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Fall 2014

- I. Ben Leonard, *REGULATE FOP NOW! A Case for Mandatory FDA Regulation Front-of-Pack Nutrition Labeling*
- II. David Winston, *Repealing the Agricultural Exemption in the FLSA and the NLRA*

REGULATE FOP NOW!
A Case for Mandatory FDA Regulated
Front-of-Pack Nutrition Labeling

By: Ben Leonard

Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. PURPOSES OF LABELING.....	4
A. Principles of Labeling, Generally	4
B. Reasons for the Rise in Food Labeling	5
C. Purposes of Nutrition Labeling in America	7
III. PROLIFERATION OF FOP NUTRITION LABELS IN THE UNITED STATES	9
A. Manufacturer Labels	10
i. <i>PepsiCo – Smart Spot</i>	10
ii. <i>General Mills – Goodness Corner</i>	11
iii. <i>Kraft Foods – Sensible Solutions</i>	13
iv. <i>Kellogg’s – Nutrition at a Glance</i>	13
B. Third-Party Labels	15
i. <i>American Heart Association – Heart Check</i>	15
ii. <i>Hannaford Brothers – Guiding Stars</i>	16
iii. <i>Keystone Center – Smart Choices</i>	17
C. Issues Arising from Multiple Formats, Standards, and Players	19
i. <i>Lack of Consistency</i>	19
ii. <i>Potential to Mislead</i>	21
D. FDA Intervention	23
IV. A MODEL FOP NUTRITION LABELING SYSTEM.....	27
A. IOM’s Recommendation – Nutrition Points System	27
B. United Kingdom’s Current Scheme – Multiple Traffic Light System	29
C. Comparing NPS and MTL	30
i. <i>Ability to Inform</i>	30
ii. <i>Ability to Protect</i>	32
iii. <i>Ability to Guide</i>	33
D. Comparing NPS and Private Industry Labels	34
i. <i>Ability to Inform</i>	34
ii. <i>Ability to Protect</i>	36
iii. <i>Ability to Guide</i>	37
E. Potential Drawbacks to NPS	37
i. <i>Lack of Positive Nutrients</i>	37
ii. <i>Grouping Fat and Trans Fat Together</i>	38

V. IMPLEMENTING IOM’S RECOMMENDATION	39
A. FDA’s Lack of Advancement	39
B. GMA Introduces “Facts Up Front”	41
C. Possible Entrenchment of “Facts Up Front”	42
VI. CONCLUSION.....	43
APPENDIX A.....	44
APPENDIX B	46

I. Introduction

In the past thirty years, global obesity rates have risen sharply.¹ The Centers for Disease Control and Prevention (CDC) reports that in 2010, 37.5% of U.S. adults were obese, along with 16.9% of children and adolescents.² Those percentages account for over 78 million obese adults and 12.5 million obese children.³ Projections show that if obesity rates continue to rise as they have, roughly 65 million more adults will suffer from obesity by 2030.⁴ This can bring about many health problems, including increased risk for type two diabetes, cardiovascular diseases, and several forms of cancer.⁵ There are also many causes of obesity, some of which stem from an individual's economic environment.⁶ One major cause, and the focus of this paper, was the move from "traditional foods and cuisine to more processed energy-dense foods."⁷ These processed foods tend to contain high levels of added sugar, fats, salt, and flavor enhancers.⁸ The marketing of these processed foods has also been associated with the rise in obesity.⁹ Thus, there is a need to present more accurate nutrition information to the consumer at the point of purchase.¹⁰

¹ Steven L. Gortmaker et al. et al., *Changing the Future of Obesity: Science, Policy, and Action*, 378 THE LANCET 838, 838 (2011).

² Cynthia L. Ogden et al., *Prevalence of Obesity in the United States, 2009-2010*, CENTERS FOR DISEASE CONTROL & PREVENTION (Jan., 2012), <http://www.cdc.gov/nchs/data/databriefs/db82.htm>.

³ *Id.*

⁴ Y. Claire Wang et al., *Health and Economic Burden of the Projected Obesity Trends in the USA and the UK*, 378 THE LANCET 815, 817 (2011). Obesity is defined as having a body-mass index of more than 30 kg/m. Gortmaker et al., *supra* note 1, at 838.

⁵ Wang et al., *supra* note 4, at 815.

⁶ Boyd A. Swinburn et al., *The Global Obesity Pandemic: Shaped by Global Drivers and Local Environments*, 378 THE LANCET 804, 806 (2011).

⁷ *Id.*; *see also*, Gortmaker et al., *supra* note 1, at 838.

⁸ Gortmaker et al., *supra* note 1, at 838.

⁹ *Id.*

¹⁰ *See* Sarah Campos et al., *Nutrition Labels on Pre-Packaged Foods: A Systematic Review*, 14 PUB. HEALTH NUTRITION 1496, 1503 ("[N]utrition labels on pre-packaged foods are a cost-

American consumers recognize the need to present nutrition information more effectively than food labels currently do. In a recent study, participants observed the need to update the Nutrition Facts Panel (NFP) and recommended that some of the key nutrient information be brought to the front of the package.¹¹ This is consistent with another study's estimation that 40% - 58% of American consumers report that they do not look at the NFP at all, when shopping.¹² The same study showed no change in attention and consumer choice when the NFP was reprinted on the front of the package, but some change in both when a simple logo was present.¹³ These results further support the argument that only the key nutrient information should be displayed on the front of the package. Moreover, consumers require some sort of directive,

effective population-level intervention with considerable reach. In order to capitalize upon the potential of nutrition labels, [however,] governments will need to explore new formats and different types of information content to ensure that nutrition information is accessible and understandable.”).

¹¹ Josephine M. Wills et al., *Exploring Global Consumer Attitudes Toward Nutrition Information on Food Labels*, 67 NUTRITION REVIEWS (1) S102, S103 (2009). The White House and the FDA recently announced a proposed update to the NFP. Office of the First Lady, *The White House and FDA Announce Proposed Updates to Nutrition Facts Label*, THE WHITE HOUSE (Feb. 27, 2014), <http://www.whitehouse.gov/the-press-office/2014/02/27/white-house-and-fda-announce-proposed-updates-nutrition-facts-label>. The update includes: (1) requiring the amount of added sugars to be displayed on the label; (2) updating serving sizes to reflect how much consumer actually eat, rather than what they should eat; (3) presenting calorie information for the whole package on foods that can be consumed in a small number of sittings; and (4) reformatting the label in order to emphasize calories, serving sizes, and Percent Daily Value. *Id.*; see Appendix B for an illustration. The proposed changes are designed to highlight some of the major issues in the food industry today. The update does not, however, propose to bring any information to the front of the package.

¹² Erica van Herpen & Hans C.M. van Trijp, *Front-of-Pack Nutrition Labels. Their Effect on Attention and Choices When Consumers Have Varying Goals and Time Constraints*, 57 APPETITE 148, 158 (2011). These percentages are likely higher in reality, because studies show that use is even less than what is reported. See, Dan J. Graham & Robert W. Jeffery, *Location, Location, Location: Eye-Tracking Evidence That Consumers Preferentially View Prominently Positioned Nutrition Information*, 111 J. AM. DIETETIC ASS'N. 1704, 1708 (2011).

¹³ *Id.*

before a front-of-pack (FOP) label can meaningfully impact choice.¹⁴ This is especially true when time is a factor, as in the hectic environment of the supermarket.¹⁵

As interest in FOP labeling rose in the early 2000s, the American food industry made a concerted effort to avoid the development of regulations. Starting in 2004, industry members began introducing their own proprietary FOP labels.¹⁶ As will be explained in more detail in section III, this proliferation was met with much criticism, and it backfired on the industry, when it eventually prompted the FDA to intervene. In March 2010, Commissioner of Food and Drugs, Dr. Margaret Hamburg, wrote an open letter to the industry in which she announced the FDA's intention to devise a regulatory scheme for FOP nutrition labeling.¹⁷ However, the FDA has not made any advancement in its initiative, since 2010 when it called for research submissions and comments through the federal register.¹⁸ Nonetheless, other entities have made substantial progress in the research and development of such a regulatory scheme.¹⁹

The goal of this paper is to urge the FDA to implement a mandatory FOP nutrition labeling scheme now. Section II outlines the normative principles of labeling, the historical reasons for the rise in food labeling, and the federal government's purposes behind regulating nutrition labeling, specifically. Section III then traces the history of FOP labeling in America. It

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Ellen Taaffe, *PepsiCo's Health and Wellness Commitment*, NAT'L INST. ENVIR. HEALTH SCI., http://www.niehs.nih.gov/news/assets/docs_p_z/summary_informationtaaffe.pdf (last visited Dec. 19, 2013).

¹⁷ Margaret A. Hamburg, *Open Letter to Industry from Dr. Hamburg*, U.S. FOOD & DRUG ADMINISTRATION (Mar. 3, 2010), <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm202733.htm>.

¹⁸ Front-of-Pack and Shelf Tag Nutrition Symbols; Establishment of Docket; Request for Comments and Information 75 Fed. Reg. 22602-01 (April 29, 2010).

