying wages before work done, would work, and that men could survive and prosper under it. [B]ut the wage-earner would probably be described as the "master". It seems reasonably clear...that there would then be no "employer" for the reason that his master would leave him nothing with which to pay. Attempts to bring about such a situation are merely attempts by servants to exchange position and become the masters.


74 Karl Marx, Questionnaire for Workers, in 1:25 Marx [&] Engels, Gesamtausgabe (MEGA) 202 (1985 [1880]).

75 See, e.g., 3A Arthur Corbin, Corbin on Contracts § 676 (1960). The other monumental contracts treatise adduced as further reasons "the normally greater responsibility of the employer and the fact that recalcitrant employee cannot be made to perform specifically..." 3 Samuel Williston, A Treatise on the Law of Contracts § 830 at 2323 (rev. ed. 1936 [1920]).
The reversal of the conditionality and unconditionality of promises to pay and to perform advocated here does not aim at an inversion of labor and capital. Rather, it proposes to remedy the consequences of the dire necessity that undergirds the massive and incorrigible wage-theft committed by employers of migrants. FLSA and AWPA should, therefore, be amended to require any employer that has previously been found by the DOL or a court to have failed to pay wages in a timely fashion to migrants to pay its workers, for a period of one year, the minimum wage for forty hours in advance. After one year's compliance, the employer would be permitted to resume the normal procedure. Relevant precedent for such an approach comes from a recent enactment in California authorizing employees to seek a temporary restraining order to prevent an employer from doing business in the state who twice within the previous ten years has been convicted of violating the state wage payment law or failed to pay a wage claim judgment until the employer posts a bond of the greater of $25,000 or twenty-five per cent of the weekly gross payroll. If employers object to such intervention, a more streamlined procedure would authorize migrants, like hotels, before beginning performance, to make an imprint of their employer's credit card (a 'master' card) in case he decides to abscond. In the alternative, legislatures could confer upon migrants the same police, prosecutory, and judicial powers that they have bestowed upon store owners "to extract payments and fines from thieves they catch in the act."

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77 Even Marx, who nurtured a very expansive view of individual capitalists' cupidity, demonstrated the very real nature of the workers' advances to their employers by reference not to outright fraud but to the consequences of crises and bankruptcies. Karl Marx, *Das Kapital* (Ökonornisches Manuskript 1863-1865), in 1:4 text pt. 1 MARX [&] ENGELS, GESAMTAUSGABE (MEGA) 6-7 (1988).

78 This proposal tracks the proposed regulations published by the DOL to implement the 1989 amendments to FLSA mandating a civil penalty (not to exceed $1,000) for an employer "who repeatedly or willfully violates" the minimum wage or overtime provision of the Act. 29 U.S.C. § 216(e) (Supp. 1991); 56 Fed. Reg. 25,168 (1991) (to be codified at 29 C.F.R. § 578.3(b)(1)) (proposed May 23, 1991). FLSA should also be amended to authorize worker-plaintiffs (in addition to the Secretary of Labor) to seek injunctions enjoining the sale of goods produced in violation of the Act. 29 U.S.C. §§ 211(a), 215(a)(1), 217; Lorillard v. Pons, 434 U.S. 575, 581 (1978); Roberg v. Henry Phipps Estate, 156 F.2d 958 (2d Cir. 1946).


In response to the objection that, where an employee leaves before having performed, an employer would be without a real remedy since workers are judgment proof, Justice Holmes observed: "The objection that this remedy is practically worthless is...no less true, although for different reasons, if the workman's wages should be detained unjustly." In other words, such workers' poverty structurally preordains that regardless of whether the performer or the payor breaches, one party will be unable to recover--the employer because the worker is judgment proof or the employee because he cannot afford to litigate. Given the inevitable lack of a remedy for some party, as between the class with a documented history of breach and the class of perpetual hard-working victims, no justification is available for not shifting a merely speculative burden to the offending class.

**Voiding Unconscionable Contracts: Judicial Restitution of Unjust Enrichment.** For migrants not covered by a minimum wage law one possible avenue of redress would be to sue employers on the ground that their contracts are unconscionable. Virtually all states have enacted the Uniform Commercial Code, which authorizes judges to deny enforcement to a contract that they determine to have been "unconscionable at the time it was made." The provision is designed to enable courts "to police explicitly against" unconscionable contracts using as a touchstone "whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses...are so one-sided as to be unconscionable...." In addition, the Restatement of Contracts, which is generally applicable to all contracts, has adopted the same provision.

