Beyond Discriminatory Intent: Agriculture, Labor Rights, and the Shortcomings of Equal Protection Doctrine

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The National Labor Relations Act provides labor protections for millions of workers. The existing exemption for agricultural workers, however, leaves a crucial category of workers vulnerable because they lack federal protection to form unions and collectively bargain with their employers. Implemented in 1935, the exemption created a severe disparate impact for farm workers, most of whom are Latinx. This lack of labor rights robs agricultural workers of important tools to increase wages and improve working conditions and benefits.

In the past, plaintiffs have attempted to challenge the exemption on equal protection grounds, but these challenges have failed—in large part because there is no direct evidence of Congress' intent to discriminate against Latinx workers, despite the exemption's disproportionate harm. This Note presents a theoretical framework for assessing equal protection claims challenging laws that have a prolonged and severe disparate impact, a framework which, unlike current equal protection doctrine, does not require plaintiffs prove discriminatory intent. The intention in creating this new framework is to make it easier for plaintiffs to challenge longstanding laws that continue to have a harmful disparate impact on minorities, even in cases where it is difficult or impossible to prove that Congress harbored discriminatory intent when it passed the law. This Note explains the elements of the theoretical framework and applies it to the NLRA agricultural exemption.

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INTRODUCTION

Unsafe working conditions in the United States attracted newfound national attention during the COVID-19 pandemic. Throughout the spring of 2020, major news outlets consistently reported on virus outbreaks in workplaces and about employees who were fired after advocating for safer conditions.[1] Many commentators noted the disconnect between classifying workers as "essential" while denying them crucial safety measures like personal protective equipment or refusing to pay them the minimum wage.[2] COVID-19's spread exacerbated already-existing inequities, but also brought increased attention to the struggles of essential workers that predated the pandemic.

As infection rates skyrocketed in communities of color, another long-standing issue suddenly became front-page news: the fact that race and labor in the United States are inextricably linked.[3]

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1. *See, e.g.*, Jack Healy, *Workers Fearful of the Coronavirus Are Getting Fired and Losing Their Benefits*, N.Y. TIMES (June 4, 2020), https://www.nytimes.com/2020/06/04/us/virus-unemployment-fired.html [https://perma.cc/2WHJ-CQHT] (reporting on workers across the United States who lost their jobs or were reported to have their unemployment benefits cut due to reticence to work in pandemic conditions.); Faiz Siddiqui, *Tesla Gave Workers Permission to Stay Home Rather Than Risk Getting Covid-19. Then it Sent Termination Notices*, WASH. POST (June 25, 2020) https://www.washingtonpost.com/technology/2020/06/25/tesla-plant-firings/ [https://perma.cc/QUX6-BZ6T] (noting that two Tesla factory workers claimed they were fired for failing to return to work after they decided to take unpaid leave when the factory reopened in early May 2020).

2. *See, e.g.*, Monica Campbell, *Farmworkers Are Getting Coronavirus. They Face Retaliation for Demanding Safe Conditions*, WORLD (July 29, 2020) https://www.pri.org/stories/2020-07-29/sick-covid-19-farmworkers-face-retaliation-demanding-safe-conditions [https://perma.cc/M8CR-XVMK] (reporting that "essential" workers were forced to work under unsafe pandemic conditions that risked their lives and their ability to do their jobs: management at Primex Farms in Central Valley California did not provide personal protective equipment to workers, did not make masks mandatory for workers, did not offer testing, and required missed shifts due to an outbreak to be counted as vacation days); Vivian Ho, *'Everyone Tested Positive': COVID Devastates Agriculture workers in California's heartland*, GUARDIAN (Aug. 8, 2020) https://www.theguardian.com/us-news/2020/aug/08/california-covid-19-central-valley-essential-workers [perma.cc/TK9E-TJQ2] ("Marielos Cisneros felt that she was being bullied by management after she participated in the strike. She also still didn't feel safe in the facility, so she quit a week ago. She knows that the work they do is essential. She only wishes they were treated as such.").

3. *See, e.g.*, Christian Davenport, Aaron Gregg, and Craig Timberg, *Working From Home Reveals Another Fault Line in America's Racial and Educational Divide*, WASH. POST (Mar. 22, 2020), https://www.washingtonpost.com/business/2020/03/22/working-home-reveals-another-fault-line-americas-racial-educational-divide/ [https://perma.cc/N4JP-HXKT] ("As new communities go into lockdown in hopes of slowing the spread of the virus, the people most at risk for getting sick, because they must venture out, are largely people of color . . . Despite those attempts to limit contact in the workplace, many industries . . .

Rates of both unemployment and COVID-19 infection were disproportionately high among non-white workers.[4]

Although the pandemic uncovered unequal labor conditions, agricultural workers—over 80% of whom are people of color[5]—have been among the most vulnerable workers in the United States for decades:[6] They have the lowest median hourly wage of any industry.[7] Generally, they lack paid sick leave.[8] Many do not have health insurance.[9] Agricultural workers are also predominantly Latinx, and many workers are immigrants from Mexico, Central America, and the Caribbean.[10] Because the workers' minority and immigrant status makes them particularly vulnerable to exploitation through unsafe working conditions and

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remain open, renewing calls to protect workers' health and shield them from the financial fallout of the pandemic.).

4. For example, rates of hospitalization for Black and Latinx people was 2.6 and 2.5 times the rate of infection for white people from March 2020 to November 2021. Rates of hospitalization for Native American people was 3.3 times during the same time period. *See Risk for COVID-19 Infection, Hospitalization, and Death by Race/Ethnicity*, CDC (Nov. 22, 2021), https://www.cdc.gov/coronavirus/2019-ncov/covid-data/investigations-discovery/hospitalization-death-by-race-ethnicity.html [https://perma.cc/XUV2-CBFX].

5. CELINE MCNICHOLAS ET AL., ECON. POL'Y INST., WHY UNIONS ARE GOOD FOR WORKERS–ESPECIALLY IN A CRISIS LIKE COVID-19, 4–5 (Aug. 25, 2020) (comparing peak unemployment rates in April 2020 for Black workers (16.7%) and Hispanic workers (18.5%) with that for white non-Hispanic workers (12.8%); and noting that unemployment rates were even higher among Black women (17.3%) and Hispanic women (20.5%)); *Findings from the National Agricultural Workers Survey 2015–2016: A Demographic and Employment Profile of United States Farmworkers*, DEP'T OF LABOR (Jan. 2018), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf [https://perma.cc/VB2C-5Q2M] (84% of farmworkers self-identified as "Hispanic" or "Latino" and 3% identified as "Black or African American.").

6. *See Migratory Labor Legislation: Hearing on S. 8, S. 195, and S. 198 Before the S. Subcomm. on Migratory Lab. of the Comm. on Lab. & Pub. Welfare*, 90th Cong. 2 (1967) (statement of Sen. Harrison A. Williams, Chairman, S. Subcomm. on Migratory Lab). "The farmworker's economic plight has been aided and abetted by actual Government intervention against his side of the equation; intervention in the form of a host of legislative exclusions and differential treatment in social and economic legislation enacted for the general work force." *Id.*

7. MCNICHOLAS ET AL., ECON. POL'Y INST., *supra* note 5, at 5.

8. Daniel Costa & Philip Martin, *Nine in 10 Farmworkers Could Be Covered by the Paid Leave Provisions of the Families First Coronavirus Response–But Not If Smaller Employers Are Exempted*, ECON. POL'Y INST.: WORKING ECON. BLOG (Mar. 31, 2020), https://www.epi.org/blog/9-in-10-farmworkers-could-be-covered-by-the-paid-leave-provisions-of-the-families-first-coronavirus-response-act-but-not-if-smaller-employers-are-exempted/ [https://perma.cc/2ERU-D7H3].

9. RUQAIIJAH YEARBY, *PROTECTING WORKERS THAT PROVIDE ESSENTIAL SERVICES, in* ASSESSING LEGAL RESPONSES TO COVID-19 193 (Scott Burris et al. eds., Boston: Public Health Law Watch, Aug. 2020), https://ssrn.com/abstract=3675824 [https://perma.cc/BM7R-LC2Q].

10. *Id.*

unfair compensation,[11] federal protection of the right to organize under the National Labor Relations Act (NLRA) would be highly beneficial.[12] But while many American workers in the private sector receive protections from the NLRA, agricultural workers are explicitly excluded from the legislation's ambit.[13]

The NLRA is the primary federal legislation that governs labor relations between employers and employees, protecting the worker's right to organize and advocate without retaliation from employers.[14] The NLRA gives workers the right to collectively bargain, unionize, and, in some circumstances, strike—three key tools for leveraging labor's power to negotiate terms and conditions of employment with employers.[15] During the pandemic, some agricultural workers successfully used these tools to improve their workplace conditions.[16] But exclusion from the NLRA meant that many of these workers would have had no recourse if employers decided to retaliate against attempts to organize or collectively bargain by firing employees or taking other adverse action.

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11. *See* Tiffany Camhi, *Oregon's Undocumented Workers, Left out of Federal Aid, Struggle to Make Ends Meet*, OR. PUB. BROAD. (Oct. 2, 2020), https://www.opb.org/article/2020/10/02/oregons-undocumented-workers-left-out-of-federal-aid-struggle-to-make-ends-meet/ [https://perma.cc/DV7W-3BPH]; Monica Samayoa, *Protecting Workers Exposed to Oregon's Heat Waves and Wildfire Smoke*, OR. PUB. BROAD. (May 17, 2021), https://www.opb.org/article/2021/05/17/oregon-heat-wave-temperatures-wildfire-smoke/ [https://perma.cc/7TS8-CZEJ].

12. "With a union, workers have negotiated additional pay, health and safety measures, paid sick leave, and job preservation" during the coronavirus pandemic. Without unions, many workers are forced to work without personal protective equipment or access to paid leave or premium pay." MCNICHOLAS ET AL., ECON. POL'Y INST., *supra* note 5, at 6–7.

13. The NLRA only covered "employees" as defined in § 152(3) in the act: "The term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer or in the domestic service of any family or person at his home." 29 U.S.C. § 152(3).

14. 29 U.S.C. §§ 151-169 (1935).

15. *Id.* §§ 157, 158, 163. On average, unionized workers earn 11.2% more in wages than their similarly situated, nonunionized peers. Union workers are also more likely to be covered by employer-provided health insurance and have more sick leave. MCNICHOLAS ET AL., ECON. POL'Y INST., *supra* note 5, at 6–7.

16. *See, e.g.*, David Bacon, *Hundreds of Apple Workers on Strike in Washington*, LABORNOTES (May 18, 2020) https://labornotes.org/2020/05/hundreds-apple-workers-strike-washington [https://perma.cc/9PMW-JF97]. Fruit pickers organized a COVID-related strike in Yakima Valley, Washington over lack of protective equipment and demanded employers put in place COVID safety measures. The company eventually signed an agreement as a result of the strikes and labor organizing by Families United for Justice, a union for farmworkers in Washington State. Negotiations subsequently began on multiple issues, including safety equipment. *Id. See also* David Bacon, *Apple Shed Strikes Win Recognition, But the Fight Goes On*, LABORNOTES (June 2, 2020), https://labornotes.org/2020/06/apple-shed-strikes-win-recognition-fight-goes [https://perma.cc/Y3UK-YJQY].

Agricultural workers have organized and advocated for worker protections for years but have faced challenges in building national coalitions without federal labor protections.[17] Even when protective laws are in place, workers may not want to report employers' noncompliance because of their precarious immigration status.[18]

Agricultural workers have been excluded from the protections of the NLRA ever since Congress enacted the law in 1935. But despite the radical changes the agriculture industry has undergone in the intervening decades, Congress has never justified the exemption in a modern context. Over the years, various Members of Congress have sought to amend the NLRA or pass legislation extending labor protections to agricultural workers, but these attempts have all been unsuccessful.[19] There are also no signs that the exemption will change any time soon. Congress has not introduced an NLRA amendment since 1988 and courts are unlikely to strike down the exemption due to the constraints of equal protection doctrine.[20]

This Note critiques the NLRA exemption's endurance despite its severe disparate racial impact and suggests an original solution in which Congress considers the harmful impacts of the exemption and votes on whether to keep the exemption in place.