¹⁹ See INST. MED., FRONT-OF-PACKAGE NUTRITION RATING SYSTEMS AND SYMBOLS: PROMOTING HEALTHIER CHOICES (Ellen A. Wartella et al. eds., 2011), available at http://www.nap.edu/catalog.php?record_id=13221.

first examines the issues that have arisen from the proliferation of privately created labels, and then outlines the FDA's response and subsequent actions. Section IV develops a model FOP labeling system that achieves the FDA's goals and is supported by the developments in the research community. It examines the Institute of Medicine's (IOM) recent study of the literature and subsequent recommendation for a regulated FOP labeling scheme in a comparative analysis with the United Kingdom's (UK) current regulatory scheme. It concludes that the IOM's recommendation is the best option moving forward, as it better fulfills the principles of labeling, outlined in Section II, and thus has the greatest chance of being effective. Section V questions the FDA's lack of activity regarding FOP labeling, especially in the wake of the IOM's recommendation. It introduces the industry's newest development for a labeling scheme, and warns that it would address none of the FDA's concerns. Finally, it concludes that the FDA needs to implement a mandatory scheme now, before the industry's label becomes entrenched in the food system.

II. Purposes of Food Labeling

A. Principles of Labeling, Generally

In general, labels provide a nexus between buyers and sellers, and are used to establish trust with consumers. At its core, then, a label is an epistemic device. It is intended to import some sort of reliable knowledge to the consumer. Within the realm of delivering information, however, a label may serve any of several different purposes, which can be abstracted to the following three categories: (1) inform;²⁰ (2) protect;²¹ and (3) guide (i.e. encourage, instruct,

²⁰ This is the most basic purpose of labeling. It can be understood in terms of providing information to the already interested reader—to convey objective knowledge. See X. Frohlich, *Buyer Be-Aware: The Ethics of Food Labeling Reform and 'Mobilising the Consumer,'* in GLOBAL FOOD SECURITY: ETHICAL AND LEGAL CHALLENGES 221, 224 (Carlos M. Romeo

motivate).^{22,23} “To inform” is a label’s most basic and objective function. It conveys knowledge to the reader, which she then can process and do with what she will. It is merely a means for a manufacturer to deliver information to its consumer, information it believes is worth knowing for some reason. To that end, it is difficult to divorce a label’s purpose to inform from the underlying motivation for providing the information. Thus, while part of a label’s purpose will always be to inform, it will also often include a normative aspect as well—either to protect or to guide.

A label protects the consumer when the information it provides relates to a risky or dangerous aspect of a product. Protection labels thus often take the form of a disclaimer. A label that is intended to guide a consumer’s choices, on the other hand, has more of the characteristics of an advertisement. While not necessarily proprietary in nature, a guiding label divides products into two categories: (1) products a consumer should purchase, based on some underlying standard; and (2) products a consumer should avoid, based on that same standard.²⁴

Casabona, et al. eds., 2010) (distinguishing informing from educating, where educating is an attempt to garner the attention of a disinterested reader).

²¹ Linda Marks, *What’s in a Label?: Consumers, Public Policy and Food Labels*, 9 FOOD POLICY 252, 252 (1984) (explaining rise in food labeling as it relates to consumer protection); Frohlich, *supra* note 21, at 222 (discussing rise in food labeling as it relates to consumer risk).

²² This includes attempts to encourage, instruct, and motivate. It also includes attempts to educate the previously disinterested reader, in an effort to guide her purchasing choices. See Frohlich, *supra* note 21, at 224; Brenda M. Derby & Alan S. Levy, *Do Food Labels Work?: Gauging the Effectiveness of Food Labels Pre- and Post-NLEA*, in HANDBOOK MARKETING & SOC’Y 372, 375 (Paul N. Bloom & Gregory T. Gundlach eds., 2001) (Food labels “assist in dietary management and contribute to nutrition education.”); Marks, *supra* note 22, at 253 (observing that dietary bodies are increasingly advocating for the reduced intake of certain nutrients, and labels can be used to motivate consumers to make those changes).

²³ Marks, *supra* note 22, at 255 (“Food labels can provide information, consumer protection, and in the case of nutrition labeling, education for healthier food choices.”).

²⁴ A nonproprietary example, recently used by the Institute of Medicine, is the Energy Star Program. INST. MED., *supra* note 20, at 65. Pursuant to the Energy Star Program, an energy-consuming product can carry the label, indicating that it is a product consumers ought to purchase, if it meets the Environmental Protection Agency’s current standards for energy

By setting a standard, the labeling entity is promoting a particular policy or agenda and instructing the consumer to make choices that are consistent with that policy. When the underlying policy is to protect in some way, the label will often contain characteristics of both protective labels and guiding labels (i.e. the label guides the consumer in an effort to protect the consumer from making dangerous choices). When the entity is a public agency, the policy also serves to legitimize and standardize information.²⁵

Given the current state of nutrition in America, a successfully regulated FOP nutrition label will have characteristics of all three categories: (1) it will provide meaningful information efficiently; (2) if utilized, it will protect the consumer from taking in excessive amounts of nutrients that are adverse to a healthy diet; and (3) it will educate consumers and guide them to purchase foods that contain a healthy level of calories and a healthful make-up of nutrients.

B. Reasons for the Rise in Regulatory Food Labeling

The factual realities motivating the rise in regulatory food labeling are consistent with the principles of labeling more generally. Thus, this historical development effectively illustrates how those principles operate in the context of food. First, the growth in production of prepackaged and processed foods in the 1960s and 1970s made it increasingly difficult for consumers to understand the nature of a food product from ordinary inspection.²⁶ Food labels

efficiency. *Id.* The Energy Star Program has been influential on consumer behavior and has gained traction with industry. *Report Briefing: Front-of-Package Nutrition Rating Systems and Symbols Phase II—Audio Webcast*, INST. MED. (Oct. 20, 2011, 11:00 AM), <http://www.iom.edu/Activities/Nutrition/NutritionSymbols/2011-OCT-20.aspx> [hereinafter *Phase II Report Briefing—Audio Webcast*].

²⁵ Frohlich, *supra* note 21, at 223.

²⁶ Marks, *supra* note 22, at 252.

were in part necessitated simply to inform the interested consumer about the contents, storage, and preparation of prepackaged food products.²⁷

Second, and related to the need to convey more information, was the interest in consumer protection.²⁸ The rise in processed and prepackaged foods prompted the industry to explore different ways of altering and preserving foods, largely through the use of additives.²⁹ As consumers tended to adopt different definitions of “acceptable risk,” with respect to food additives, the need for regulated disclosure of their presence became apparent.³⁰

Finally, increased interest in nutrition and health also helped initiate the rise in regulatory food labeling.³¹ Following scientific developments on the relationship between health and nutrition, as well as the correlation between changing patterns in diet and changing patterns in disease, a number of medical bodies and government-appointed committees began formulating dietary goals.³² From the beginning, these entities have recommended “reductions in the average intake of total fat, saturated fat, sugar and salt, and increases in the consumption of whole-grain cereals, vegetables and fruit.”³³

The reasons for the rise in food labeling correlate with the general principles of labeling. This correlation means that food labeling is consistent with these principles and thus has the potential to be useful and effective. As detailed below, the federal government’s purpose in initiating nutrition labeling into its regulatory scheme is also consistent with the normative principles of labeling.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 253.

³¹ *Id.*

³² *Id.*

³³ *Id.*

C. Purposes of Nutrition Labeling in America

In order to trust that regulation of nutrition labeling is both necessary and useful, its actual purposes must be consistent with the general principles of labeling. In enacting the Nutrition Labeling and Education Act (NLEA),³⁴ Congress stated that the purpose of the food label is “to meaningfully inform, warn, and instruct.”³⁵ These three words are essentially synonyms of the three general principles of labeling, as stated in this paper (i.e. to inform, to protect, and to guide).³⁶ What is more, Congress has consistently concluded that these purposes are accomplishable.³⁷ Thus, Congress understands that in order for a label to be effective, it needs to inform and either protect or guide. It also believes that all three of these principles are achievable goals in the context of regulated nutrition labeling.

The FDA also identified goals of nutrition labeling that, if achieved, would fulfill all three principles of labeling. In interpreting the NLEA, the FDA identified three major objectives for its regulations: (1) to clear up consumer confusion about label information; (2) to encourage manufacturers to create healthier products; and (3) to guide consumers in making healthful food choices.³⁸ By attempting to clear up consumer confusion, the FDA made its goal to meaningfully inform consumers about the nutritional profiles of packaged food products. At first blush, the FDA’s second objective may not appear to fit cleanly into the normative analysis, because the identified labeling principles focus solely on the consumer and this objective appears to focus on the manufacturer. However, this objective is actually still focused on the consumer,

³⁴ Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, 104 Stat. 2353.

³⁵ Frederick H. Degnan, *The Food Label and the Right to Know*, 52 FOOD & DRUG L.J. 49, 60 (1997).

³⁶ It is also worth noting that the popular name of the Act includes the word “education,” which is one of the common methods of guiding consumer choices.

³⁷ Degnan, *supra* note 36, at 60.

³⁸ Derby & levy, *supra* note 23, at 375.

and it fulfills the protection principle. By encouraging product reformulation, the FDA attempts to minimize the risky and potentially dangerous food products available to the consumer. Finally, the FDA's third goal, helping consumers make healthful food choices, is an explicit instance of guiding consumer choice. Thus, both the FDA and Congress have set goals of nutrition labeling that are consistent with the general principles of labeling. Therefore, if the FDA designs an FOP regulatory scheme that reasonably fulfills its goals in nutrition labeling, it will have created a useful and likely effective FOP nutrition label.