The problem with this existing remedy is that courts have granted it almost exclusively to rescind contracts on behalf of buyers

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83 RESTATEMENT (SECOND) OF CONTRACTS § 208 (1981). Although the UCC does not cover employment contracts, it has been applied by analogy to other transactions. DAN DOBBS, HANDBOOK ON THE LAW OF REMEDIES 712-13 (1973). California has enacted the same provision as part of its Civil Code applicable to all contracts. CAL. CIV. CODE § 1670.5 (West 1985); Cubic Corp. v. Marty, 185 Cal. App. 3d 438, 229 Cal. Rptr. 828 (1986).
who wanted to relieve themselves of excessively onerous payments. What an underpaid migrant wants, however, is a judgment by a court substituting a more appropriate level of compensation for the actual wage, which is found to be "disproportionate" to the value of the performance received by the employer. In Germany, the law has conceptualized this problem of so-called hunger or starvation wages by invalidating such labor contracts as violations of public policy. The German Civil Code deems void any transaction by which one person "through exploitation" of the other's "distressed situation, inexperience, lack of judgmental ability, or gross weakness of will" receives an economic advantage "conspicuously disproportionate to the performance." Where both these subjective and objective elements are present, German courts have awarded higher wages based on prevailing wages--even where the contracts were already fully executed on both sides. Thus in one case the court increased the piece-rate wage to a seamstress on the grounds that the actual wage was so far below an "appropriate wage" that only the fear of not being able to obtain any work or her inability to recognize the disproportion between performance and compensation could have motivated her to agree to such a wage. Several Anglo-American contract doctrines are also available to achieve such results. Although superior bargaining power alone

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84E.g., Williams v. Walker-Thomas Furniture Co., 350 F.2d 445 (D.C. Cir. 1965) (welfare mother who bought various items on installment plan subject to very unfavorable cross-collateral conditions). But see Gianni Sport Ltd. v. Gantos, Inc., 151 Mich. App. 598, 391 N.W.2d 760 (1986) (manufacturer successfully sued retailer alleging unconscionable cancellation clause); Vockner v. Erickson, 712 P.2d 379 (Alaska 1986) (agreement under which seventy-three year-old seller of boarding house would not have received full payment for thirty years was unconscionable and reformed by court).

85See [Heinz] Potthoff, Programm eines Reichsarbeitsgesetzes, 13 DEUTSCHE JURISTEN-ZEITUNG 1302, 1304 (1908) (de lege ferenda).

86BGB § 138(2). Until 1976 the three categories were "necessity, lightheadedness, and inexperience."

87See 2 WOLFGANG DÄUBLER, DAS ARBEITSRECHT 233-34 (1979); BGB §§ 612, 812, 826. For criticism of judicial reformation of hunger wages as a preemption of a legislated minimum wage, see Paul Oertmann, Hungerlöhne und Arbeitsvertrag, 18 DEUTSCHE JURISTEN-ZEITUNG 254 (1913).

8816 DEUTSCHE JURISTEN-ZEITUNG 768 (1911) (Gewerbegericht Berlin, Feb. 27, 1911). See also 25 Arbeitserhebungsammlung 185, RAG 75/35, No. 33, Oct. 23, 1935 (higher, appropriate, prevailing piece rate awarded to shirt-maker outworker—who was herself a sweatshop employer—subject to extreme exploitation by unjustly enriched employer).
may not constitute oppression, when coupled with an extraordinarily harsh wage term and ignorance and hardship on the part of the weaker party, unconscionability may result. The following considerations support, \textit{mutatis mutandis}, such a conclusion for weak sellers of labor:

If there is a market, normally available, but unavailable to a buyer because of his ignorance, or because he lives in a ghetto and cannot normally be expected to reach it,..., then if the seller extracts a higher-than-market price for his goods, the inequality of the exchange can be demonstrated.89

Courts should therefore adopt a presumption that where the going wage is at least the minimum wage, cognizable duress has coerced migrants who perform the same labor as others to work for less. Since the procedural and substantive aspects of unconscionability are present, the contract should be voided. In its place, courts should order the unjustly enriched employer to disgorge his unconscionably obtained gains to the employee in the form of the difference between the actual wage and the going wage.90

4. \textit{Amending the National Labor Relations Act to Include Farm Workers}

The history of farm labor organizing in the United States strongly suggests that migrants cannot achieve organizational parity with their employers exclusively on economic terrain; larger political forces must be galvanized to force agricultural employers to recog-

\textsuperscript{89} \textsc{Dobbs, Law of Remedies} at 711.