In particular, this Note argues that equal protection doctrine is ill-suited to remedy the harmful effects of discriminatory labor laws because the doctrine requires a court to focus on the original intent[21] behind the legislation, even though common sense

17. *See, e.g.*, BUREAU OF LABOR STATISTICS, News Release Union Members—2020, Tbl. 3 (Jan. 22, 2021); *see also infra* Part II.C.1 discussing the difficulty of agricultural workers to unionize since the mid-20th Century.

18. *See, e.g.*, HO *supra* note 2 ("From the beginning of the pandemic, advocacy groups expressed concern for the safety of essential food workers . . . Some are undocumented, with the fear of deportation preventing them from coming forward with any grievances.").

19. From the 1960s through the 1980s, various amendments to extend the NLRA's coverage to include agricultural workers were introduced in both the House and the Senate, but none of these bills ever received a vote. *See, e.g.*, A bill to amend the National Labor Relations Act, as amended, so as to make its provisions applicable to agriculture, S. 1128, 87th Cong. (1961); H.R. 2435, 89th Cong. (1965); S. 8, 90th Cong. (1967); H.R. 5963, 91st Cong. (1969); H.R. 8177, 91st Cong. (1969); H.R. 4007, 93rd Cong. (1973); H.R. 7532, 95th Cong. (1977); S. 2812, 100th Cong. (1988).

20. The last bill introduced was S. 2812 in 1988. A bill to amend the National Labor Relations Act to provide States with an option to include agricultural employees within the scope of such Act, and for other purposes, S. 2812, 100th Cong. (1988).

21. In order for plaintiffs to prevail on an equal protection challenge of a federal law, they must prove the law was enacted with discriminatory, racially motivated intent. *See* Shaw v. Hunt, 517 U.S. 899, 905 (1996) ("The plaintiff bears the burden of proving the race-

suggests that intent becomes both harder to prove and less relevant if a discriminatory effect emerges in practice over time. The Note also argues for the repeal of the exclusion of agricultural workers from the protections of the NLRA, an eighty-seven-year-old statutory provision that has disadvantaged Black and Latinx workers since its enactment. It has long been commonplace among labor and New Deal historians to describe the agricultural exemption as the product of flatly racist intentions.[22] As this Note will show, however, current equal protection doctrine makes it all but impossible to challenge the exemption on equal protection grounds. Using the NLRA as a case study, this Note highlights a crucial myopia in the Supreme Court's treatment of racially disproportionate legislation, then sketches a framework that would bring the law back in line with common sense.

Part I begins with an overview of equal protection doctrine and a discussion of its potential as a tool to protect minority groups from discriminatory laws. Part II then discusses agricultural workers in the United States and examines the historical context in which the NLRA was passed. As part of the New Deal, the Democrats in Congress took charge of passage of the NLRA. In order to the gain support of their southern party-members, proponents of the NLRA made a terrible compromise: they excluded agricultural workers, who were mostly Black in the southern states, from the benefits and protections of the NLRA.[23] Many of these workers were formerly enslaved sharecroppers.[24] The historical context and evidence from the NLRA Congressional record cast doubt on any claim the agricultural exemption was a neutral decision not motivated by racial discrimination.[25]

Part II also presents the reasons why Congress has failed to amend the agricultural exemption despite its harmful effects and

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based motive and may do so either through 'circumstantial evidence of a district's shape and demographics' or through 'more direct evidence going to legislative purpose.'") (quoting Miller v. Johnson, 515 U.S. 900, 915 (1995)).

22. *See* Part II.B.

23. *See infra* Part II.B (discussing the historical record chronicling conflict within the Democratic Party due to varying stances on racial and economic inequality).

24. *See* Jennifer T. Manion, *Cultivating Farmworker Injustice: The Resurgence of Sharecropping*, 62 OHIO ST. L. J. 1665, 1668 (2001).

25. The evidence that creates this doubt is not enough to support a traditional equal protection claim. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (stating that historical context and congressional record may support a discrimination claim, but a law cannot be struck down without evidence of racially discriminatory intent).

racially discriminatory motive, then goes on to examine past court cases concerning the constitutionality of agricultural exemptions in the NLRA and other employment laws. In scrutinizing why plaintiffs have been unsuccessful in the past, this analysis reveals that the intent requirement for equal protection is a major barrier to challenging the NLRA exemption in court.

Part III then uses the example of the difficulty of challenging old laws in court to critique the intent requirement of equal protection doctrine. As time passes after the enactment of a law, evidence of Congress' discriminatory intent may deteriorate or be lost altogether. In addition, new effects of discrimination can occur over time, such as the NLRA exemption's disproportionate impact on Latinx workers. This creates a problem within equal protection doctrine because laws with discriminatory effects can remain on the books simply because plaintiffs cannot identify sufficient evidence to prove intent.

Part III then proposes an original and theoretical framework of analysis, called prolonged disparate impact, and uses the NLRA as an example to present a theoretical model that removes the need for plaintiffs to prove discriminatory intent if their claims meet certain criteria.

Prolonged disparate impact proceeds in several steps to make it easier for plaintiffs to challenge discriminatory laws while still providing guardrails that ensure courts do not interfere with legitimate, non-discriminatory laws. In the first step of the framework, plaintiffs establish that a particular law has a disparate impact on their racial or ethnic group. Second, plaintiffs point to an existing bill introduced by a previous Congress that aims to address the disparate impact. Third, the government must justify keeping the challenged law in place. Finally, if the court finds that the law is discriminatory and in violation of equal protection, then it sends the matter back to Congress, which must vote to repeal the law, amend the law, or keep it in place.[26]

Rethinking a way to address equal protection issues would bring more equity to the law and help limit the marginalization of minority groups. Unless courts begin to think beyond an ill-fitting equal protection doctrine based on a division between intent and effect, then the exemption, and other harmful laws, will remain

26. *See infra* Part III.C (discussing the separation of powers implications of this theoretical framework).

untouched and continue to discriminate against marginalized groups.

I. THE OLD GUARD: TRADITIONAL EQUAL PROTECTION DOCTRINE

A. OVERVIEW OF EQUAL PROTECTION DOCTRINE

The Fifth and Fourteenth Amendments provide a cause of action to challenge discriminatory laws as violations of peoples' rights to equal protection under the law.[27] There are multiple grounds on which plaintiffs can claim discrimination, including religion, gender, and sexual orientation.[28] One scenario in which plaintiffs may challenge a law is when the law makes a facial classification based on race. Such a law would be a clear candidate for strict scrutiny review.[29] For example, if Congress passed an amendment stating the NLRA included all agricultural workers except for Latinx workers, then plaintiffs challenging the amendment could easily show it facially discriminates against Latinx people, and a court would overturn the law absent a showing that the law was narrowly tailored to serve a compelling government interest.

There are multiple levels of scrutiny under which courts assess justifications provided by the government. Courts, assuming the validity of most laws, apply the rational basis test as a default for equal protection challenges.[30] Rational basis dictates that as long as the law or policy is reasonably related to health, safety, or moral concerns of government, then the court will recognize the government's justification as valid.[31]

If plaintiffs allege a suspect classification, such as race, then the court must apply the much more rigorous standard of strict

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27. *See* U.S. CONST. amend. V (extending equal protection to the federal government); U.S. CONST. amend. XIV, § 1 ("No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.").

28. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976) (holding gender discrimination violates equal protection unless the law satisfies an important governmental interest).

29. *See* Washington v. Davis, 426 U.S. 229, 242 (1976) ("[R]acial classifications are to be subjected to the strictest scrutiny and are justifiable only by the weightiest of considerations.").

30. *See, e.g.*, McCulloch v. Maryland, 17 U.S. 316 (1819).

31. *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).

scrutiny.[32] When the court applies strict scrutiny, the government is more likely to fail in its justification of the allegedly discriminatory law. Under strict scrutiny, the government must present a compelling state interest to justify the classification.[33] Even if the government identifies a compelling state interest, under strict scrutiny the court must also assess whether the challenged law serves that interest in the least discriminatory way possible.[34]

The analysis is more challenging, however, when the law at issue is neutral in its language. If the statute is not discriminatory on its face, then plaintiffs have the burden of showing Congress has discriminatory intent.[35] How does one prove discriminatory intent? The Supreme Court provided five types of evidence in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* that could potentially support an argument that the government discriminated intentionally: (i) extreme disproportionate impact;[36] (ii) absence of justification; (iii) historical background of the action; (iv) departure from normal procedural standards; and (v) departures from typically applied substantive rules.[37] These five types of evidence are not dispositive, however, and courts often require additional direct and explicit evidence of an intent to discriminate.[38] Although the Supreme Court currently recognizes that circumstantial evidence

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32. *See, e.g.*, Johnson v. California, 543 U.S. 499 (2005).

33. *Id.*

34. *See, e.g.*, Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974).

35. *See supra* note 21 ("[T]he plaintiff bears the burden of proving the race-based motive[.]").

36. The Court in *Arlington Heights* did not specify what level of disproportionate impact was necessary to support an equal protection case. Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977). It is important to note that the Court in *Arlington Heights* characterized disparate impact as a potential "starting point" for establishing discriminatory intent, but not dispositive. *Id.*

37. Vill. of Arlington Heights, 429 U.S. at 252. The court in *Arlington Heights* stated that if a statute that created a disproportionate impact, unexplainable on any basis other than race, then that impact can be the basis of an equal protection claim even without intent. But they referred to specific circumstances, such as those in *Gomillion v. Lightfoot*, in which the district lines drawn were so absurd the only explanation was that the legislature had drawn them to disenfranchise Black people living in the gerrymandered area. *Id.* at 266. *See also* Gomillion, 364 U.S. at 339 (1960).

38. *See, e.g.*, Alexander v. Sandoval, 532 U.S. 275, 306 n.13 (2001) (Breyer, J., dissenting) (discussing race-neutral policies and the difficulty in obtaining "direct evidence of this motivating animus." This is challenging for plaintiffs because "the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor." (quoting Washington v. Davis, 426 U.S. 229, 253 (1976)).

such as historical context or extreme disproportionate impact can *help* establish discriminatory purpose, disparate impact may only be a "starting point" for the analysis.[39] Without a clear pattern of discriminatory state action, disparate impact alone will not satisfy wrongful motive.[40]

There are a few key takeaways from this overview of equal protection analysis. First, plaintiffs have a much better chance of striking down a discriminatory law when strict scrutiny is applied.[41] Without strict scrutiny, the government is much more likely to prevail.[42] Second, while disparate impact can help establish discriminatory intent for the purpose of applying strict scrutiny, impact by itself does not establish intent.[43] The use of discriminatory intent as the gatekeeper to strict scrutiny has unfortunately made equal protection an ineffective means of protecting people from discriminatory laws.

B. THE DISAPPOINTMENT OF DISPARATE IMPACT THEORY

When first introduced into equal protection doctrine, disparate impact theory had the potential to strike down many laws that had a harmful disproportionate impact. However, the requirement of intent makes disparate impact extremely ineffective at combatting harmful laws.[44]

The Supreme Court first applied disparate impact theory to employment disputes, but in the 1976 case *Washington v. Davis*, the Supreme Court declined to extend disparate impact theory to

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39. *See Arlington Heights*, 429 U.S. at 266.

40. *Id.* (quoting Washington v. Davis, 426 U.S. 299, 242 (1976) (noting the impact of an official action and whether it "bears more heavily on one race than another," may provide an "important starting point"); *id.* at 267–68 (stating circumstantial evidence such as historical background of the decision, sequence of events leading up to the decision, and contemporary legislative or administrative history can help plaintiffs establish the government's intent).