III. Proliferation of FOP Nutrition Labels in the United States³⁹

In 2004, the UK announced its initial commitment to research and eventually introduce “at-a-glance FOP nutrition labeling that can be readily understood and used by consumers to make healthier choices.”⁴⁰ Recognizing the potential for the American government to follow in the UK's footsteps, the American food industry quickly introduced its own collection of FOP nutrition labels—PepsiCo's Smart Spot and General Mills' Goodness Corner entered the marketplace in the same year.⁴¹ While the industry stated that its objectives were genuine and sincere,⁴² the timing of the proliferation is telling—it suggests that the industry was

³⁹ Citations to all images that appear in this section can be found in Appendix A.

⁴⁰ SALLY MALAM, ET AL., COMPREHENSION AND USE OF UK NUTRITION SIGNPOST LABELLING SCHEMES 7 (2009), *available at* <http://www.food.gov.uk/multimedia/pdfs/pmpreport.pdf>.

⁴¹ Taaffe, *supra* note 17; KATHY WIEMER, GENERAL MILLS PERSPECTIVE: NUTRITION SYMBOLS ON FRONT OF PACKAGE 10 (2010), *available at* http://www.iom.edu/~media/Files/Activity%20Files/Nutrition/NutritionSymbols/5_%20General%20Mills%20IOM%20FOP%20Presentation%20backup%20slides%204%2009%2010.pdf.

⁴² See e.g., Taaffe, *supra* note 17 (discussing Smart Spot in “Health and Wellness Commitment” press release); WIEMER, *supra* note 42 (arguing that a fact-based system helps consumers and “augments” the NFP); *Kraft Foods Flagging Items as ‘Sensible Solutions,’* PROGRESSIVE GROCER (Apr. 20, 2007) (“To help consumers more easily identify its ‘better-for-you’ meals and snacks, Kraft Foods here has rolled out a new front-package labeling system.”); *Reading Nutrition at a Glance*, KELLOGG'S, <http://module.kelloggs.com/nutrition/learn-about-labels/reading-nutrition.html> (last visited Dec. 19, 2013) (offering the most honest objective: helping people make trade-offs—do not have to choose healthiest food); *Helping Guide Smart*

attempting to stay the development of an FOP regulatory initiative. As will be illuminated by the discussion of these proprietary labels and the public's subsequent response, it seems the industry was attempting to implement labels that would highlight the beneficial portions of its food products while masking the more problematic elements.

The presence of these proprietary labels has sparked a wealth of criticism. The two largest issues that experts and advocates have are: (1) that standards are inconsistent, both within particular schemes and across the various labels; and (2) that these labels have the potential to mislead consumers. As discussed below, these criticisms reveal that the industry labels fail to fulfill the principles of labeling. In terms of inconsistency, the proliferation has failed to meaningfully inform and effectively guide consumers at the point of purchase. That is, various schemes with varying standards makes it difficult to know what any one label actually indicates. In terms of the potential to mislead, the labels fail, not only to meaningfully inform (i.e. “mislead” is an inverse of “inform”), but also to protect. Because some labels create a phenomenon known as the “health halo” effect⁴³ the labels do not adequately protect consumers from high levels of “negative nutrients” (i.e. those nutrients that we ought to eat less of). Furthermore, the “health halo” encourages consumers to choose not the healthiest food products available, but rather the proprietary products they have always enjoyed, which now simply appear to be healthier.

Food and Beverage Choices, SMART CHOICES PROGRAM, <http://www.smartchoicesprogram.com/> (last visited Dec. 19, 2013) (“Helping Guide Smart Food and Beverage Choices”).

⁴³ “The health halo effect leads people to overestimate the overall healthfulness of a food based on one narrow attribute. Health halos are proven to cause people to eat more food than they intended Studies have shown that people eat far more low-fat foods than they do traditional versions.” Elaine Koontz, RD, LD/N, *Health Halo Effect*, NUTRITION 411, <http://www.nutrition411.com/education-materials/miscellaneous-topics/item/14736-health-halo-effect> (last visited May 21, 2014).

This section examines the components of the more problematic industry labels and identifies some of their individual issues. The section organizes the labels by type of proponent. It first discusses labels designed by food manufacturers. The most common issues among these labels include the use of inconsistent standards within the same scheme, as well as a liberal use of the color “green.” Both factors contribute to the development of the health halo. This section will also discuss labels designed by independent third parties. The most common issues arising among these labels is a lack of coverage as well as overly-lenient criteria—likely the result of efforts to remedy the lack of coverage. The section then analyzes the two major criticisms of the proliferation as a whole: (1) a lack of consistency; and (2) the potential to mislead. It finishes by detailing the FDA’s eventual intervention in the FOP labeling chaos and its announcement to develop a regulatory FOP labeling scheme.

A. Manufacturer Labels

i. PepsiCo – Smart Spot

In 2004, PepsiCo unveiled the first manufacturer-designed FOP labeling scheme called Smart Spot.⁴⁴ PepsiCo products that qualified for the program bore a green circle with a white check mark and the words “Smart Choices Made Easy” written around a checkmark.⁴⁵ Vice-President of PepsiCo’s Marketing, Health and Wellness, Ellen Taaffe, led the development and



⁴⁴ Taaffe, *supra* note 17.

⁴⁵ MICHAEL F. JACOBSON & BRUCE SILVERGLADE, PETITION FOR ADVANCE NOTICE OF PROPOSED RULEMAKING ON THE USE OF SYMBOLS ON THE PRINCIPAL DISPLAY PANEL TO COMMUNICATE THE HEALTHFULNESS OF FOODS 9 (2006), *available at* http://cspinet.org/new/pdf/healthy_symbol_petition.pdf.

ultimate launch of the program.⁴⁶ According to Taaffe, the Smart Spot program was designed to make it easier for customers to choose products “that contribute to healthier lifestyles.”⁴⁷ However, Taaffe does not expound on this statement other than to assert that the products bearing the Smart Spot logo meet certain nutrition criteria based on FDA and National Academy of Sciences criteria.⁴⁸ While the threshold levels for most nutrients were largely consistent with then current standards set out by the FDA,⁴⁹ the program also allowed the logo to be placed on products that delivered a functional benefit from either natural or fortified ingredients (regardless of other criteria), as well as foods that reduced any one of the following by 25% from its base product: calories, fat, sugar, or sodium.⁵⁰ Moreover, Smart Spot used two different sets of criteria depending on whether it considered the product a snack or not, which allowed more calories to come from fat in snack foods.⁵¹

ii. General Mills – Goodness Corner

Also in 2004, General Mills released its FOP nutrition labeling program, Goodness



Corner.⁵² The primary purpose of this program was to highlight beneficial aspects of particular General Mills

products.⁵³ In the Goodness Corner appeared any and all nutrient content claims applicable to that product.⁵⁴ Examples include: “icon indicating number of grams of sugars”⁵⁵ (without

⁴⁶ *Ellen Taaffe—Biography*, NAT’L INST. ENVIR. HEALTH SCI., http://www.niehs.nih.gov/news/assets/docs_f_o/ms_ellen_taaffe.pdf (last visited Dec. 19, 2013).

⁴⁷ Taaffe, *supra* note 17.

⁴⁸ *Id.*

⁴⁹ JACOBSON & SILVERGLADE, *supra* note 45, at App’x. II.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² WIEMER, *supra* note 42.

⁵³ JACOBSON & SILVERGLADE, *supra* note 45, at 9.

⁵⁴ There are twenty-six in total. *Id.*

⁵⁵ *Id.* at App’x. II.

disclosing whether the amount is high or low); “good source of fiber;”⁵⁶ and “low saturated fat.”⁵⁷ The focus of this program, however, appears to have been on what health benefits any food may contain, without regard to the levels of other nutrients in the same food or the food’s overall health effects.⁵⁸ The majority of claims concerned only the level of positive nutrients (i.e. those nutrients that we ought to eat more of, such as vitamins, fiber, and whole grains).⁵⁹

iii. Kraft Foods – Sensible Solutions

Kraft Foods jumped on the FOP nutrition labeling bandwagon in 2005, when it



introduced Sensible Solutions to its consumers. Kraft Foods placed its Sensible Solutions logo on its products that met certain nutrition criteria, allowing it to be deemed “better-for-you.”⁶⁰ The logo displayed a yellow sun placed inside a green flag;⁶¹ printed on the

sun were certain nutrition content claims, like “0 grams of trans fat,” and “good source of protein.”⁶² While maintaining that its standards for claims were consistent with standards and guidelines provided by the FDA, National Academy of Sciences (NAS), and United States Department of Agriculture (USDA), many of its standards could be bypassed, if, similar to

⁵⁶ WIEMER, *supra* note 42.

⁵⁷ JACOBSON & SILVERGLADE, *supra* note 45, at App’x. II.

⁵⁸ *Id.* at 9 (observing that the label on Chocolate Lucky Charms highlights its “12 vitamins and minerals” and “good source of calcium,” while failing to mention that the product is 50% sugar).