\textsuperscript{90}The procedural and substantive elements in American law correspond to the German subjective and objective aspects. As articulated by the leading labor law scholar in Weimar, Nazi, and postwar Germany, subminimum migrant wages would satisfy both. Alfred Hueck sees "necessity" as given where workers are compelled to sell their labor power in order to support their families under conditions of depression and high unemployment; by the same token, a "conspicuous disproportion" between wages and performance is present where the former does not constitute a living wage. 1 \textsc{Alfred Hueck & H. Nipperdey, Lehrbuch des Arbeitbrechts} 129 (2d ed. 1928). For an overview of the American contract remedies doctrines, see \textsc{John Calamari & Joseph Perillo, The Law of Contracts} 337-38, 648-49 (3d ed. 1987). In the alternative, the contract "could be reformed to meet minimal standards of conscionability." \textsc{Dobbs, Law of Remedies} at 707. See also Uniform Rev. Sales Act, § 23 (proposed final draft no. 1, 1944).
nize unions and to negotiate with them. The fact, for example, that farm workers have to strike to enforce their already existing statutory right to receive the minimum wage underscores the unique lopsidedness of bargaining power. Farmers' opposition to unions and the exclusion of farm workers from the NLRA are particularly ironic in light of the fact that because Congress believed that few farmers as individuals "had sufficient economic power" to outwait processors and distributors, the Capper-Volstead Act has since 1922 exempted from the antitrust laws "comparatively helpless" farmers who join in cooperatives in order to avoid being "forced to bring [their] harvest to market at an unfavorable time."

In order to create support for unionization, leading public officials and politicians would have to enunciate a public bias in favor of farm worker organizing. A campaign orchestrated by the federal and state governments (and existing unions) to encourage unionization would have to be an integral part of such mobilization. The NLRA would also have to be amended to accommodate the need for quick elections, union access to employers' property, and secondary boycotts as has been done under the California Agricultural Labor Relations Act.

In the alternative, states should enact their own Agricultural Labor Relations Act. A further possibility is a "self-executing" state

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constitutional provision, such as the one in New Jersey, guaranteeing "[p]ersons in private employment...the right to organize and bargain collectively." Within such a framework, state courts can, like the National Labor Relations Board, order recalcitrant agricultural employers to bargain collectively with unions and to reinstate and to make back pay awards to migrants who have been discriminatorily discharged for seeking to vindicate such constitutional rights.\textsuperscript{96} As a transitional measure, industry-wide wage advisory committees for hand-harvest agriculture could be reintroduced under FLSA, the representative character of which would "give[] both to employers and workers some experience and some realistic education in the technique of collective bargaining."\textsuperscript{97}

5. Socio-Technological Transformation of Agricultural Production and Land Tenure

Large-scale, mechanized, chemical-dependent farming has brought about an ecological catastrophe for the stock of arable farm­land and injected intolerable levels of poisons into the nutritional base. Several purposes would be served by restructuring fruit and vegetable production along small-scale, labor and knowledge-intensive, organic lines. A family farm could operate more efficiently--in terms of output per input--on fifty acres of mixed crops than current specialized agribusinesses.\textsuperscript{98} Since such a regime would require approximately the same land base, many more farmers, and vastly fewer wage workers, the new pattern of rural land use would create the possibility of reinstating some proportion


\textsuperscript{97} \textit{FLSA Hearings} at 180 (testimony of Frances Perkins, Sec'y of Labor).

of farm workers as organic farmers. Even the much more modest proposal of crop diversification on the same farm or in the same location with staggered harvests would promote decasualization of farm labor by enabling a smaller group of resident workers to work for much longer periods of time.

6. What If They Gave a Harvest and No One Came? Towards a Guaranteed Income

The foregoing weak super-paternalistic proposals are designed to improve the conditions of exchange for migrants by remedying the defects of their labor market. The root cause on the supply side is migrants' extraordinary poverty, which compels them to acquiesce in wages and working conditions that no other segment of the working class in the United States would tolerate. This ever-present politically constructed reserve army, in turn, offers little incentive to agricultural firms to adopt less labor-intensive methods of production.