41. *See* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995) (noting cases that qualify for strict scrutiny require a "most searching examination"); *see also* City of Richmond v. J.A. Croson Co., 488 U.S. 469, 472 (1989) (referring to strict scrutiny review of government policies as a "highly suspect tool").

42. *See, e.g.*, Adarand Constructors, 515 U.S. at 200; Croson, 488 U.S. at 469.

43. *See supra* note 36.

44. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705 (2006) ("Although courts have never restricted the [disparate impact] theory to those particular contexts, the reality has been that the theory has proved an ill fit for any challenge other than to written examinations, the only category of claim for which legal standards have evolved to evaluate the permissibility of employment practices.").

constitutional claims.[45] In *Davis*, plaintiffs challenged a written test that the Civil Service Commission used when hiring for the D.C. Police Department.[46] The written examination tested verbal ability and vocabulary, reading, and comprehension skills.[47] Plaintiffs argued that the personnel tests discriminated against Black people because the tests measured skills that were "culturally slanted" to favor white people.[48] According to plaintiffs, the test had no relationship to actual job performance and excluded a disproportionate number of Black applicants.[49] The Court found that disparate impact alone did not make the policy constitutionally invalid; plaintiffs also had to prove the government had discriminatory intent when it required the test.[50] In 1977, the Supreme Court restated the rule that "racially disproportionate impact" on a group was not by itself *sufficient* for establishing a violation of the Equal Protection Clause in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*[51] The Court's decision to separate intent and impact would later prove to have greatly weakened disparate impact theory and limited the scope of courts' understanding of discrimination.[52]

For plaintiffs without direct evidence of discriminatory intent, the intent requirement becomes a barrier to succeeding on a discrimination claim. Intent to differentiate on the basis of race is a requirement to qualify for strict scrutiny, and without intent the government's justification would most likely satisfy the

45. *See id.* ("[T]he disparate impact theory arose initially to deal with specific practices, seniority systems and written tests, that were perpetuating past intentional discrimination."); United Papermakers & Paperworkers v. United States, 416 F.2d 980 (5th Cir. 1969); Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968). *See also* Selmi, *supra* note 44, at 702 ("Five years later in the equally momentous *Washington v. Davis* the Court refused to extend the theory to constitutional claims, holding instead that intentional discrimination is required to establish a violation of the Equal Protection Clause."); Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252 (1977) (holding that disparate impact alone could not establish unconstitutionality; rather, discriminatory intent was necessary).

46. Washington v. Davis, 426 U.S. 229 (1976).

47. *Id.* at 234–35.

48. *Id.* at 235.

49. *Id.*

50. *Id.* at 230 ("The disproportionate impact of Test 21, which is neutral on its face, does not warrant the conclusion that the test was a purposely discriminatory device.").

51. Arlington Heights, 429 U.S. at 264–65.

52. Selmi, *supra* note 44, at 706 ("[T]he theory had the rather perverse effect of limiting our conception of intentional discrimination, which, in the end, may have hindered our efforts to eradicate discrimination more than it has plausibly helped.").

permissible standard of rationality review.[53] Discriminatory motive for the NLRA exemption is difficult to establish because the only evidence available is circumstantial, as discussed in Part II. Another obstacle is that the demographics affected by the exemption have changed. Initially, the exemption discriminated against Black farm workers, but now the affected group is predominantly Latinx. These problems with the intent requirement support the conclusion that current equal protection doctrine unduly shields the agricultural exemption from a successful constitutional challenge.

II. OVERVIEW, ORIGINS, AND BACKGROUND OF THE AGRICULTURAL WORKER EXEMPTION

A. PROTECTIONS AND BENEFITS OF NATIONAL LABOR RELATIONS ACT

The NLRA is based on the premise that inequality inherently exists within employment relationships between employers and employees.[54] The Act's drafters thought the best way to ensure a peaceful and profitable workplace was to mitigate the power imbalance between the two groups.[55] Section 1 of the NLRA clearly states that when employers interfere with the assertion of employee rights, industrial unrest follows and the fallout obstructs commerce.[56] The language of Section 1 indicates that the empowerment of workers accomplished by the NLRA is not only for the sake of workers' wellbeing and dignity; Congress also considered the importance of stabilizing the economy and employers' interests.[57]

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53. Plyler v. Doe, 457 U.S. 202, 216 (1982) ("In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.").

54. Section 1 of the NLRA describes the workplace dynamic as a "power imbalance," drawing a line between employers and employees. Ellen Dannin, *NLRA Values, Labor Values, American Values*, 26 BERKELEY J. EMP. & LAB. L. 223, 240 (2005).

55. *Id.*

56. 29 U.S.C. § 151 ("Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest.").

57. *See id. See also* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME 172 (2013) (describing major labor incidents including the employee takeover of the Goodyear plant in the 1930s). In 1935 and 1936, rubber workers staged a takeover—carrying clubs and other weapons in order to resist police—to force Goodyear's management

The protections and rights workers receive under the NLRA depend on their categorization in Section 2. Section 2 defines "employers" as those acting as an agent of an employer and excludes government employers.[58] The definition of employee is more relevant to this Note, but its definition is tragically circular: "The term 'employee' shall include any employee, unless the Act explicitly states otherwise."[59] The definition of "employee," however, excludes "any individual employed as an agricultural laborer," domestic workers in the service of a family or person at his home, and independent contractors.[60] The exemption of agricultural workers is explicit and therefore closed to interpretation by the courts. Agricultural workers' exemption from an otherwise broad definition shows the 1935 Congress' clear intent to exclude them.

Section 7 of the NLRA, as amended by the Taft-Hartley Act,[61] gives workers three core rights: association and speech, collective bargaining, and group protest.[62] Section 8 protects these rights and prohibits employer interference in the exercise of these rights.[63] The right of association and speech provides that unions can communicate with workers during specific, non-work hours.[64] Employers cannot interfere with the formation or administration of labor organizations, discriminate or retaliate against employees

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to recognize unions affiliated with the Congress of Industrial Organizations (CIO). *Id.* In *Fear Itself*, Katznelson also describes Congress' goals in passing the NLRA, including the empowerment of unions and equalizing bargaining power between employees and employers. *See id.* at 257–58.

58. 29 U.S.C. § 152(2).

59. 29 U.S.C. § 152(3).

60. *Id.* ("The term 'employee' . . . shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor.").

61. KATZNELSON, *supra* note 57, at 393 (stating that in 1947, Congress passed the Taft-Hartley Act, a series of amendments to the NLRA that shifted the balance of power in favor of employers and management, including a relaxation of unfair labor practices committed by employers).

62. 29 U.S.C. § 157.

63. 29 U.S.C. § 158(a)(1) ("It shall be an unfair labor practice for an employer . . . to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title.").

64. *See* Republic Aviation Corp v. NLRB, 324 U.S. 793 (1945) (holding that under the NLRA, employees can communicate within reason about union business outside work hours and during lunch breaks).

for engaging in lawful labor practices,[65] or fire workers solely because they engage in lawful union activity.[66] Unions often provide workers with due process protections that require employers to use formal procedures to dismiss workers and explain why.[67] Successful negotiations can secure increased pay, better healthcare access, improved safety conditions, and reasonable hours.[68] The right to bargain collectively is a major benefit of the NLRA.[69] During the process, bargaining representatives must negotiate with the employer about wages, hours, vacation days, and union status.[70] For example, in *NLRB v. Katz*, the Supreme Court held that employers cannot unilaterally make changes to terms and conditions of employment.[71]

The NLRA regulates more than just unions and collective bargaining; Section 7 also protects the right of employees to engage in concerted activities for mutual aid.[72] Importantly, mutual aid

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65. 29 U.S.C. § 158(a)(2) ("It shall be an unfair labor practice for an employer [] to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it.").

66. *Id.* § 158(a)(3).

67. Just cause provisions are common in union contracts and can make a huge difference in the experience of at-will workers. An example of a just cause provision reads "No employee will be disciplined or discharged except for just cause." *See* Robert M. Schwartz, *Using 'Just Cause' to Defend Against Unfair Discipline*, LABORNOTES (Jan. 15, 2019), https://labornotes.org/2019/01/using-just-cause-defend-against-unfair-discipline [https://perma.cc/TST7-TB5Q].

68. BIVENS ET AL., ECON. POL'Y INST., *supra* note 58, at 9, 14 (noting, on average, union workers earn 13.2% more in wages than their similarly situated, nonunionized peers; 94% of workers covered by a union contract have access to employer-sponsored health benefits). For example, the unionization of dishwasher and hospitality workers in Las Vegas led to a wage increase of four dollars per hour more than the national average and secured dramatically improved benefits. *Id.* at 10.

69. *See e.g.*, Hayley Jones, *Familias Unidas por la Justicia: Their Historic Union Contract*, FOOD FIRST (July 24, 2017), https://foodfirst.org/familias-unidas-por-la-justicia-their-historic-union-contract/#_edn1 [https://perma.cc/6Z3V-9B77] (reporting on a two-year collective bargaining agreement negotiated by an independent farmworker union, which included standardized wages, a just cause firing requirement, and a no strikes provision).

70. 29 U.S.C. § 158(a)(5) ("It shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title[.]"); *id.* § 158(d) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment."). *See also* Dannin, supra note 54, at 258.

71. NLRB v. Katz, 369 U.S. 736 (1962) (finding that the employer violated the NLRA's duty to bargain by unilaterally changing conditions of employment, thus circumventing and frustrating statutory objectives).

72. *See* Dannin, *supra* note 54, at 265. Mutual aid is broadly defined as an act or association made by employees to further a common cause and includes individual actions that benefit other employees. *Id.*

actions can occur without any union involvement and can encourage employees to take steps to protect themselves.[73]

The Supreme Court has held that even action taken by a single worker can be interpreted as collective action.[74] In *Silchia v. MCI Telecommunications Corp.*, for example, the Court found that an employee without union representation engaged in concerted activity when he reported to human resources complaints from multiple employees about a supervisor.[75] Because the plaintiff acted for the benefit of the worker group, his actions were "concerted activity" and he was protected by the NLRA.[76] The Court explicitly stated that even though union activities were not involved, presenting grievances constituted concerted activity.[77]

The NLRA also created the National Labor Relations Board (NLRB), an entity independent from the Department of Labor.[78] The NLRB consists of labor experts appointed by the president and has the power to issue cease and desist orders, and to investigate and adjudicate most disputes that arise under the NLRA.[79] The NLRB can also adopt rules to restrict the conduct of employers that suppresses concerted activity by employees or that undermines collective bargaining agreements.[80]

Congress sought to balance the needs and wants of both employees and employers, so the Act is not entirely pro-labor. The NLRA still qualifies the protected rights of employees. The NLRA framework nonetheless enabled an increase in unionization and a reduction in labor strife over time.[81] Although rates of union membership have declined in recent decades, unions and collective

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73. *Id.* at 267.

74. NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 824–26 (1984) (holding that an employee's refusal to drive an unsafe truck, a right grounded in the governing collective bargaining agreement, was concerted activity).

75. 942 F. Supp. 1369 (D. Colo. 1996).

76. *Id.* at 1374 (finding that there was no genuine dispute that plaintiffs acted as a group for their mutual aid and protection, and, therefore, that "they engaged in concerted activity within the meaning of section 7 of the NLRA").

77. *Id.* at 1373.

78. 29 U.S.C. § 153(a).

79. KATZNELSON, *supra* note 57, at 258 (describing the National Labor Relations Board as "a quasi-judicial expert board, appointed by the president, to investigate and adjudicate most labor disputes arising under the act").

80. *See, e.g.*, NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990) (holding that petitioner labor board's refusal to adopt a presumption that strike replacements do not support unions was rational and consistent with the NLRA).