⁵⁹ *Id.* at App’x. II. In 2007, General Mills replaced its Goodness Corner program with Nutrition Highlights. WIEMER, *supra* note 42. Attempting to be more objective in its delivery of nutrient information, the company placed a panel across the front of the packaging that contained the following two pieces of information for each nutrient displayed: (1) the amount of the nutrient per serving; and (2) the percentage of one’s recommended daily value for that nutrient. *Id.* General Mills lauded its own program, claiming that it has the right amount of information so as to allow consumers to make informed decisions, however these claims are based on studies that the industry conducted itself. *Id.* Essentially, this program cherry picks certain nutrients from the NFP and places them on the front of the package in a different format.

⁶⁰ JACOBSON & SILVERGLADE, *supra* note 45, at 8.

⁶¹ *Id.*

⁶² *Kraft Foods Flagging Items as ‘Sensible Solutions,’ supra* note 43.

PepsiCo's Smart Spot initiative, the product contained an amount of calories, fat, saturated fat, sugar, or sodium that was 25% lower than its traditional counterpart.⁶³ Thus, a hot dog with 25% less fat than the base product's level could be labeled as a Sensible Solution, even though it contained 21% of one's daily value for sodium (i.e. 500 mgs).⁶⁴

iv. Kellogg's – Nutrition at a Glance

Finally, Kellogg's, in 2007, launched its FOP nutrition labeling initiative, called Nutrition at a Glance.⁶⁵ This program, much like General Mills' Nutrition Highlights, released the same year, gives consumers a snapshot of some of the information contained in the NFP.⁶⁶ One distinguishing characteristic of Kellogg's system, however, is that every box containing a nutrient is green, regardless of its percentage of that nutrient's daily value.⁶⁷ Nutrition at a Glance provides the amount of each nutrient per serving, as well as the percentage of each nutrient's Guideline Daily Amount.⁶⁸ The program was designed to provide consumers with information that would help them decide how much to eat, what to eat it with, and what choices to make with the remainder of the day.⁶⁹ However, Kellogg's offers guidance on how to interpret different numbers and percentages only on its website; the same information is not evident by looking at the pack itself.⁷⁰



⁶³ JACOBSON & SILVERGLADE, *supra* note 45, at 8.

⁶⁴ *Id.*

⁶⁵ INST. MED., FRONT-OF-PACKAGE NUTRITION RATING SYSTEMS AND SYMBOLS: PHASE I REPORT 38 (Ellen A. Wartella et al. eds., 2010), available at http://www.nap.edu/catalog.php?record_id=12957.

⁶⁶ *See Reading Nutrition at a Glance, supra* note 43.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* (commenting that if a food has 10% of one's daily value for a mineral or fiber, it is a "good source," while one that has 20% is an "excellent source").

B. Third-Party Labels

i. American Heart Association – Heart Check

In 1995, the American Heart Association (AHA) released the first third-party nutrition label for beneficial foods.⁷¹ The Heart Check program is designed to help consumers identify



and purchase “heart-healthy foods.”⁷² Originally focusing primarily on levels of total fat, saturated fat, and cholesterol, the AHA eventually incorporated the presence of beneficial vitamins and dietary fiber into its certification process.⁷³

Like Guiding Stars, the AHA uses separate criteria for certification depending on whether the product is: (1) packaged food; (2) whole grain; or (3) seafood, meat, or poultry.⁷⁴

While the AHA does not currently consider sugar (refined or natural) in its certification process,⁷⁵ it intends to implement several different thresholds and standards for various products beginning January 2014.⁷⁶ The Heart Check program has proven to raise some awareness of healthy options and has guided consumers to purchase those foods.⁷⁷ However, because the AHA is an independent third-party, industry members must pay for certification, which has

⁷¹ INST. MED., *supra* note 68, at 37.

⁷² AM. HEART ASS’N., THE HEART CHECK MARK: A LEADER AMONG NUTRITION ICONS 1 (2013), available at https://www.heart.org/idc/groups/heart-public/@wcm/@fc/documents/downloadable/ucm_453121.pdf.

⁷³ INST. MED., *supra* note 68, at 37.

⁷⁴ *Id.*

⁷⁵ *But see Heart Check Mark Nutrition Requirements*, AM. HEART ASS’N., http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/HeartSmartShopping/Heart-Check-Mark-Nutritional-Requirements_UCM_300914_Article.jsp# (last visited Dec. 19, 2013) (stating that it does not allow its label to be placed deserts or beverages, other than milks and fruit juices).

⁷⁶ *Id.* (examples include: limiting the total sugar content in yogurt, amount of calories in milk, and amount of calories in juice).

⁷⁷ AM. HEART ASS’N., *supra* note 92 at 1.

resulted in the program being underutilized, especially with respect to non-packaged foods, such as most fruits and vegetables.⁷⁸

ii. Hannaford Brothers – Guiding Stars

The most widely known and successful FOP nutrition labeling system devised by a retailer is Hannaford Supermarkets' Guiding Stars initiative.⁷⁹ Patented in 2011,⁸⁰ Guiding Stars provides an interpretive grading scale,



where one star represents good nutritional value, two stars represents better nutritional value, and three stars represents the best nutritional value. Much like the labels created by manufacturers, the system accounts for both positive and negative nutrients.⁸¹ However, Guiding Stars runs the nutrient levels through its proprietary algorithm in order to assign it a base score, which is then translated into the requisite number of stars.⁸² A product must receive a base score of more than 0, indicating that the positive nutrients outweigh the negative nutrients.⁸³ Thus a product can receive stars even with relatively high levels of negative nutrients, such as sodium and sugar, if it contains higher levels of positive nutrients.⁸⁴ Moreover, the algorithm only accounts for levels

⁷⁸ JACOBSON & SILVERGLADE, *supra* note 45, at 10.

⁷⁹ David Sharp, *Guiding Stars Nutrition Ratings Convince Grocery Shoppers to Buy Healthier Products, Study Finds*, HUFFINGTON POST (Oct. 24, 2013, 5:47 PM), http://www.huffingtonpost.com/2013/10/24/guiding-star-nutrition_n_4155524.html article (describing a recent study that found positive effects on consumer behavior).

⁸⁰ *About Guiding Stars*, GUIDING STARS, <http://guidingstars.com/what-is-guiding-stars/> (last visited Dec. 19, 2013).

⁸¹ *How It Works*, GUIDING STARS, <http://guidingstars.com/what-is-guiding-stars/how-it-works/> (last visited Dec. 19, 2013) (nutrients to eat more of: vitamins, minerals, fiber, whole grains; nutrients to eat less of: saturated fat, trans fat, cholesterol, added sodium, added sugar)

⁸² *Understanding the Science Behind Guiding Stars*, GUIDING STARS (Dec. 1, 2011), <http://guidingstars.com/news/understanding-the-science-behind-guiding-stars/>.

⁸³ INST. MED., *supra* note 68, at 39.

⁸⁴ *Cf. Understanding the Science Behind Guiding Stars*, *supra* note 77 (noting that a certain threshold of sugar and sodium disqualifies product from receiving any stars).

of added sugars and sodium, so as to not “penalize foods which naturally contain sugars or sodium (such as milk and spinach, respectively).”⁸⁵ Like the AHA’s Heart Check, Guiding Stars also uses different algorithms for: (1) meats, poultry, seafood, dairy, and nuts; and (2) general foods and beverages.⁸⁶ Despite its varying thresholds and algorithms, Hannaford maintains that its system is consistent with the 2010 Dietary Guidelines for Americans, as well as relevant FDA and World Health Organization standards.⁸⁷

While the program does appear to be having a positive effect on consumer behavior,⁸⁸ this effect is limited to those people who shop at Hannaford Supermarkets. Thus while Guiding Stars can be a good indicator of foods containing a higher levels of positive nutrients than negative nutrients, the program’s coverage is sparse, leaving the majority of the nation’s supermarkets without this guiding information.

iii. Keystone Center – Smart Choices

Arguably the most ubiquitous of all proprietary FOP nutrition labels, the Keystone Center introduced the Smart Choices program to the marketplace in the summer of 2009.⁸⁹ One of the program’s main goals was to reduce some of the confusion created by the numerous (often competing) proprietary labels then on the market, by creating a uniform system for all manufacturers and retailers.⁹⁰ Indeed, many industry members dropped their



⁸⁵ *Id.*

⁸⁶ Compare *Id.* at Table 1, with *id.* at Table 2.

⁸⁷ *Id.*; Lee Klein, *Four Ideas For New Nutrition Labels, From Stars to Traffic Lights*, SHORT ORDER: MIAMI NEW TIMES FOOD BLOG (Jan. 6, 2012, 8:35 AM), http://blogs.miaminewtimes.com/shortorder/2012/01/time_for_new_nutrition_labels.php.

⁸⁸ See Sharp, *supra* note 74 – add quote; Klein, *supra* note 82.

⁸⁹ SILVERGLADE & HELLER, *supra* note 84, at III-2.