If the international division of labor precludes achieving the goal of full employment in a work-for-profit context, migrants may be the vanguard of a growing sector of would-be workers the market value of whose labor is insufficient to sustain a societally acknowledged minimal family standard of living. Without independent access either to the means of production or to the necessities of life, this group must be alimented in one way or another. Both the right and the left have suggested how purchasing power might be

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99 The experiments that the Farm Security Administration conducted in the 1930s and 1940s in creating large-scale cooperative farms for migrant families are one model. See U.S. FARM SECURITY ADM'N, CASA GRANDE FARMS (March 10, 1941); idem, HISTORY OF THE FARM SECURITY ADMINISTRATION 6 (rev. ed. Oct. 21, 1941); McWILLIAMS, ILL. FARES THE LAND at 370-71. For a pessimistic psychological explanation of the failure of the largest cooperative, see EDWARD BANFIELD, GOVERNMENT PROJECT (1951).

100 See HARRY SCHWARTZ, SEASONAL FARM LABOR IN THE UNITED STATES 150 (1945); Robert Glover, Unstructured Labor Markets and Alternative Labor Market Forms at 270-76. But see John Mamer & Varden Fuller, Labor and the Economic Factors in Fruit and Vegetable Mechanization, AGRIC. SCI. REV., 4th Q. 1965, at 1, 2 (such restructuring leads to "foregoing most of the advantages of specialization that are based on the unique soil and thermal characteristics").

101 A migrant is the archetypical "very poor labourer" whose lack of a "reservation of price" creates "a Hobson's choice in the fullest sense." WILLIAM THORNTON, ON LABOUR 69, 71, 78 (1869).
transferred to such contingent members of the working class—the one to buttress the remaining for-profit market system, the other to signal that system's demise and the emergence of a new principle of social organization. As the problems inherent in linking income to employment become increasingly intractable for migrants and similarly situated strata, a political decision may have to be made to transcend traditional paternalism.102

One way to break out of the self-reinforcing circle of migrant poverty is to create a higher floor of income security through a guaranteed basic annual income (fixed at the equivalent of a minimum wage higher than its current level), which would provide migrants with the economic wherewithal to resist working for sweatshop employers. Another is for the government to provide socially useful work at wages in excess of the minimum to all those willing to work. Such a program would make minimum wage laws superfluous (and eliminate their coverage and enforcement problems) by exerting labor market rather than legal pressure on agricultural employers to compete for workers by offering higher wages.103

For migrants a unique transitional solution lies closer to hand. Just as other societies have created early-retirement pensions for workers, such as underground miners, who are deemed to have borne an undue share of the social costs of production, the United States should establish generous occupational pensions and free housing for all migrant farm workers after twenty years of work. The pensions could be financed through a special tax on producers


103 See Guy Standing, The "British Experiment": Structural Adjustment or Accelerated Decline? in THE INFORMAL ECONOMY: STUDIES IN ADVANCED AND LESS DEVELOPED COUNTRIES 279, 295-96 (Alejandro Portes, Manuel Castells, & Lauren Benton ed. 1989); Esping-Andersen, Politics Against Markets at 31, 148; Hyman Minsky, The Role of Employment Policy, in POVERTY IN AMERICA 175, 196 (Margaret Gordon ed. 1965); idem, STABILIZING AN UNSTABLE ECONOMY 308-10 (1986). Adapting the unemployment insurance system to the needs of migrants would be a second-best solution. See 1 Kissam & Griffith, FARM LABOR SUPPLY STUDY at 182-83.
and current consumers of the products harvested and cultivated by migrants as well as through general tax revenues. In this way society at large might at last acknowledge its debt to those whose unnecessarily hard lives have made possible thoughtlessly plentiful diets for others.  

Covered workers could be defined as those having earned at least half of their income from seasonal agricultural labor during any twenty years. Provision would have to be made for alternative documentation for those workers whose employers failed to keep proper wage records. Russell Williams, a California farm representative and commissioner on the Commission on Agricultural Workers, has proposed for discussion a national retail food sales tax to support migrant assistance programs. Comm'n on Agricultural Workers, Hearings 330 (Grand Rapids, Mich., June 25, 1991).
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