81. KATZNELSON, *supra* note 57, at 258 (noting that, by 1939, despite mass unemployment, the CIO and AFL had added millions of members).

bargaining are still important tools for workers to utilize in modern day labor reform.[82]

B. COMPROMISE IN CONGRESS: PASSING THE AGRICULTURAL EXEMPTION

During the New Deal Era, the Democratic Party created legislation that revolutionized worker rights in the United States. Tensions within the Democratic Party complicated the NLRA's chances at enactment. Specifically, internal conflict created more pressure to compromise within the party in order to pass key legislation in the 1930s.[83] Some Southern Democrats accused Northern Democrats of abandoning the South in order to appease Black voters.[84] According to a 1937 article in Mississippi's *Fayette Chronicle*, the absolute loyalty of Southern Democrats to the party waned because of the party's focus on gaining Black constituents.[85] For example, Southern Democrats perceived party support for an anti-lynching bill as a disruption of the status quo and state autonomy.[86] The Roosevelt Administration, however, required unity in Congress to pass controversial New Deal legislation.[87] Disrupting life and politics in the South was not an option.

The desire of Southern congressmen to maintain the status quo led to the exclusion of agricultural workers from the NLRA.

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82. *See* Costa, *supra* note 8.

83. KATZNELSON, *supra* note 57, at 177; *see also* KATZNELSON, supra note 88, at 58 ("Representative Fred Hartley, a New Jersey Republican, observed that 'the poorest paid labor of all, the farm labor,' was excluded from the bill as a matter of 'political expediency' because coverage of agricultural labor would have resulted in defeat of the bill in Congress.").

84. *See, e.g.*, *id.* (Pennsylvania Representative James Byrne arguing that the Democratic Party had fallen under influence of the "Negroes of the North" and deserted the South); *id.* at 180 (Congressman Edward Cox claiming Southerners had "kept life" in the Democratic Party and at times were its only supporters). *See also* 101 CONG. REC. 3437 (1937).

85. KATZNELSON, *supra* note 57, at 178 (citing FAYETTE CHRON., September 28, 1937 ("Southern states . . . which for so long have given absolute loyalty to the Democratic party . . . have been actuated by one consideration—the preservation of white supremacy in the south.")).

86. Juan F. Perea, *Echoes of Slavery: Recognizing the Racist Origins of the Agricultural and Domestic Worker Exclusion from the National Labor Relations Act*, 72 OHIO ST. L. J. 95, 115 (2011) (quoting 81 CONG. REC. 7881–82 (1937) (Statement of Senator Ed Smith) ("Antilynching, two-thirds rule, and, last of all, this unconscionable . . . bill [the FLSA]! Any man on this floor who has sense enough to read the English language knows that the main object of this bill is, by human legislation, to overcome the splendid gifts of God to the South.")).

87. *Id.* at 103.

Historical context reveals the fear Southern Democrats felt about the effect that empowering Black agricultural workers would have on society. In the South, party leaders were "intensely concerned" with the status of Black labor in agriculture.[88]

The demographics of Southern labor in the 1930s are key to understanding Southern anxiety. In 1930, workers in the South performed fifty-three percent of all agricultural labor in the United States.[89] At the time, forty percent of the Southern agricultural labor force was Black.[90] After the abolition of slavery, white people controlled the vast majority of the farmland and employed many formerly enslaved Black people as tenant farmers and sharecroppers.[91] In the tenancy system, white landowners charged Black workers a fee to farm the land[92] and consistently escalated prices for farming tools and equipment.[93] This practice kept tenants in constant debt to landowners. In the 1940s, several Southern states made it a crime to leave employment before paying off debt borrowed from employers.[94] Criminalization of debt kept Black farmers from establishing independent farms, which would have enabled them to pay off debts faster.[95] Given these hurdles, Black farmers, tenants, and sharecroppers ran only eight percent of farms in the South, and only one in ten Black farmers owned their own land even decades after the end of slavery.[96] The disproportionate demographics of workers and landowners inextricably linked race to labor in the South.

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88. IRA KATZNELSON, WHEN AFFIRMATIVE ACTION WAS WHITE: AN UNTOLD STORY OF RACIAL INEQUALITY IN TWENTIETH-CENTURY AMERICA 59 (2005).

89. *Id.* at 30.

90. *Id.*

91. Manion, *supra* note 24, at 1668.

Cultivating Farmworker Injustice: The Resurgence of Sharecropping, 62 OHIO ST. L.J. 1665, 1668 (2001).

92. *Id.* (citing Michael Parrish, *Betting on Hard Labor and a Plot of Land*, L.A. TIMES (July 7, 1995)).

93. Perea, *supra* note 86, at 101 (noting that landowning farmers provided Black tenant farmers with supplies on credit for inflated prices, which the tenant farmers had to pay off before they could leave the farm).

94. Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, 1348–49 (1987) (quoting RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS 68 (2010)) (noting that refusal to work was prima facie evidence of the intent to defraud). In 1911, the U.S. Supreme Court recognized the statutes as violating the Thirteenth Amendment, but states continued to enforce them until the early 1940s, ensuring a continuing supply of cheap farm labor. GOLUBOFF at 68.

95. GOLUBOFF, *supra* note 94, at 59.

96. KATZNELSON, *supra* note 88, at 30.

Evidence in the Congressional Record for other New Deal laws reflected congressmembers' concern about Black laborers. For example, some congressmen expressed their concerns directly in the hearings and debate for the Fair Labor Standards Act (FLSA), specifically regarding the provision that set a standard minimum wage for all workers covered by the Act. Rep. J. Mark Wilcox of Florida stated that giving Black and white workers the same minimum wage would lead to conflict in his state.[97] Rep. Wilcox characterized this dilemma as "the problem of Negro labor."[98] Reps. Martin Dies of Texas and Edward Cox of Georgia echoed Wilcox's sentiment.[99] Cox felt very strongly that the "color line" of the South was a "permanent institution" with which Congress should not tamper.[100] Senator Richard Russell of Georgia framed the FLSA as an "assault" on Southern states,[101] and Senator Ellison Smith of South Carolina complained that the entry of Black people into political society was deteriorating American civilization.[102] These statements, made during debates over the FLSA, showed that the prospect of using federal legislation to empower Black workers worried at least several members of Congress. Prior to passage of the FLSA, Congress added language that excluded agricultural workers. Although this evidence in the Record relates to the FLSA and not the NLRA, it nonetheless illustrates Congress' acute awareness that Southern Democrats

97. 110 82 CONG. REC. 1404 (1937).

98. *Id.*

99. Perea, *supra* note 86, at 116. Representative Dies acknowledged that the government could not treat workers differently based on race but insisted that Black and white men could not receive the same wages. Limiting the number of Black workers covered by the FLSA was one way to avoid this problem. *Id.*; KATZNELSON, *supra* note 57, at 177 (Statement of Representative Martin Dies) ("There is a racial question here . . . and you cannot prescribe the same wage for the [B]lack man as for the white man."); *Id.* at 582 (Statement of Congressman Cox) ("Negro groups supported the FLSA because of its ability to eliminate racial and social distinctions"); Congressmen Edward Cox also staunchly believed "the color line South [was] a permanent institution." *Id*. at 179.

100. Perea, *supra* note 86, at 116.

101. KATZNELSON, *supra* note 57, at 179 (quoting 97 CONG. REC. 3550 (1937)).

102. CONG. REC. 7881 (1937) (Statement of Senator Ellison "Cotton Ed" Smith of South Carolina) ("By a stroke of the pen the majority of those totally unfit for the purpose were injected into the blood stream of American politics.") Senator Smith was referring to the Fourteenth and Fifteenth Amendments and inclusion of Black people into the body politic following the Civil War; Perea, *supra* note 86, at 115 (quoting 81 CONG. REC. 7881-82 (1937) (Statement of Senator Ellison Smith of South Carolina) ("I shall not attempt to use the proper adjective to designate, in my opinion, this bill [the FLSA]! Any man on this floor who has sense enough to read the English language knows that the main object of this bill is, by human legislation, to overcome the splendid gifts of God to the South.")).

objected to the inclusion in protective employment legislation of industries containing the majority of the Black workforce.[103]

Indeed, the NLRA's own legislative history shows that the exclusion of agricultural workers was a similarly essential compromise for Congress to pass the NLRA. Southern Democrats dominated the Senate Committee on Agriculture, and Northern Democrats needed their support to pass any legislation.[104] The first version of the NLRA, proposed by Senator Robert Wagner of New York, did not have an exemption for agricultural workers.[105] Two Southern senators, Hugo Black of Alabama, and Park Trammell of Florida, worked with Northern Democrats to report a version of the NLRA bill that contained the exemption of agriculture.[106] The NLRA passed with Southern support only after both chambers added the exemption.[107]

Even though prominent historians agree that the NLRA exemption had racist motivations,[108] only the justifications given in the Congressional proceedings matter for an equal protection challenge,[109] and Congress presented facially valid justifications based primarily on the unique nature of the agriculture industry. One cited concern was that NLRA coverage would enable labor to exploit small scale employers if the Act protected collective bargaining on family farms.[110] Some congressmen also claimed

103. *Economic Security Act: Hearings on H.R. 4120 Before the H. Comm. on Ways & Means*, 74th Cong. 108 (1935). Agricultural and domestic workers were also excluded from the Old-Age Insurance provisions of the Social Security Act. The colloquy between Representative Howard W. Smith of Virginia and Representative Thomas Jenkins of Ohio illustrates their concern in including those groups in federal benefits. *Id.*

104. Linder, *supra* note 94, at 1351–52, citing Schapsmeier & Schapsmeier, *Farm Policy from FDR to Eisenhower: Southern Democrats and the Politics of Agriculture*, 53 AGRIC. HIST. 352, 355 (1979) ("President Roosevelt could be confident of the support of these leaders of Congress only "[s]o long as the New Deal did not disturb southern agricultural, industrial, or racial patterns.").

105. KATZNELSON, *supra* note 88, at 57.

106. KATZNELSON, *supra* note 88, at 57 (noting that despite Hugo Black's reputation for liberal policies, his attitude toward racial equality had not fully formed at the time of the New Deal). The exclusion of domestic workers from this version of the NLRA seemed to target Black women workers. In the 1930s, eighty-five percent of Black women in the labor force either worked in agriculture or in domestic service. *Id.* at 32.

107. KATZNELSON, *supra* note 57, at 271.

108. For example, historian Ira Katznelson writes that the agricultural exemption in the NLRA along with the FLSA were racially motivated. *See* KATZNELSON, *supra* note 88, at 55.

109. *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 264–65 (1977).

110. *See* Michael H. LeRoy and Wallace Hendricks, *Should "Agricultural Laborers" Continue to be Excluded from the National Labor Relations Act?*, 48 EMORY L.J. 489, 491 (1999); *see also* Perea, *supra* note 86, at 126.

that agricultural workers had no interest in participating in organizing and did not need the leverage of collective bargaining.[111] Congress also expressed concern over placing agricultural workers under the jurisdiction of the NLRB, a national body, when the industry was not widespread enough to affect interstate commerce.[112] Crucially, there is no evidence that indicates these justifications were pretextual.[113] Although some members of Congress expressed hostility towards Black workers, there is no evidence from which a court could find intent to discriminate against Black people by passing the agricultural exemption.

Regardless of intent, due to the demographics of agricultural labor, the exemption disproportionately affected Black laborers in the 1930s and 1940s.[114] Over time, Congress amended some labor legislation to incorporate agricultural workers.[115] But the NLRA exemption remains and continues to disadvantage minority workers.

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111. *But see* F. RAY MARSHALL, LABOR IN THE SOUTH 94 (1967) (noting that the efforts of sharecroppers and farmers, many of whom also worked as lumber workers, to align themselves with the Industrial Workers of the World and unionize prior to World War I, may contradict this claim).