⁹⁰ *Helping Guide Smart Food and Beverage Choices*, *supra* note 43.

individual programs, including PepsiCo (Smart Spot) and Kraft (Sensible Solutions), discussed above, around this time.⁹¹ By bringing in “a diverse group of scientists, academicians, health and research organizations, food and beverage manufacturers, and retailers,”⁹² the program aimed to be collaborative, comprehensive, and transparent.⁹³ Manufacturers and retailers could apply the logo, a white box with a green check mark inside of it, to any food product that did not rise above certain levels of total fat, saturated fat, trans fat, cholesterol, added sugars, and sodium.⁹⁴ For most categories of food, the product was also required to have a high level of at least one positive nutrient, although all of the nineteen different categories had different qualifying criteria.⁹⁵ Below the check mark logo appeared calorie per serving information, as well as the number of servings in the package.⁹⁶

Smart Choices was met by severe criticism almost immediately after its launch.⁹⁷ Many nutritionists voiced their concerns that the nutrient criteria were too lenient;⁹⁸ The Center for Science in the Public Interest (CSPI) was originally a member of the formulation coalition but dropped out when its concerns over the nutrient criteria became too large to ignore.⁹⁹ Critics point particularly to the sugary cereals, such as Frosted Flakes and Fruit Loops, that bore the label despite inconsistency with the 2005 Dietary Guidelines for Americans directive to eat foods

⁹¹ SILVERGLADE & HELLER, *supra* note 84, at III-2.

⁹² *Helping Guide Smart Food and Beverage Choices*, *supra* note 43.

⁹³ *Id.*

⁹⁴ *Nutrition Qualifying Criteria*, SMART CHOICES PROGRAM, <http://www.smartchoicesprogram.com/nutrition.html> (last visited Dec. 19, 2013).

⁹⁵ *Id.*

⁹⁶ *Helping Guide Smart Food and Beverage Choices*, *supra* note 43.

⁹⁷ William Neuman, *Food Label Program to Suspend Operations*, NEW YORK TIMES (Oct. 23, 2009), http://www.nytimes.com/2009/10/24/business/24food.html?_r=0.

⁹⁸ *Background Information on Point of Purchase Labeling*, U.S. FOOD & DRUG ADMINISTRATION, <http://www.fda.gov/food/ingredientspackaginglabeling/labelingnutrition/ucm187320.htm> (last updated May 17, 2013).

⁹⁹ Neuman, *supra* note 107.

with little added sugars and caloric sweeteners.¹⁰⁰ Frosted Flakes, for instance, contains 11 grams of sugar per serving size, making an entire box 37% sugar by weight.¹⁰¹

C. Issues Arising from Multiple Formats, Standards, and Players

i. Lack of Consistency

The most common criticism nutritionists and policy makers have with the proliferation of industry labels is the lack of consistency both within and across labeling schemes.¹⁰² With respect to inconsistencies within labeling schemes, many systems created by manufacturers contained different avenues by which a product could earn a healthful indicator. PepsiCo's Smart Spot, for instance, allowed its food products to display the checkmark if one of three conditions obtained: (1) all negative nutrients fell below a certain threshold;¹⁰³ (2) any one of the negative nutrients was reduced by 25% from its base product; or (3) the product delivered a functional benefit via the presence of some positive nutrient, such as fiber.¹⁰⁴ Similarly, Guiding Stars uses different algorithms to rate three broad food categories, which precludes effective comparison between them.¹⁰⁵ For example one could not compare breakfast cereals and yogurt, simply based on the number of stars each received.¹⁰⁶ These internal inconsistencies make the label confusing in nature and water down the label's ability to promote healthy choices throughout the supermarket.

¹⁰⁰ SILVERGLADE & HELLER, *supra* note 84, at III-3.

¹⁰¹ *Id.* at III-5.

¹⁰² JACOBSON & SILVERGLADE, *supra* note 45, at 8; *Background Information on Point of Purchase Labeling*, *supra* note 108.

¹⁰³ PepsiCo also used two different threshold matrixes, depending on whether it considered the product to be a snack or a non-snack food. JACOBSON & SILVERGLADE, *supra* note 45, at App'x. II. Snacks were allowed to contain more calories, but were required to have a lower amount of sodium. *Id.*

¹⁰⁴ *Id.* at 8.

¹⁰⁵ INST. MED., *supra* note 68, at 56.

¹⁰⁶ *Id.*

The inconsistencies across labeling schemes are largely twofold. First, many systems use different standards and factors for determining eligibility and healthfulness. Some systems account for positive and negative nutrients, balancing the two, like Guiding Stars and NuVal.¹⁰⁷ Within these interpretive systems, there are also inconsistencies. Most notably, Guiding Stars only has a three-tiered ranking system, whereas NuVal's system allows for one hundred different valuations (i.e. 0 – 100).¹⁰⁸ Moreover, NuVal gives different weights to different nutrients in its algorithm, whereas Guiding Stars only uses nutrient levels.¹⁰⁹ Other systems are not interpretive, displaying various nutrient levels objectively (i.e. not explicitly indicating whether the levels are particularly beneficial).¹¹⁰ And still others only account for certain nutrients¹¹¹ or, like Sensible Solutions and Goodness Corner, only add certain positive claims to the label, depending on individual criteria for each type of claim (e.g. Low in Trans Fat).¹¹² What is more, some labels count nutrient levels for those that have been increased through fortification, while others require all nutrient levels to be naturally occurring.¹¹³

With various methods for analyzing and presenting nutrient information, consumers have been left with a great deal of confusion.¹¹⁴ What if a manufacturer's label appears on its packaging, indicating that the product is a healthier choice than its basic equivalent, but the Guiding Stars label on the shelf tag below awards the product one or zero stars? Because manufacturer labels only appear on like-branded products, consumers cannot compare two food

¹⁰⁷ *About Guiding Stars*, *supra* note 75; *How It Works*, *supra* note 86.

¹⁰⁸ *About Guiding Stars*, *supra* note 75; *How It Works*, *supra* note 86.

¹⁰⁹ *How It Works*, *supra* note 86; *About Guiding Stars*, *supra* note 75.

¹¹⁰ *See Reading Nutrition at a Glance*, *supra* note 43.

¹¹¹ *See Heart Check Mark Nutrition Requirements*, *supra* note 95.

¹¹² *Kraft Foods Flagging Items as 'Sensible Solutions'*, *supra* note 43; WIEMER, *supra* note 42.

¹¹³ *See JACOBSON & SILVERGLADE*, *supra* note 45, at 10 ("The AHA program does not permit fortification, the PepsiCo program does, and many of the other corporate programs are conspicuously silent about the matter.").

¹¹⁴ *Background Information on Point of Purchase Labeling*, *supra* note 108.

products, one made by General Mills and the other made by Kraft. While third-party labels do allow for some industry-wide comparison, retailer labels will only ever appear in their respective stores, and, as mentioned above, those labels appear in conjunction with the manufacturer's own label. Moreover, the AHA heart check is not applied to every product that meets its established criteria; industry members have to pay a licensing fee to carry the label. As some manufacturers inevitably conclude that it is not cost-effective to pay for the label, it is not applied to all eligible products, leading to an inability to make comprehensive comparisons.

The second major issue relating to inconsistencies across food labels is their varying standards for nutrient levels. Sodium cut-offs are one example. While Smart Spot allowed snacks to have up to 270 milligrams per serving, Simple Solutions allowed for 290 milligrams, and the AHA allows for up to 480.¹¹⁵ Thus labels are not indicating consistent types of food products as healthy. With so many players in the mix, competing labels can make it difficult for consumers to know what certain labels are telling them about the food inside the package.

ii. Potential to Mislead

Another major issue with these proprietary labels is their potential to mislead.¹¹⁶ Section 403 of the Food Drug and Cosmetics Act ("FDCA")¹¹⁷ deems a food product "misbranded," if "its labeling is false or misleading in any particular."¹¹⁸ Thus, as administrator of the FDCA, the Secretary of the FDA is responsible for ensuring that members of the food industry properly label their products so as not to mislead consumers.¹¹⁹ A label can be misleading in a number of

¹¹⁵ JACOBSON & SILVERGLADE, *supra* note 45, at 8.

¹¹⁶ Chelsea M. Childs, *Federal Regulation of "Smart Choices Program": Subjecting Front-of-Pack Nutrition Labeling Schemes to Concurrent Regulation by the FDA and the FTC*, 90 B.U. L. REV. 2403, 2406 (2010).

¹¹⁷ 21 U.S.C. §§ 301, et seq.

¹¹⁸ 21 U.S.C. § 343(a)(1).

¹¹⁹ Childs, *supra* note 126, at 2406.

ways.¹²⁰ Examples include “by statement, word, design, device, or any combination thereof.”

Privately developed FOP nutrition labels have been the subject of much criticism with respect to their potential to mislead consumers in these ways. Thus, the presence of these labels in the marketplace is properly the concern of the FDA.

Nutrition labels can be misleading in two different ways. First is in their presentation. This issue mainly pertains to the objective and informative labels (e.g. Nutrition at a Glance). As the FDA notes, these symbols are often green, which may indicate positive attributes.¹²¹ Shoppers can be led to believe that because all the symbols are green, the food must be good to eat. However, contained in those symbols are various indicators of nutrient levels, including percentage of one’s daily value. A product could contain 50% of one’s daily value for fat, and yet the information would still be presented in a “green” fashion.