112. *See, e.g.*, 79 CONG. REC. 9721 (Statement of Representative Henry Ellenbogen regarding concern about whether agricultural labor fell within the meaning of "interstate commerce").

113. Through conducting her own research of the 1930s Congressional Record, the author did not find explicit evidence of intent related to the NLRA exemption. The author also did not find evidence of discriminatory intent for the agricultural exemption in any of the following years. Amendments were brought between 1961–1978 and the Record does not show any hostility towards agricultural workers—only ambivalence.

114. *See* KATZNELSON, *supra* note 88, at 30. The Bureau of Labor Statistics found that forty percent of agricultural laborers and fifty-five percent of sharecroppers in the South in 1940 were Black. *Id.*

115. Most notably, the Fair Labor Standards Act and the Social Security Act. *See* Susan Kocin, *Basic Provisions of the 1966 FLSA Amendments,* MONTHLY LABOR REVIEW, Vol. 90 No. 3, 2 (1967); Larry DeWitt, *The Decision to Exclude Agricultural and Domestic Workers from the 1935 Social Security Act*, SOCIAL SECURITY BULLETIN, Vol. 70, No. 4 (2010) (noting "almost all agricultural and domestic workers would be included by 1950 and the remainder by 1954").

C. FAILED CHALLENGES OF THE AGRICULTURAL EXEMPTION—AGRICULTURAL EXEMPTIONS UPHELD IN *ROMERO* AND *DOE*

Part II.C examines past court cases that challenged agricultural exemptions as violations of equal protection and explains why they failed.[116] Only two federal court cases focus primarily on the disproportionate impact of agricultural exemptions on racial minorities—*Romero v. Hodgson* and *Doe v. Hodgson*.[117] In both cases, the district and appellate courts ruled in favor of the government and upheld the exemptions. This Part gives context and argues why prospective plaintiffs bringing an equal protection challenge to the exemption would likely fail today based on the precedent of these two cases. The likely failure of traditional equal protection doctrine helps justify the modified framework of equal protection analysis proposed in Part III. Part II.C also argues that because plaintiffs have not brought a challenge to the exemption since the early 1970s, greater scrutiny of the constitutionality of agricultural exemptions is long overdue.

The first case, *Romero*, did not challenge the NLRA agriculture exemption specifically; rather, the case dealt with a similar exclusion present in the Federal Unemployment Tax Code (FUTC).[118] The plaintiffs in *Romero*, a group of California farmworkers, challenged the FUTC's exclusion of agricultural workers from the Code's definition of employees and, therefore, from unemployment compensation.[119] They claimed that due to the growth and mechanization of the agriculture business since the FUTC's enactment, the exemption invidiously discriminated against plaintiffs in violation of the due process and equal protection clauses of the Constitution.[120] In other words, plaintiffs

116. The NLRA exemption was not the only exemption included in New Deal legislation. Agricultural workers were exempt from the coverage by the Fair Labor Standards Act, Social Security Act, Federal Unemployment Tax Act, and others. *See* Perea, *supra* note 86, 104, 109; Doe v. Hodgson, 478 F.2d 537, 536 (2d Cir. 1973).

117. Romero v. Hodgson, 319 F. Supp. 1201, 1202 (N.D. Cal. 1970); Doe v. Hodgson, 344 F. Supp. 964, 968 (S.D.N.Y. 1972). *See also* Doe v. Hodgson, 478 F.2d at 538 (affirming dismissal of plaintiffs' complaint).

118. Romero, 319 F. Supp. at 1202.

119. *Id.* at 1201 (citing 26 U.S.C. § 3306(c)(1)(A) (excluding agricultural labor from the definition of employment "[f]or purposes of this chapter, the term 'employment' means any service performed prior to 1955 . . . except . . . agricultural labor (as defined in subsection (k))."

120. *Id.* ("[T]hey argue that this exclusion, when considered in light of the economic and social changes since the enactment of the Federal Unemployment Tax Act, constitutes

claimed that no legitimate reason existed for excluding agricultural workers.

Plaintiffs argued that the primary reason offered by the government to justify the exemption—that inclusion would pose an administrative burden on the government—no longer applied to the agriculture industry.[121] In the 1930s, the agriculture business consisted largely of small-scale family farms.[122] When the law was enacted, the government argued that it was an unwieldy administrative burden to collect taxes for unemployment insurance from many small employers.[123] But, the plaintiffs argued, small-scale farming had transformed into "agribusiness" and now ran in the same way as a large corporate enterprise.[124] The primary reason to give farm employers special treatment had disappeared.

The district court disagreed and found that the government's revised justification formed a rational basis for upholding the exemption. The government's new justification was an intent to subsidize the agricultural industry by relieving farmers of the 3.2% tax that they would have to pay if they were covered by the Act.[125] The court concluded that it was rational that the government intended to save the compensation fund from drainage by the agriculture industry.[126]

Plaintiffs appealed to the Supreme Court, which granted certiorari and upheld the lower court decision through a summary affirmance that did not address the merits of plaintiffs' claims.[127]

'invidious discrimination' within the meaning of the due process and equal protection clauses of the Constitution.").

121. *Id.* at 1202.

122. *Id.* at 1202.

123. *Id.* at 1204–05.

124. *Id.* at 1205.

125. Romero v. Hodgson, 319 F. Supp. 1201, 1205 (N.D. Cal. 1970). *See also id.* at 1205 n.2 ("A 'deficit industry' is one which distributes more money in unemployment compensation to unemployed workers in that industry than it produces through taxes levied against the industry . . . . In light of these figures, it is difficult to understand how agriculture can be rationally distinguished, on this ground, from these other industries covered by the Act.").

126. *Id.* at 1203 ("Hence the exclusion of agriculture from unemployment compensation can be seen as an indirect subsidy of a 'beneficent enterprise', or as an effort to save the compensation fund from the drain which would result from the inclusion of another large 'deficit industry'.").

127. Romero v. Hodgson, 403 U.S. 901 (1971). *But see* Mercado v. Rockefeller, 502 F.2d 666, 673 (2d Cir. 1974) (indicating that summary affirmances have "precedential value" but that they do not have the same precedential value as an opinion that assesses the merits of the legal question).

The *Romero* case shows that the Supreme Court solidified the constitutionality of agricultural exemptions without any interrogation of the government interest or intent.

The summary affirmance denying plaintiffs relief in *Romero* blocked a similar challenge to agricultural exclusions when the issue arose again a year later, this time in New York federal court. In *Doe v. Hodgson*, the district court addressed whether the plaintiffs had successfully differentiated their case from *Romero*.[128] If they did not, then the *Romero* precedent from the Supreme Court would require the district court to dismiss the complaint.

The plaintiffs—nine agricultural workers—tried to distinguish their case from *Romero* in several ways.[129] They claimed *Romero* only concerned unemployment compensation and did not address the current disadvantages of agricultural workers.[130] Plaintiffs in *Doe* also increased the scale of their claims significantly from the claims in *Romero*.[131] In the lawsuit, they named as defendants the leaders of multiple federal labor institutions and New York state officials.[132] Plaintiffs targeted exemptions in a number of major labor statutes, including the Federal Unemployment Tax Act, the FLSA, the Social Security Act, and the NLRA, claiming they were arbitrary and unreasonable and that they invidiously discriminated among classes of laborers on racial grounds.[133] The plaintiffs claimed this invidious discrimination violated equal protection and due process in contravention of the Fifth and Fourteenth Amendments.[134] Unfortunately for the plaintiffs, the

128. Doe v. Hodgson, 344 F. Supp. 964, 968 (S.D.N.Y. 1972).

129. *Id.* at 966.

130. *Id.* at 968. The plaintiffs in *Doe* also claimed that the *Romero* plaintiffs did not base their claims on racial discrimination, but the *Romero* plaintiffs did claim inadvertent racial discrimination against Mexican-American workers. *See id*. at 968; *see also* Individual and Class Action for Declaratory Judgment, Injunction, and Damages at 7, Romero v. Wirtz (N.D. Cal. 1968) (No. 50213) (also commenting on the disparity in unemployment insurance coverage for African-American, Puerto Rican, and Native American laborers).

131. *Id.* at 967. The plaintiffs also claimed that the various exclusions were so blatantly in violation of fundamental rights that they imposed a peonage system on agricultural laborers in violation of the Fifth, Thirteenth, and Fourteenth Amendments. *Id.*

132. The named federal defendants were the Secretary of Labor, the Commissioner of Internal Revenue, the Chairman of the NLRB, the Administrator of the DOL's Wage & Hour Division, and the Commissioner of Social Security. *Id.* at 966.

133. *Id. Romero*, in contrast, only challenged an agricultural exemption in one federal law—the Unemployment Tax Code. *See Romero*, *supra* note 118.

134. Doe v. Hodgson, 344 F. Supp. 964, 966 (S.D.N.Y. 1972).

breadth of their claims backfired: the district court called their complaint too "impersonal."[135]

Plaintiffs also tried to distinguish their case by claiming that *Romero* had not addressed the disparate impact of the exemption on racial groups.[136] Plaintiffs asserted that the exemptions in their suit disproportionately affected workers who were "[B]lack and [C]hicano," an ostensibly different group than in *Romero*.[137] But the district court disagreed and cited the *Romero* opinion and its discussion of inadvertent discrimination against "Mexican-Americans."[138]

The court in *Doe* did not address the merits of the claims, deciding instead to dismiss the complaint, leaving *Romero* undisturbed (and undistinguished).[139] The Second Circuit affirmed the decision and also cited the Supreme Court's summary affirmance in *Romero* as prohibiting plaintiffs' claims because both cases addressed the constitutionality of agricultural exemptions in federal labor legislation.[140] *Doe* was the last federal case to challenge an agricultural exclusion from federal labor legislation.

The opinions in *Doe* and *Romero* reveal that the only time a court has ever seriously examined the constitutionality of the exemptions and their effects was in *Romero* in 1971.[141] Although changes in the agriculture industry and equal protection doctrine signal a need to revisit the justifications for upholding the exemptions that the government provided in the 1970s, it is possible that a court may apply the *Romero* precedent to dismiss a case challenging an agriculture exemption. The agricultural industry today resembles many other mass automated industries included in the NLRA and other employment legislation, lessening the administrative burden of dealing with small farms. In addition, the Supreme Court dismissed the *Romero* plaintiffs' case in 1971, a few years before disparate impact theory created a major development in equal protection doctrine. Now, a claim that asserted racial discrimination may receive strict scrutiny. This is a higher standard of review than the review applied in the *Romero* and *Doe* cases. At first glance, courts' adoption of the strict

135. *Id.*
136. *Id.* at 968.
137. *Id.* at 966.
138. *Id.* at 968.
139. *Id.* at 968–69.
140. Doe v. Hodgson, 478 F.2d 537, 538–39 (1973).
141. *See Romero*, *supra* note 125.

scrutiny standard seems like it would benefit plaintiffs today. But strict scrutiny would not benefit plaintiffs bringing a challenge to the agriculture exemption because it is unlikely that they would be able to prove discriminatory intent.

III. MOVING BEYOND DISCRIMINATORY INTENT WITH PROLONGED DISPARATE IMPACT

This Note proposes a theoretical modified equal protection analysis that relies primarily on the disparate impact of a law in order to scrutinize its constitutionality. As the previous sections have illustrated, if plaintiffs are to succeed in equal protection claims, the intent barrier must be removed.[142] However, limitations on the claims that receive relief should still exist. The criteria necessary for equal protection challenges protect legitimately nondiscriminatory laws from meritless claims. The theoretical framework described in this section seeks to strike a balance that makes it easier for plaintiffs and the courts to dismantle discriminatory laws while preserving legitimate laws. One of the primary motivations for creating this theoretical framework is to push the legal field to consider alternatives to our current model of equal protection. Current equal protection doctrine gives courts two options: either strike down laws when there is proof of discriminatory intent or allow laws to remain despite their harmful disparate effect when plaintiffs cannot establish intent.[143] The prolonged disparate impact analysis proposes a middle ground that does not let old justifications sit unexamined indefinitely while disparate impact continues.

The NLRA agriculture exemption is an ideal case study for prolonged disparate impact because of its longstanding, severe disparate impact on racial minorities and the attempts of Congress to repeal it. Circumstances and societal attitudes towards non-white workers have changed substantially since the exemption's enactment. Solutions have also been proposed within Congress to remedy the known disparate impact of the NLRA exemption. These two factors indicate that Congress is aware of the harm caused by the exemption but chooses not to act. Prolonged

142. *See supra* Part II.B.
143. *See* Selmi *supra* note 44, at 768–69.

disparate impact forces Congress to reassess and justify the exemption.

Prolonged disparate impact would provide a remedy for old laws that have languished for decades, unexamined and unchecked by Congress. Part of the problem in striking down discriminatory laws is that as times goes on, evidence of discriminatory intent is lost or obscured. Simultaneously, the justifications for passing the law become stale. This creates a situation in which a law no longer honors the original intent of Congress and still actively harms people. Keeping these types of laws based on justifications and circumstances from decades ago runs contrary to principles of equal protection.[144] Accordingly, Congress and the courts should treat these types of laws—those with a severe and prolonged disparate impact—differently from other laws subject to equal protection claims. The following section describes the specific criteria for when laws qualify for a prolonged disparate impact challenge.

A. EXPLAINING THE PROLONGED DISPARATE IMPACT THEORY

1. *Overview of Analytical Framework*

The prolonged disparate impact framework resembles current doctrine by placing a burden on plaintiffs to prove that the challenged law has a harmful racial disparate impact and assessing the validity of government justifications for the law. This framework differs in significant ways, however, that make it much easier for plaintiffs, Congress, and courts to work together to remedy social harms. First, prolonged disparate impact removes the intent barrier to plaintiffs' claims. Second, the rest of the framework creates a guardrail so that the only claims that receive relief under the prolonged approach are those that truly have a severe disparate impact on minorities. In this way,

144. *See* City of Cleburne, Tex. v. Cleburne Living Ctr., 473 U.S. 432, 466 (1985) (Marshall, J., concurring) ("[H]istory makes clear that constitutional principles of equality, like constitutional principles of liberty, property, and due process, evolve over time; what once was a "natural" and "self-evident" ordering later comes to be seen as an artificial and invidious constraint on human potential and freedom . . . . Shifting cultural, political, and social patterns at times come to make past practices appear inconsistent with fundamental principles upon which American society rests, an inconsistency legally cognizable under the Equal Protection Clause.").

prolonged disparate impact still upholds the tenets of equal protection doctrine while striking down discriminatory laws.

Prolonged disparate impact is a burden-shifting framework that seeks to balance the roles of both the judiciary and Congress. In the first step of the framework, plaintiffs must establish that a law disparately impacts their racial or ethnic group.[145] In the second step of analysis, plaintiffs must point to an existing formal proposal or bill introduced in Congress that would alleviate the effect of the disparate impact affecting plaintiffs. The court must also find that the proposal would indeed target the disparate impact. If the court finds the proposed legislation would address the disparate impact, the burden shifts to the government at step three. In step three, the government has an opportunity to make its case to the court for why the challenged provision should remain by providing a compelling justification. Finally, in step four, Congress must weigh the government's justification against the benefit of eliminating the challenged provision's discriminatory effect. If the court decides the proposal does not adequately address the discriminatory effect or the government provides sufficiently compelling reasons for keeping the law, then the plaintiff's claim is dismissed, and the law remains in place.

If the court finds, however, that the harm of the discriminatory effect outweighs the government's interest in the challenged law, then Congress must vote to either keep the challenged law or strike it down based on the new record created during the court case. This new record will include current harm against plaintiffs and assessment of new justifications for the challenged law. The court will set a specific deadline for when Congress must vote on the challenged provision. The court may decide the deadline on a case-by-case basis and grant extensions when necessary. Through this process, Congress will be forced to reconsider legislation in its current context.

2. *Establishing Disparate Impact*

This first step of establishing disparate impact is similar to a showing of disparate impact in traditional equal protection analysis. In a normal equal protection claim, plaintiffs can show

145. In theory, prolonged disparate impact may apply to other protected classes as well, such as gender and religion, but this Note only addresses racial claims.

disparate impact using statistical analysis.[146] The same standard applies for prolonged disparate impact claims. There is not an exact numerical threshold that makes an effect disparate.[147] For equal protection claims, a plaintiff can rely on statistics only if they can also point to the specific law or policy creating the disparity.[148] Normally, courts assess evidence of disparate impact along with intent,[149] but under the prolonged disparate impact framework, the court assesses evidence of disparate impact independently. The court must carefully scrutinize causation between the disparate effect and the provision challenged by plaintiffs to ensure the disparate impact is not merely coincidental[150] because neutral laws can affect groups differently in ways that are not suspect.[151] Looking at the entirety of a plaintiff's complaint, the court can see whether the statistical evidence demonstrates that the law burdens a historically marginalized group. Usually, courts use statistical evidence to glean the government's intent,[152] but absent a need to prove intent, the court should focus on the issue of whether the law proximately causes the disparate harm.

3. *Meaningful Remedy to Disparate Impact*

In the next phase of analysis, the court must decide whether the proposed solution would remedy the harmful effect of the disparate impact. The proposed remedy can take two forms: a bill introduced in committee or a formal proposal drafted by members of Congress and submitted to congressional leadership. The bill or

146. *See* Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).

147. Smith v. City of Madison, 413 F. Supp. 3d 823, 836 (W.D. Wis. 2019) (discussing statistics offered by plaintiff that of the 132 people placed in the focused deterrence program for parolees, 112 of them were Black). The court concluded, without citing precedent, that this statistic showed a disparate impact. *Id.*

148. Alston v. City of Madison, 853 F.3d 901, 908 (7th Cir. 2017).

149. Vill. of Arlington Heighs v. Metro. Hous. Dev. Corp., 429 U.S. 252, 265 (1977) ("Disproportionate impact is not irrelevant, but it is not the sole touchstone of an invidious racial discrimination. Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.") (internal citation omitted).

150. The Supreme Court emphasizes causality for employment discrimination and FHA claims. *See* Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 521 (2015) ("A disparate impact claim based upon a statistical disparity "must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.").

151. *See Wards Cove*, 490 U.S. at 657 (explaining that causality ensures that defendants are not held responsible for a racial imbalance that they did not create).

152. *See, e.g.,* United States v. Avery 137 F.3d 343, 355 (6th Cir. 1997) ("[D]iscrimination can be proved through direct evidence, which seldom exists, or inferences can be drawn from valid relevant statistical evidence of disparate impact or other circumstantial evidence.").

proposal could plan to amend or repeal the challenged provision. In this stage, the court must assess plaintiffs' argument regarding whether the proposal will actually alleviate the harm caused by the disparate impact.

If a bill or proposal that attempts to alter the law has been introduced in the past, this strengthens plaintiffs' argument because the new bill weakens government's reliance on past justifications for the provision. Proposals to amend or repeal the challenged law may also indicate the effects of the law are problematic. If Members of Congress have identified the provision as improper, there is less of a need to prove that Congress acted with discriminatory intent when it originally enacted the law.[153] If Congress itself has identified the law as harmful or inequitable, then the intent of Congressmen centuries or decades ago becomes irrelevant. Accordingly, courts should consider the modern view of a challenged law as expressed in current deliberations rather than only focusing on the view expressed at the time of enactment. This myopia defies common sense but can be remedied by the requirement that courts consider the past attempts in Congress to amend flawed laws. Requiring an existing remedy will help guarantee courts only apply prolonged disparate impact to laws that are truly flawed, limiting the scope of the analysis.

4. *Compelling Government Justification*

In the third phase, prolonged disparate impact analysis evaluates the government interest on the same basis as strict scrutiny.[154] In traditional equal protection analysis, absent discriminatory intent or racial classification present in the law, the state interest would only have to *rationally* relate to a government interest.[155] Strict scrutiny requires the government to present a compelling interest and show that the law is narrowly tailored to fulfill that interest. Phase three of prolonged disparate impact analysis differs in that the government must provide a *compelling* interest for why it wants to keep the challenged provision in place.

153. *See supra* note 19 and accompanying text. Members of Congress tried to amend the NLRA to include agricultural workers many times.

154. *See supra* note 32. Strict scrutiny applies in equal protection cases when the government has classified people on the basis of race, or the government has intentionally discriminated against a group on the basis of race. In these cases, the government must prove the classification was necessary to accomplish a compelling state interest purpose.

155. *See* City of Cleborne v. Cleborne Living Cntr., 473 U.S. 432 (1975).

Typically, heightened scrutiny of this nature would require an intent finding.

There are a few factors that guide courts' analyses of compelling interest. Consistency indicates compelling interest, such as when the government enacts other laws to protect the interest from similar threats.[156] Generally, however, a compelling government interest depends heavily on the facts, and there is a myriad of interests that courts have upheld in the past.[157]

The new approach differs from the existing equal protection approach in that it requires that the government convince *both* the court *and* Congress that the compelling interest sufficiently justifies the disparate impact. In the prolonged disparate impact framework, the government cannot simply rely on an old rationale to justify perpetuation of a harm. Rather, the government must provide current justifications for the challenged law. The government must also address any prior bills or proposals that seek to alter or remedy the law challenged in that particular case. The court will assess the government's compelling interest and may make a recommendation to Congress as to whether the interest is compelling and sufficiently narrowly tailored. The court will also assess the strength of the government's response to prior amendments. The court's determination will rest primarily on the justifications offered in response to the new challenge.

5. *Congress Decides*

The next phase of the framework shifts responsibility back to Congress so that it can amend or repeal the challenged law. Once the court assesses the government's justifications and decides the constitutionality of the challenged law, Congress must deliberate and vote based on the record, which details the disparate effect and harm to plaintiffs and the justification offered by the government in court. The role of Congress in the prolonged disparate impact framework is important because it helps balance out the absence

156. Republican Party of Minnesota v. White, 416 F.3d 738, 750 (8th Cir. 2005) ("If an interest is *compelling* enough to justify abridging core constitutional rights, a state will enact regulations that substantially protect that interest from similarly significant threats.").

157. *See, e.g.*, United States v. Wilgus, 638 F.3d 1274 (10th Cir. 2011) (finding that the federal government had a compelling interest in protecting eagles); State v. Hardesty, 222 Ariz. 363, 367 (Ariz. 2009) (reiterating that the state had a compelling interest to regulate marijuana).

of proof of intent. The power of the judiciary is checked because Congress still has a large amount of control over whether the law stays in place. After the court makes its recommendation, Congress has a number of months or years to vote on the resolution. The court will determine the amount of time Congress has to deliberate. This time is also an opportunity for advocacy groups and activists to lobby Congress members and the relevant committees to draft a new bill or amendment, if necessary, or advocate on their behalf during deliberation. If Congress decides to repeal or amend the challenged provision, plaintiffs have achieved their goal. If Congress fails to vote within the time period the court gives, the court will strike down the challenged law as an equal protection violation. If Congress votes to keep the law in place, the process may end. Plaintiffs may decide to challenge Congress' decision to keep the law place and bring another equal protection challenge. The hope, however, with this framework is that Congress changes problematic laws when presented with evidence of harm and an already formulated solution.