The second way that industry-created FOP nutrition labels can be misleading is best described by a phenomenon known as the “health halo.” When a consumer sees certain positive health claims on the front of a package, such as “low-fat” or “sodium free,” she is naturally led to believe that the food is more nutritious as a whole.¹²² However, as mentioned previously, many such claims only refer to the product’s less healthy counterpoint—low-fat mayonnaise may have less fat than regular mayonnaise, but it does not necessarily mean that it has a healthy level of fat content. Moreover, the FDA has compiled research that suggests that most FOP nutrition labels “give consumers an overrated view of a food’s healthiness.”¹²³ All manufacturer labels can be

¹²⁰ 21 U.S.C. § 321(n).

¹²¹ *Background Information on Point of Purchase Labeling*, *supra* note 108. Green is a color people often associate with “go.” SILVERGLADE & HELLER, *supra* note 84, at III-5.

¹²² Lori Kaley, *Health Halo Effect*, GUIDING STARS (Apr. 19, 2011), <http://guidingstars.com/health-and-wellness/health-halo-effect/>.

¹²³ *Background Information on Point of Purchase Labeling*, *supra* note 108.

misleading in this way, as they are clearly intended to encourage the consumer to patronize a particular brand.¹²⁴

The labeling scheme that has been the most notorious for creating a health halo effect is Smart Choices.¹²⁵ A 2012 study examined the effect of the Smart Choices logo on consumer perception.¹²⁶ While the study primarily focused on participants' ability to correctly deduce the amount of calories per serving, it also observed that the potential for the logo to "increase the perceptions of healthfulness was troubling from a public health perspective because many foods carrying the labels were of nutritionally poor quality."¹²⁷ While Smart Choices is intended to indicate healthy options in the supermarket, the logo appeared on many breakfast cereals whose first ingredient was sugar.¹²⁸ Another prominent creator of the health halo is the AHA.¹²⁹ Because the heart check system does not currently account for levels of sugars, many products that have high levels nonetheless bear the heart check logo.¹³⁰

D. FDA Intervention

In August 2009, shortly after the Smart Choices logo began appearing on supermarket shelves, the FDA wrote a letter to Sarah Krol, General Manager of the program.¹³¹ The letter

¹²⁴ *Id.*

¹²⁵ See Christina A. Roberto et al., *The Smart Choices Front-of-Package Nutrition Label. Influence on Perceptions and Intake of Cereal*, 58 APPETITE 651 (2012).

¹²⁶ *Id.*

¹²⁷ *Id.* at 656.

¹²⁸ See, e.g., Neuman, *supra* note 107 ("The first ingredient in Froot Loops is sugar.").

¹²⁹ *Making Sense of Food Labels: Some to Look for and Others to Ignore*, CONSUMER REPORTS, <http://www.consumerreports.org/cro/magazine/2013/08/making-sense-of-food-labels/index.htm> (last updated Sept., 2013).

¹³⁰ Examples include: (1) Quaker Instant Oatmeal Cinnamon Spice (15 grams per serving) (Food Labeling Chaos); and (2) Welch's 100% Grape Juice (36 g per serving). *Id.*

¹³¹ Michael R. Taylor & Jerold R. Mande, Letter to the Smart Choices Program, U.S. FOOD & DRUG ADMINISTRATION (Aug. 19, 2009), <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm180146.htm>.

expressed general concerns regarding the proliferation of FOP nutrition labels, as well as hinting that the nutrient criteria Smart Choices used for evaluating food products may not be “stringent enough to protect consumers against misleading claims.”¹³² The FDA was also worried that the Smart Choices program was not consistent with the Dietary Guidelines for Americans, and encouraged consumers to choose their processed food products over fruits, vegetables, and whole grains.¹³³ It concluded its letter by stating that it had conducted research on consumer response to FOP nutrition labeling and would continue to conduct such research with an eye toward giving the people “complete and accurate information.”¹³⁴ Shortly after the FDA’s letter was delivered, Smart Choices announced that it would be suspending its operations.¹³⁵ As companies like PepsiCo and Kellogg’s began backing away from the program, Smart Choices announced that it would stop recruiting companies to partake and would stop promoting the program to consumers.¹³⁶

After the FDA issued its specific letter to the Smart Choices program, it published an open letter to the industry, offering guidance on FOP nutrition labeling.¹³⁷ After summarizing many of the above criticisms concerning the abundance of inconsistent labeling schemes, the FDA announced that it would be conducting research to potentially devise a standardized

¹³² *Id.*

¹³³ *Id.* The current Dietary Guidelines emphasize the consumption of fruits, vegetables, and whole grains. U.S. DEP’T. AGRIC. & U.S. DEP’T. HEALTH & HUM. SERV., DIETARY GUIDELINES FOR AMERICANS, 2010 34 (7th ed. 2010), *available at* <http://www.health.gov/dietaryguidelines/2010.asp> [hereinafter 2010 DIETARY GUIDELINES]. It is recommend that at least half of all grains consumed be whole, and that Americans increase their intake of fruits and vegetables. *Id.*

¹³⁴ Taylor & Mande, *supra* note 142.

¹³⁵ Neuman, *supra* note 107.

¹³⁶ *Id.*

¹³⁷ Barbara O. Schneeman, *Guidance for Industry: Letter Regarding Point of Purchase Food Labeling*, U.S. FOOD & DRUG ADMINISTRATION (Oct., 2009), <http://www.fda.gov/food/guidanceregulation/guidancedocumentsregulatoryinformation/labelingnutrition/ucm187208.htm>.

system.¹³⁸ At the very least, the FDA hoped to create a standard set of mandatory nutrient criteria that all labels would have to meet before being placed on the front of packaging.¹³⁹ Its main concern was that when consumers see an FOP nutrition label, they are less likely to turn the package over and examine the full NFP.¹⁴⁰ Thus, one of its main objectives in creating a standardized system was to reinforce the information on the back panel and to give consumers an accurate description of a product's full nutrition profile.¹⁴¹

In March of 2010, the FDA furthered its initiative, when Commissioner of Food and Drugs, Dr. Margaret Hamburg, wrote another open letter to the industry.¹⁴² This letter noted that some industry members had responded positively to the FDA's guidance letter by altering their labeling schemes, but also maintained that the problems continued to persist.¹⁴³ Dr. Hamburg announced that one of her priorities as Commissioner was to improve the scientific accuracy and usefulness of food labeling, and she made the industry's intention to devise a regulatory scheme explicit.¹⁴⁴

In April of 2010, the FDA published a notice in conjunction with the USDA, calling for the submission of research data regarding FOP nutrition labeling.¹⁴⁵ Specifically, the FDA sought information regarding the following:

(1) consumer perception and consumer behavior; (2) the assessment and comparison of the effectiveness of particular possible approaches to front-of-pack labeling; (3) graphic design, package design, information architecture, advertising, marketing, and human factors that affect noticeability,

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Hamburg, *supra* note 18.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Front-of-Pack and Shelf Tag Nutrition Symbols; Establishment of Docket; Request for Comments and Information 75 Fed. Reg. 22602-01 (April 29, 2010).

understandability and use; and (4) the extent to which point-of-purchase nutrition information may affect decisions by food manufacturers to reformulate products.¹⁴⁶

Its aim was to build a scientific basis for a standardized FOP nutrition label. The goal of an eventual scheme would be “to increase the proportion of consumers who readily notice, understand, and use the available information to make more nutritious choices for themselves and their families, and thereby prevent or reduce obesity and other diet-related chronic disease.”¹⁴⁷

Meanwhile, the IOM was beginning its own comprehensive study of these issues.¹⁴⁸ The study was funded by Congress and was broken into two phases.¹⁴⁹ The goal of the first phase was to review the FOP nutrition rating systems currently on the market and to evaluate a scientific basis for underlying nutrient criteria.¹⁵⁰ It thus geared its conclusions to the goals of the FDA’s mission. Because the FDA is mostly concerned with the prevention of diet-related diseases, and because a majority of Americans are overweight or obese, the IOM concluded that the target audience for a labeling scheme should be the general population.¹⁵¹ For much the same reasons it also concluded that the system should focus on key nutrients related to these issues, and originally recommended only including calories, saturated fat, trans fat, and sodium

¹⁴⁶ *Id.* at 22604.

¹⁴⁷ *Id.* at 22603. The goals of the FDA’s desired scheme are consistent with the principles of labeling. It seeks to guide consumers to make more nutritious choices when purchasing food, and it hopes to thereby protect the American public from the perils of obesity, diabetes, and hypertension.

¹⁴⁸ SILVERGLADE & HELLER, *supra* note 84, at III-6.

¹⁴⁹ *Id.*

¹⁵⁰ INST. MED., *supra* note 68, at ix.

¹⁵¹ *Id.* at 80.

in its criteria.¹⁵² However, the first phase left open many of the FDA's questions regarding specific strategies for creating the most effective system, so that the IOM could sufficiently examine all of the possibilities in phase two.¹⁵³ The next section of this paper will closely examine the IOM's conclusions and recommendations, provided in the second phase of its study, in an effort to arrive at a model FOP labeling system.

IV. A Model FOP Nutrition Labeling System¹⁵⁴

The purpose the second phase of IOM's study was to outline the benefits of a single, simple food guidance system on the front of packages that best promotes health and will be useful to consumers.¹⁵⁵ Its four principles for such a system are that it should be: (1) simple; (2) interpretive; (3) ordinal; and (4) supported by communication.¹⁵⁶ This section examines the IOM's recommendation in light of these principles, compares the recommendation with the UK's current Multiple Traffic Light (MTL) labeling system, and concludes that the IOM's recommendations would lead to an ideal standardized FOP nutrition labeling system for American consumers that fulfills the FDA's goals.