B. APPLYING THE FRAMEWORK TO THE NLRA EXEMPTION

1. *Disparate Impact on Latinx Workers*

The NLRA exemption qualifies for prolonged disparate impact because of its severe and longstanding disparate impact on a protected class. Statistics show that the NLRA exemption predominantly affects racial minorities. Around 83% of all farmworkers are Latinx.[158] This percentage establishes a substantial disproportionate application on Latinx workers which make up only 16.2% of the American workforce.[159] But the disparate harm created by the exemption is more challenging to

158. Trish Hernandez and Susan Gabbard, *Findings from the National Agricultural Workers Survey (NAWS) 2015-2016*, DEP'T LAB., EMPLOYMENT, & TRAINING (2019), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/NAWS_Research_Report_13.pdf [https://perma.cc/3LGR-B8ZE]. The survey collected information using face-to-face interviews with 5,342 crop workers between October 1, 2014 and September 30, 2016. The survey found that 69% of farmworkers were born in Mexico and 6% were born in Central America; 29% were U.S. citizens, 21% were legal permanent residents, and 1% had work authorization through another visa program. *Id.*

159. CHERRIE BUCKNOR, CTR. FOR ECON. AND POL'Y RSCH., HISPANIC WORKERS IN THE UNITED STATES 6, CENTER FOR ECONOMIC AND POLICY RESEARCH (2016), https://cepr.net/images/stories/reports/hispanic-workers-2016-11.pdf [https://perma.cc/35FP-UQ6G].

define. The question is what specific harms agricultural workers suffer as a result of their exclusion.

There are a few key factors that set agricultural workers apart from workers included in the NLRA. The first is the rate of unionization. Agricultural workers have the lowest rates of unionization among all worker groups.[160] Unions represented only 2.8% of agricultural workers in 2019 and this number dropped to 1.7% in 2020.[161] Comparatively lower rates of unionization are not surprising given that agricultural workers do not have uniform federal protections and face employer retaliation for attempts to unionize. Agricultural workers also do not have the same legacy of unionization other industries have.

The second factor is socio-economic: data on farmworkers' wages indicates that agricultural workers are one of the country's most impoverished working groups.[162] They have the lowest median income of any worker group.[163] Data gathered by the Department of Labor also indicates that 33% of agricultural workers have household incomes below the poverty threshold.[164] In comparison, only 4.5% of non-farm workers classified as "working poor" were below the poverty threshold.[165]

Agricultural workers' struggle for labor rights has also contributed to their marginalization.[166] Since enactment of the NLRA, the exemption has contributed to social and economic

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160. *See* BUREAU OF LABOR STATISTICS, News Release Union Members—2020, Tbl. 3 (Jan. 22, 2021).

161. *Id.*

162. *Id.* at iii-iv. The mean and median annual incomes for farmworkers ranges from $17,500 to $19,999 while the median income in the United States is around $31,000. *Id.* In addition, 29% of farmworkers have employer-provided health insurance, compared to 49% of the workers in the country. *Id.*

163. CELINE MCNICHOLAS, LYNN RHINEHART, MARGARET POYDOCK, HEIDI SHIERHOLZ, DANIEL PEREZ, ECONOMIC POLICY INSTITUTE, WHY UNIONS ARE GOOD FOR WORKERS–ESPECIALLY IN A CRISIS LIKE COVID-19 5 , ECONOMIC POLICY INSTITUTE (2020), Why Unions Are Good for Workers–Especially in a Crisis like COVID-19, 6 (Aug. 25, 2020)., https://www.epi.org/publication/why-unions-are-good-for-workers-especially-in-a-crisis-like-covid-19-12-policies-that-would-boost-worker-rights-safety-and-wages/ [https://perma.cc/TX9L-GPSQ].

164. NAWS, *supra* note 158, at 36.

165. U.S. BUREAU LAB. STAT., A PROFILE OF THE WORKING POOR, 2018 1 (2020) https://www.bls.gov/opub/reports/working-poor/2018/home.htm [https://perma.cc/Z94J-W24G].

166. *Migratory Labor Legislation: Hearings on S. 8 A Bill to Amend the National Labor Relations Act, As Amended, So as to Make Its Provisions Applicable to Agriculture before the Senate Subcomm. on Migratory Labor*, 105th Cong. 155, at 2–3 (1968) (statement of Sen. Harrison A. Williams, Jr.) [hereinafter "1968 Hearings"] (referring to conditions of farmworkers as a "national embarrassment").

inequality that has severely impacted agricultural workers and contributed to their societal marginalization. Agricultural workers' pursuit of labor reform created a cycle of strikes, economic disruption, and violent conflict that pushed an already marginalized group to the fringes of society. In the mid-twentieth century, agricultural workers, who became primarily migrant workers, were cut off from the rest of society by their poverty and transience.[167] In the 1960s and 1970s, labor unrest was a national topic and a point of concern for some congressmen. The congressional record in the 1960s and 1970s reflected those tensions created by labor unrest.[168] Over time, although the agricultural industry became more stable and consistent due to technological advances, workers have remained vulnerable. This vulnerability has made it more difficult for them to use traditional channels to advocate for improved working conditions.

2. *NLRA Coverage as a Solution*

Amending the NLRA to extend coverage to agricultural workers is a fitting solution to relieve the disparate impact by including agricultural workers in the Act's organizing protections. The primary reason is that empowering workers would put them in a better position to bargain for improved terms and conditions of employment. Collective bargaining, as recognized by the NLRA, occurs when elected bargaining representatives negotiate with management to establish a collective bargaining agreement. Once signed, the collective bargaining agreement must be followed by workers and management, and violating it is unlawful.[169] Congress has expressed the same conclusion repeatedly: collective bargaining is an ideal solution because it better enables workers to advocate for particular protections they may lack currently,

167. SUBCOMM. ON MIGRANT LAB., COMM. ON LAB. & PUB. WELFARE, THE MIGRATORY FARM LABOR PROBLEM IN THE UNITED STATES, S. REP. NO. 91-83, at 13 (1969). [hereinafter "1969 Hearings"].

168. *See e.g.*, "Grape Growers File Damage Suit," N.Y. TIMES (July 4, 1969) (in July 1969, California growers claimed in district court that the four-year boycott had cost them a staggering $25 million in damages); SEN. REPORT NO. 91–83, The Migratory Farm Labor Problem in the United States, 20 (1969) ("This year, the industry is involved in the most costly and economically detrimental activity yet. A nationwide boycott of California table grapes was called by the United Farm Workers Organizing Committee . . .").

169. 29 U.S.C. § 158(8)(d) (2018).

such as sick leave, medical benefits, protective equipment, overtime pay, and increased wages.[170]

In the past, members of Congress have argued that collective bargaining was an essential step to materially improving conditions for agricultural workers. The Migratory Labor Subcommittee hearings for S.8, a bill to give agricultural workers bargaining rights, illustrate the importance of collective bargaining for establishing worker equality. Senator Harrison A. Williams argued that collective bargaining would be the most effective route to alleviate economic inequities of agricultural workers during the May 1967 hearings surrounding S.8, titled "A Bill to Amend the National Labor Relations Act, as Amended, So as to Make its Provisions Applicable to Agriculture."[171] In 1967, Secretary of Labor Willard Wirtz also stated that collective bargaining would help the millions of farm workers consigned to poverty.[172] In 1967, the AFL-CIO advocated for collective bargaining legislation as a way to finally move agricultural workers out of poverty.[173]

Some members of Congress also positioned collective bargaining rights as a solution to mass labor unrest.[174] In 1969, the Senate Committee on Labor and Public Welfare recommended as a solution to the Delano Boycott expanding the scope of the NLRA to agricultural workers which would give them established procedures for communication, elections, and negotiations.[175] Representative Seymour Halpern of New York argued in support of collective bargaining for agricultural workers as a necessary way to stabilize employer-employee relations.[176] In 1973, members of Congress again stressed the need for labor laws that facilitated peaceful organizing efforts.[177] Representative Al Quie from

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170. *See supra* note 19.

171. 1968 Hearings, *supra* note 166, at 2.

172. *Id.* at 32.

173. *Id.* at 21–22 ("Their only hope . . . is to lift themselves through a union.").

174. *Id.* at 42–43 (Secretary of Labor William Wirtz agreeing with the proposition made by Senator Williams that collective bargaining agreements would prevent the "devastating" strikes that occurred each year).

175. 1969 Hearings, *supra* note 167, at 315.

176. 115 Cong. Rec. 4821 (1969) (statement of Rep. Seymour Halpern) [hereinafter "Halpern Statement"] ("Consideration of agriculture as one of our Nation's major industries, coupled with its critical effect on all our lives, further evidences the need to maintain equitable and stable employer-employee relations.").

177. *Agricultural Labor-Management Relations: Hearings on H.R. 4007 A BILL To amend the National Labor Relations Act, as amended, to amend the definition of "employee"*

Minnesota pointed to recognition strikes[178] in particular as a source of labor strife.[179] And in 1988, Senator Orrin Hatch noted that legislation could help facilitate progress in the labor movement, noting the labor unrest in California and Arizona.[180]

3. *Justifying Decades of Government Interests*

In a prolonged disparate impact claim, the government would need to provide new justifications for the agricultural exemption. Since 1935, the agricultural industry has changed, as have attitudes towards race and labor, thus rendering most of the old justifications for the exemption moot. This section addresses the validity of justifications offered in the past and how they would apply now in a modern context in order to show why it is imperative that the government articulate a compelling interest in keeping the exemption in place.

According to Congress, the nature of the agriculture industry created two issues. One reason was Congress' concern that agriculture did not affect interstate commerce and therefore it would be unconstitutional to regulate the industry using Congress' commerce power.[181] In the 1930s, members of Congress argued that the agricultural industry consisted mostly of small-scale farms. Congress wanted to avoid a possibility that the Supreme Court would strike down the NLRA because of the question of whether agriculture affected interstate commerce, so they

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to include certain agricultural employees, 93rd Cong. 53–54 (statement of Rep. William Ketchum).

178. If employees vote in favor of union representation, but an employer does not accept the vote, then workers may strike or picket the employer in order to force them to accept the union. *See* NAT'L LAB. RELATIONS BD., *Recognitional picketing (Section 8(b)(7))*, https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law/recognitional-picketing-section-8b7 [https://perma.cc/8F66-QR94].

179. *Id.*; 29 U.S.C. § 8(b)(7).

180. 134 CONG. REC. 24540 (1988). ("[W]idespread labor unrest, including interruption of harvests by strikes, violence on both sides, costly litigation, and little accomplishment in terms of labor organizing, collective-bargaining agreements, or improved relations between management and labor.").

181. *Review of the National Labor Relations Act: Hearing before the Special Subcomm. on Lan. of the H. Comm. on Educ. & Lab.*, 89th Cong. 64 (1966) (statement of Rep. Henry Ellenbogen). Representative Ellenbogen spoke about the desirability of including agricultural workers, but stated that "under the N.R.A. decisions of the Supreme Court, they could not be included in this bill, unless they came within the term 'interstate commerce'" and adding that "[i]f we have the power to do it, we should include the agricultural workers". *Id.*

excluded agricultural workers.[182] Another justification was concern about employees on small farms trying to organize and the imbalance of power this would create.[183] Both of these issues are no longer relevant because of the large-scale and automated nature of agriculture. Even by the 1960s, the majority of farm workers were employed by just a few large corporations.[184]

In the 1960s, Congress offered additional justifications for why it should not amend the NLRA. First, Congress claimed there was opposition from employers and employees in the agricultural industry. Agricultural groups and employers lobbied Congress at various points in opposition to legislation that would expand NLRA coverage or create new legislation to protect collective bargaining.[185] Another argument against amending the Act was the peculiar nature of the industry, particularly its seasonality, and involvement of perishable goods. Lastly, The Growers Association of America objected to S.8 due to fears the Act would be used to impose union shops.[186]

But because agriculture has changed in the decades since enactment of the agricultural exemption, none of the original reasons for excluding agricultural workers hold water today. Members of Congress have even acknowledged that the reasons are pretextual.[187] This raises the interesting question of what compelling interest the government would propose today, if it had to defend the exemption in court.

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182. *See* 79 CONG. REC. 9721 (Statement of Representative Henry Ellenbogen), *supra* note 112.

183. 1968 Hearings, *supra* note 166, at 206–07. An AFL-CIO legislative representative noted that small farms are not very likely to deal with unionization and NLRB elections because there are so few hired laborers. *Id.*

184. *See* Mem. Points & Authorities at 2, Romero v. Wirtz, (N.D. Cal., 1968) (No. 50213) ("The agricultural industry is presently dominated by large commercial farms with specialized crops and a high degree of mechanization.").

185. *See, e.g.*, 1968 Hearings, *supra* note 166, at 289. The Agricultural Products Labor Committee opposed S. 8 because it "compelled" unionization and created a union monopoly of agricultural labor and control of the nation's food supply; Vice President of the Labor Committee J. J. Miller argued in his statement that S. 8 would actually kill collective bargaining. Miller advocated, instead, for the regulation of farm labor by state governments. *Id.*

186. *Id.* at 204.

187. *See, e.g.,* 1969 Hearings, *supra* note 167, at 19 (referring to the exemption as a "discriminatory exclusion").

C. COUNTER ARGUMENTS & ALTERNATIVE STRATEGIES

1. *Arguments Against Prolonged Disparate Impact*

One argument against applying prolonged disparate impact, and expanding disparate impact theory in general, is an increase in litigation that would become unwieldy. Arguably, a function of the intent requirement is to weed out less meritorious claims. Removing some of those barriers could lead to lawsuits that waste legal resources or incorrectly place blame with the government.[188]

The prolonged disparate impact framework is constructed to mitigate this problem. Many laws would not qualify for prolonged disparate impact. Plaintiffs have the initial burden of bringing forward a viable solution. It would be troubling if plaintiffs used this disparate impact framework to sneak legislation past the usual deliberative process. If a member of Congress proposed a bill that got stuck in committee, then they could wait for or initiate a lawsuit that would push it out of committee. This illuminates why the framework requires some harm against a protected class. Otherwise, the framework will be used to carry out the bidding of influential interest groups rather than to expand the rights of marginalized groups.

The court's direction to Congress to vote on legislation also raises separation of powers concerns.[189] Separation of powers is widely understood to establish the principle that the Constitution

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188. SECSYS, LLC v. Vigil, 666 F.3d 678, 685 (10th Cir. 2012) ("By contrast, when the law under review is generally applicable to all persons, no presumption of intentional discrimination arises; proof is required. This is so because many laws, perhaps most and often unavoidably, affect some groups of persons differently than others even though they involve no *intentional* discrimination. Some persons, for example, will be better able to perform a generally applicable aptitude test designed to measure competence for a particular government job, or better able to fill out universally mandated paperwork necessary to establish entitlement to a benefit. Yet none of this necessarily betokens an intent to discriminate against the burdened group (the failed job seekers, the poor paperwork performers).").

189. *See* Ittai Bar-Siman-Tov, *The Puzzling Resistance to Judicial Review of the Legislative Process*, 91 BULR 1915, 1916 (2011) ("*While substantive judicial review is well-established and often taken for granted, many judges and scholars see judicial review of the legislative process as utterly objectionable."); see also* Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1372 (2001) *("*By upholding the exclusivity of constitutionally prescribed lawmaking procedures, the Court has prevented attempts to evade obstacles meant both to impede federal lawmaking and to give states a voice in the process. Although commentators sometimes criticize these decisions as unduly formal, few have questioned the propriety of judicial review to police federal lawmaking procedures.").

gives each of the three branches distinct powers that are not to be encroached upon by the other branches.[190] Directing Congress to vote on a challenged law could be viewed as the court inserting itself into the lawmaking process. However, the prolonged disparate impact framework is fashioned to still give deference to Congress for final lawmaking decisions. The prolonged framework also respects the principle that Congress is well-suited to make decisions about justifications for legislation.[191] The court will strike down the law *only* if Congress does not act at all and declines to vote on legislation.

In our current system, courts do in fact insert themselves into the lawmaking process through substantive judicial review.[192] The review process outlined in prolonged disparate impact theory is a form of review for lawmaking procedure that is not significantly different from substantive judicial review. Within substantive judicial review, if the court finds a law unconstitutional, then it may strike down the law.[193] Within prolonged disparate impact, if the process for lawmaking raises constitutional concerns, then the court may ultimately do the same and invalidate the law.

Lastly, an NLRA amendment to include agricultural workers is arguably not the best solution to improving worker conditions. Although federal protection could help many workers groups unionize and collectively bargain, it is unclear how widespread or substantial this change would be. Unionization rates are low for workers across different industries. Unions are not as strong or influential as they were in the 1960s when the campaign to amend the NLRA began. The NLRA also is arguably not well-suited for agricultural workers and not all employers would fall under the jurisdiction of the NLRB.[194]

Despite its flaws, inclusion in the NLRA is still an important step even if it would not increase the welfare of *all* agricultural workers. There is symbolic value in the inclusion of agricultural workers in the NLRA. Including them within the framework of the

190. *See* Patachak v. Zinke, 138 S. Ct. 897, 904 (2018); *see also id.* ("To the legislative department has been committed the duty of making laws; to the executive the duty of executing them; and to the judiciary the duty of interpreting and applying them in cases properly brought before the courts.") (quoting Massachusetts v. Melon, 262 U.S. 447, 448 (1923)).

191. *See, e.g.*, U.S. CONST. art. I.

192. *See* Saikrishna B. Prakash & John C. Yoo, *The Origins of Judicial Review*, 70 U. CHI. L. REV. 887 (2003).

193. *Id.* at 888.

194. 134 CONG. REC. 24540 (1988) (Statement of Senator Orrin Hatch).

NLRA and placing them within the jurisdiction of the NLRB could empower a group of workers that federal labor law has marginalized for decades.

2. *Imputed Intent Strategy*

Legal academics in the past have also proposed solutions for incorporating agricultural workers into the NLRA. One interesting strategy for establishing discriminatory intent for the NLRA agricultural exemption is to impute intent from the FLSA congressional record to the NLRA.[195] As discussed in Part II.B, there is clear evidence of racial hostility expressed by congressmen during debates on provisions in the FLSA, which can inform interpretation of the NLRA.[196] In *Echoes of Slavery*, Professor Juan F. Perea argues that comments made during the FLSA debates show a general intent to discriminate against Black workers and satisfy the discriminatory intent requirement for equal protection analysis.[197] According to Perea, intent from the FLSA can be imputed to the NLRA for an equal protection analysis by applying the theory of statutory interpretation *in pari materia*.[198] The doctrine of *in pari materia* roughly translates to mean "in a similar case."[199] It stands for the premise that courts should interpret similar statutes so that meaning is consistent across the law.[200] *In pari materia* is a useful tool to resolve ambiguities and doubts about the meaning of statutory language.[201] When applied by courts, similar statutes and provisions can be read to have the same or similar meaning.[202]

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195. *See* Perea, *supra* note 86, at 114–15.
196. 82 CONG. REC. 1404 (1937).
197. *See* Perea, *supra* note 86, at 114–15.
198. *Id.* at 132.
199. *In Pari Materia*, BLACK'S LAW DICTIONARY (11th ed. 2019).
200. Erlenbaugh v. United States, 409 U.S. 239, 243–44 (1972); *see also* Haig v. Agee 453 U.S. 280, 300–01 (1981).
201. *Erlenbaugh*, 409 U.S. at 244.
202. Perea, *supra* note 86, at 131 (quoting Smith v. City of Jackson, Miss., 544 U.S. 228, 233 (2005)); *see also* Greenwood Trust Co. v. Mass., 971 F.2d 818, 827 (1st Cir. 1992) ("It is, after all, a general rule that when Congress borrows language from one statute and incorporates it into a second statute, the language of the two acts should be interpreted the same way.").
The case *Erlenbaugh v. United States* provides guidance on how to apply to doctrine. The Supreme Court stated that in order for statues to be *in pari materia*, they must serve the same function, be enacted at the same time, and be enacted by the same legislative body. *Erlenbaugh*, 409 U.S. at 244–45. *Cf.* Wachovia Bank v. Schmidt, 546 U.S. 303, 319 (2006) (noting that a 1933 *Yale Law Review* article argued that similarity in language does not

There are some key similarities between the FLSA and NLRA, which supports the argument of reading the statutes *in pari materia*. As Perea argues in his article, the FLSA and NLRA were both New Deal Era statutes that used almost identical language to explicitly exclude agricultural workers.[203] Congress intended both acts to provide relief for workers during the Great Depression and although Congress enacted the acts in different sessions, many of the congressmen who made racist statements during the FLSA debates were involved in the passage of the NLRA.[204] It is therefore not unreasonable to argue that these same congressmen cast their votes on the NLRA with the same racist sentiments as they did when they voted to pass the FLSA. Perea argues that courts should find the racist intent to exclude farmworkers from the FLSA applies to the similarly worded NLRA, which courts have not yet considered.[205]

Perea's *in pari materia* imputed intent argument, however, faces some challenges. First, there is no example of a prior case that applies this type of argument. It is unclear, therefore, how strictly a court would apply the *Erlenbaugh* factors and how the court would treat the fact that the FLSA and NLRA do not perfectly satisfy the requirements to establish similarity. Specifically, Congress enacted the acts three years apart—the NLRA in 1935 and the FLSA in 1938.[206] The statutes also serve different functions. The FLSA regulates worker wages and conditions while the NLRA governs labor organizing and collective bargaining. Furthermore, Perea's use of the doctrine to impute discriminatory intent is arguably flawed. The canon stands for the premise that a later act can be regarded as an interpretation of an earlier act as a way to resolve ambiguities and doubts.[207] It may be difficult to argue discriminatory intent existed in 1935, before evidence of it arose in 1938. In addition, the theory is often only

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mean legal rules should be applied the same way). *See also* Ryan v. Carter, 93 U.S. 78, 84 (1876) (stating that various laws passed respecting the Territories of Orleans and Louisiana were *in pari materia* and should be read as one statute).

203. *See* Perea, *supra* note 86, at 132.

204. Specifically, Congressmen Smith, Wilcox, and Cox. *See* 110 82 CONG. REC. 1404 (1937).

205. *See* Perea, supra note 86, at 132.

206. National Labor Relations Act of 1935, Pub. L. No. 74-98, 49 Stat. 449; Fair Labor Standards Act of 1938, Pub. L. No. 75-718, 52 Stat. 1060.

207. Erlenbaugh v. United States, 409 U.S. 239, 244–45 (1972); *see also* Haig v. Agee, 453. U.S. 280, 300–01 (1981).

applied when the statutory language is ambiguous, and the FLSA's and NLRA's exemptions are clear and explicit.[208]

CONCLUSION

Prolonged disparate impact is an original and theoretical framework that seeks to remedy the problem of challenging the NLRA exemption for agricultural workers using traditional equal protection doctrine. Agricultural workers have been a disadvantaged group of workers for decades, if not centuries. And although the agricultural exemption has a racist effect (as well as a likely racist intent), an equal protection challenge to the law would likely fail. It is highly unlikely that courts will ever displace the intent requirement for equal protection or direct Congress to vote on legislation, but this Note highlights the need to rethink equal protection analysis and the ways in which current doctrine's emphasis on legislators' *original* intent fails to reckon with circumstances that have changed over decades. The prolonged disparate impact framework is designed to make it easier for plaintiffs to instigate change in old, discriminatory laws by prompting Congress to revisit its legislation.

208. In the NLRA, "the term "employee" shall include any employee . . . but shall not include any individual employed as an agricultural laborer." 29 U.S.C. § 152(3). The FLSA stated that any "employee employed in agriculture" was exempt from the maximum hour or overtime compensation provision of the FLSA. 29 U.S.C. § 213(b)(12).