A. IOM's Recommendation – Nutrition Points System

At the end of its report on its second study phase, the IOM lays out its model FOP nutrition labeling scheme, Nutrition Points System (NPS).¹⁵⁷ The NPS is a simple symbol

¹⁵² The study was released prior to the publication of the 2010 Dietary Guidelines for Americans, which recommends reducing intake of added sugars. 2010 DIETARY GUIDELINES, *supra* note 144, at 28.

¹⁵³ For example, the study did not decide whether a summary system or a nutrient-specific system would be more effective at achieving the FDA's goals. INST. MED., *supra* note 68, at 85.

¹⁵⁴ Citations to all images that appear in this section can be found in Appendix A.

¹⁵⁵ INST. MED., *supra* note 20, at 2.

¹⁵⁶ *Id.* at 3.

¹⁵⁷ *Id.* at 71.

system that accounts for three problem nutrients: (1) saturated fat and trans fat;¹⁵⁸ (2) sodium; and (3) added sugar. While the IOM rejected the idea of only considering added sugars in the first phase of its study, the 2010 Dietary Guidelines for Americans recommended reducing our intake of added sugars, as they add to caloric intake and often appear in products that have little other nutritional value.¹⁵⁹ The actual label will display two things. First, it will display the number of calories in a manner consistent with household measure serving sizes.¹⁶⁰ Second, it will display between zero and three nutritional points.¹⁶¹ For each specified nutrient that falls below a certain threshold level, a product can be eligible to earn a point.¹⁶² Thus, if a product contains sufficiently low levels of saturated fat and trans fat, sodium, and added sugars, then it is eligible to display all three points. However, the NPS system also bars a product from eligibility if any one of the nutrient's levels is above another threshold.¹⁶³ Thus, if a product contains no or very low levels of sodium and solid fat, but also contains a very high level of added sugar, then the product would show the calorie information only—no stars.¹⁶⁴



While the forgoing comprises the mechanics of the NPS scheme, the IOM also recommends features of the label that it concludes are necessary for an effective scheme. It recommends that the label be consistently applied to all foods in the supermarket, packaged and

¹⁵⁸ Both trans fat and saturated fat are considered together in order to emphasize the 2010 Dietary Guidelines for Americans' recommendation to consume less solid fats. *Id.* at 73; 2010 DIETARY GUIDELINES, *supra* note 144, at 27.

¹⁵⁹ INST. MED., *supra* note 20, at 71; 2010 DIETARY GUIDELINES, *supra* note 144, at 27.

¹⁶⁰ INST. MED., *supra* note 20, at 73.

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

unpackaged.¹⁶⁵ Moreover, the label should be placed in a consistent place on all food packaging and on a consistently placed shelf-tag label for unpackaged bulk items, such as fruits and vegetables.¹⁶⁶ The IOM notes further that NPS should be integrated with the NFP, such that the two labels are mutually reinforcing.¹⁶⁷ To do so, the IOM recommends placing a mark, in or near the NFP, indicating which nutrients are responsible for the product's earned points.¹⁶⁸ Finally, the IOM recognizes that no such regulated system will be successful without an accompanying educational campaign.¹⁶⁹

B. United Kingdom's Current Scheme – Multiple Traffic Light System

The UK's current FOP nutrition labeling system is a voluntary regulatory scheme, designed and implemented by the Food Standards Agency (FSA), UK's equivalent of the FDA.¹⁷⁰ The system provides the best precedent for a comparative analysis, because it also aims



to provide interpretive guidance to consumers, yet it utilizes a different approach than the IOM recommends.

As its name suggests, the Multiple Traffic Light (MTL) system uses the colors of a traditional traffic light to indicate desired nutrient levels. The system considers similar nutrients as NPS, however it weighs total fat and saturated fat separately (it does not account for trans fat),¹⁷¹ and it accounts for sugars present, not just those that have been

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 74.

¹⁷⁰ See FOOD STANDARDS AGENCY, FRONT OF PACK TRAFFIC LIGHT SIGNPOST LABELING TECHNICAL GUIDANCE: ISSUE 2 (Nov., 2007), available at <http://www.food.gov.uk/multimedia/pdfs/frontofpackguidance2.pdf>.

¹⁷¹ *Id.* at 2.

added to the product.¹⁷² Like NPS, the MTL system also discloses calories per serving.¹⁷³ The MTL label presents the four nutrients in a line, each color-coded to reflect the normative level of that nutrient in the product.

One key difference between NPS and MTL is that the current MTL system is not mandatory.¹⁷⁴ Industry members can utilize the label if they want to, but are not so required. Furthermore, the FSA does not require a consistent format for those who choose to adopt the label, but rather provides guidance for what an exemplar label might look like.¹⁷⁵ In its guidance document, it displays five different options: some use circles, some use rectangles; some contain text accompanying the colors, some do not; some present percentages of one's Guideline Daily Amount, others do not.¹⁷⁶ While the two systems are both aimed at encouraging consumers to make healthy choices at the point of purchase, they are different in crucial respects, and through their differences, NPS proves to be a system more likely to achieve the FDA's goals.

C. Comparing NPS and MTL

i. Ability to Inform

A major difference between the NPS and MTL systems is that NPS is ordinal, where as MTL is not. In the MTL system, the nutrients are displayed individually, providing consumers with particular knowledge about the level of each particular nutrient. It also includes words and percentages. NPS, on the other hand, contains only symbols and ranks all foods on the same

¹⁷² *Id.*

¹⁷³ *Id.* at 11.

¹⁷⁴ Nick Trigg, *Food labelling: Consistent System to Be Rolled Out*, BBC (June 18, 2013, 7:10 PM), <http://www.bbc.co.uk/news/health-22959239>. Consistent with the IOM's position, this paper argues that the FDA's regulations should be mandatory. There "should [be one] consistent labeling scheme on all foods." *Phase II Report Briefing—Audio Webcast*, *supra* note 25.

"Having one label will be more effective than having many." *Id.*

¹⁷⁵ FOOD STANDARDS AGENCY, *supra* note 181, at 10-11.

¹⁷⁶ *Id.* at 11.

three-tiered ordinal scale. This simpler system will be of particular benefit to the uneducated consumers, who tend to be the same demographic at high risk for obesity.¹⁷⁷ A consumer can be uneducated, for the purposes of nutrition labeling, in one of two ways: (1) low literacy makes it difficult to understand what the label says; and (2) even if a consumer can read the label, limited understanding of nutrition makes it difficult to understand the implications of what is communicated. With regard to literacy, more than half of American adults have low “health literacy.”¹⁷⁸ Almost half read at an eighth grade level, and most health communication material is written at a tenth grade reading level and higher.¹⁷⁹ Thus almost half of the population cannot read health directives. NPS, then, is the desired alternative to the written NFP. One study, examined by the IOM, showed that when a simple symbol system was introduced, decision-making improved among populations disadvantaged by low literacy rates.¹⁸⁰ With respect to low understanding of nutrition, NPS’s simpler, ordinal system does not require consumers to have extensive knowledge of nutrition, or even the elements contained in the NFP. Thus, NPS better accommodates the uneducated consumer and avoids both issues that arise out of lacking education.¹⁸¹ NPS will, therefore, likely better achieve the FDA’s goal of increasing “the number of people who readily notice, understand, and use the available information.”¹⁸²

¹⁷⁷ INST. MED., *supra* note 20, at 40.

¹⁷⁸ CHRISTINA ZARCADOOLAS, FRONT-OF-PACKAGE NUTRITION RATINGS AND SYMBOLS – A CONSUMER HEALTH LITERACY PERSPECTIVE 3 (Oct. 26, 2010), *available at* <http://www.iom.edu/~media/Files/Activity%20Files/Nutrition/NutritionSymbols/Christina%20Zarcadoolas102610finalppt%20Compatibility%20Mode.pdf>. Detailed information is not helpful to the illiterate or the nutritionally uneducated. INST. MED., *supra* note 20, at 40.

¹⁷⁹ ZARCADOOLAS, *supra* note 189, at 3-4.

¹⁸⁰ INST. MED., *supra* note 20, at 67.

¹⁸¹ *Id.* at 40. NPS displays no written information, percentages, data, or statistics. *Phase II Report Briefing—Audio Webcast*, *supra* note 25.

¹⁸² Front-of-Pack and Shelf Tag Nutrition Symbols; Establishment of Docket; Request for Comments and Information 75 Fed. Reg. at 22603.

Because NPS is simpler than the MTL system, it is likely to garner more attention, especially from those in the time-constrained environment of the supermarket.¹⁸³ Surprisingly, NPS's current monochromatic design is also likely to attract more attention faster than MTL's polychromatic format.¹⁸⁴ By capturing the attention of more consumers, NPS has the ability to inform more consumers. Moreover, by using an ordinal symbol system, it is likely to successfully convey the intended information to the uneducated population. Thus, as a whole, NPS is more apt to inform consumers about the nutritional make-up of a food product than is MTL.

ii. Ability to Protect

The MTL system uses red lights to indicate dangerously high levels of nutrients, and thus may seem like it will be better at protecting consumers from foods that may affect their health. Indeed, one study surmises that the colors in the MTL system “convey a strong normative message.”¹⁸⁵ This is likely the case, given that the color red is often associated with “stop,” “no,” and “bad.” Thus, the MTL system expressly tells consumers to avoid products with those levels of nutrients. While it may well be the case that MTL better protects consumers against products with dangerously high levels of nutrients, the NPS system is set up to achieve the same purpose as if it used red indicators. Specifically, a product is not eligible to receive any stars if any one of the three nutrients is above a certain threshold, even if the presence of the other two

¹⁸³ INST. MED., *supra* note 20, at 56; *see also* Gerda I.J. Feunekes et al., *Front-of-Pack Nutrition Labelling: Testing Effectiveness of Different Nutrition Labelling Formats Front-of-Pack in Four European Countries*, 50 APPETITE 57, 69 (2008) (concluding that something simpler than MTL is likely to be more effective at affecting consumer choice).

¹⁸⁴ Svetlana Bialkova & Hans van Trijp, *What Determines Consumer Attention to Nutrition Labels?*, 21 FOOD QUALITY & PREFERENCE 1042, 1049 (2010).

¹⁸⁵ Kelvin Balcombe et al., *Traffic Lights and Food Choice: A Choice Experiment Examining the relationship Between Nutritional Food Labels and Price*, 35 FOOD POLICY 211, 219 (2010).

nutrients is very low.¹⁸⁶ Just like MTL, NPS tells the consumer that a product is unhealthful (i.e. NPS – the product bears zero stars; MTL – the product bears a red indicator) if it contains a high level of any negative nutrient. Moreover, the lack of red coloring on the NPS label makes it less likely to be attacked and rejected by the industry.

iii. Ability to Guide

One of the FDA’s goals in implementing an FOP regulatory scheme is to encourage consumers “to make more nutritious choices for themselves and their families.”¹⁸⁷ Thus, the ability to guide consumer choice is likely the most important principle that an FOP labeling scheme must fulfill.¹⁸⁸ The most striking difference between NPS and MTL, in this regard, is that NPS is ordinal in nature, whereas MTL is not. NPS therefore likely guides consumer choices more easily than does MTL, in that it essentially orders all foods, regardless of individual nutrients, into a linear scale. All three-starred foods are better for the average consumer than all two-starred foods, and so on down the line. Proponents of MTL may argue that MTL serves just as equally as a guide, because when it places the color red on a food package, it tells the consumer to avoid that product. This may be true, but the lack of an ordinal structure makes it more difficult for consumers to compare products across the supermarket, especially those with varying numbers of red, yellow, and green indicators. Thus NPS’s ordinal system will likely guide consumer choice more effectively than will MTL.

Moreover, as mentioned above, NPS is a simpler system than MTL, which makes it easier for consumers to understand and use. The requirement that all nutrients must be below a

¹⁸⁶ INST. MED., *supra* note 20, at 73.

¹⁸⁷ Front-of-Pack and Shelf Tag Nutrition Symbols; Establishment of Docket; Request for Comments and Information 75 Fed. Reg. at 22603.

¹⁸⁸ In the final report briefing, IOM representatives explained that the goal of its recommendation is to move from informing consumers to encouraging consumers. *Phase II Report Briefing—Audio Webcast*, *supra* note 25.

certain threshold, before the product is eligible to receive any stars, also plays an important role in guiding consumer choice. The health halo effect, one major criticism of some of the private industry labels, is a risk that must be minimized in order to avoid misguiding consumers.

Requiring a particular level of all nutrients, before a food product can indicate that it has healthy levels of any nutrient, is a strong safeguard against the health halo. The current MTL system does not incorporate such a safeguard. Instead, a food product with dangerously high levels of certain nutrients may still bear a green indicator, if only one nutrient is below the applicable threshold. Granted, this green indicator would be sandwiched between two red ones, but the potential to create a health halo is still present. NPS, on the other hand, completely avoids the dangers of the health halo. Thus, NPS will likely serve as a more effective guide in encouraging consumers to make healthy food choices. Given that NPS is likely to achieve the FDA's goals more successfully than MTL, it is more appropriate for the FDA to adopt it as its regulatory scheme. Other characteristics of NPS render it a model system as well. While these characteristics do not create a point of comparison with MTL, they do create one with some of the private labels discussed earlier.

D. Comparing NPS and Private Industry Labels

i. Ability to Inform

One of the facets of the industry labels that subjected them to such skepticism and criticism is their proprietary nature. Because NPS will be a government program, it is inherently nonproprietary. It can thus appear on all food products, regardless of industry affiliation. This is especially relevant, given that one of the main issues with the proprietary labels was that they functioned more like advertisements than nutrition labels. The FDA regulated NPS scheme is thus likely to garner more trust from the public than any privately created label—trust that the

label is accurate, not misleading, and designed to effectively combat the leading causes of obesity. Those opposed to a regulated FOP labeling scheme might point to Griffin Hospital's NuVal labeling scheme as successfully achieving a neutral posture among industry members, thereby rendering government intervention unnecessary. Like Guiding Stars, NuVal is an independent third party that ranks food on a graded scale based on the balance of positive and negative nutrients in a given product. Unlike Guiding Stars, however, NuVal's algorithm assigns a product a numerical score between one and one hundred.¹⁸⁹ While its algorithm is currently unavailable to the public, as it is patent pending, NuVal's website explains how the algorithm generally works.¹⁹⁰ The system accounts for not only the quantity of certain nutrients, but also the quality and density of those nutrients.¹⁹¹ It also assigns "weighting coefficients" to certain nutrients, like trans fat, that have a close association with a serious health condition.¹⁹² The ultimate goal, according to Dr. David Katz, original creator of the formula and director of the Yale University Prevention Research Center, is to give a "summative, overall assessment of nutritional quality."¹⁹³

While NuVal may be open to entering into agreements with every supermarket, it currently does not do so. Thus, the label is not available to all American consumers. The system is also currently patent pending. It may or may not receive patent protection. However, applying for it demonstrates NuVal's intention to protect its proprietary algorithm from public

¹⁸⁹ *How It Works*, NUVAL, <http://www.nuval.com/How> (last visited Dec. 19, 2013).

¹⁹⁰ *ONQI: The Science Behind the Scores*, NUVAL, <http://www.nuval.com/science> (last visited Dec. 19, 2013).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *NuVal Food Labeling System Hard to Swallow for Some*, *supra* note 85.

use.¹⁹⁴ In the federally regulated NPS system, on the other hand, thresholds will be transparent and available for all to examine and use.¹⁹⁵

ii. Ability to Protect

A major (and currently unique) feature of the IOM's recommendation is that it suggests accounting for only the presence of added sugar, and not total sugar content.¹⁹⁶ This position is consistent with the 2010 Dietary Guidelines for Americans, which "strongly recommends reducing intakes of calories from added sugars and consumption of foods containing added sugars,"¹⁹⁷ as well as the White House and FDA's recent proposal to add added sugars to the NFP.¹⁹⁸ It is also consistent with current, albeit new, developments in the research community. Most naturally occurring sugars are accompanied by water and fiber, which slows absorption into the system.¹⁹⁹ When sugar is added to processed food products, the food is often stripped of the essential water and fibers.²⁰⁰ Thus added sugar more readily turns to body fat than does naturally occurring sugar.²⁰¹ So by limiting the focus to added sugars, the IOM's recommendation addresses the problem of sugar accurately and precisely, leading to better

¹⁹⁴ See *NuVal Food Labeling System Hard to Swallow for Some*, *supra* note 85 ("Manufacturers like General Mills have said, '...the marketers of NuVal do not make the NuVal criteria and formula criteria publicly available, which makes accurate comparisons and analysis difficult, if not impossible.'")

¹⁹⁵ *Phase II Report Briefing—Audio Webcast*, *supra* note 25.

¹⁹⁶ INST. MED., *supra* note 20, at 71.

¹⁹⁷ *Id.*; see also 2010 DIETARY GUIDELINES, *supra* note 144, at 28.

¹⁹⁸ Office of the First Lady, *supra* note 11.

¹⁹⁹ Ashley Gearhardt, et al., *If Sugar Addictive . . . What Does It Mean for the Law?*, J.L. MED. & ETHICS (SUPP.) 46, 47 (2012); see also 2010 DIETARY GUIDELINES, *supra* note 144, at 27.

²⁰⁰ Gearhardt et al., *supra* note 204, at 47; see also 2010 DIETARY GUIDELINES, *supra* note 144, at 27.

²⁰¹ Rich Cohen, *Sugar Love: A Not so Sweet Story*, NAT'L GEOGRAPHIC (Aug. 2013), <http://ngm.nationalgeographic.com/2013/08/sugar/cohen-text> ("[I]n the 1960s the British nutrition expert John Yudkin conducted a series of experiments on animals and people showing that high amounts of sugar in the diet led to high levels of fat and insulin in the blood—risk factors for heart disease and diabetes.").

consumer protection from dangerous additives. Most importantly, however, NPS will not inadvertently harm the perception of healthy foods that contain naturally occurring sugars, such as milk and fruit.

iii. Ability to Guide

In order to guide consumer choice as effectively as possible, NPS ought to be implemented with the IOM's recommendation that the label appear on all food products in the supermarket, not just on prepackaged foods. This will require working closely with the USDA, who is responsible for foods such as beef and poultry, in order to cover the entire supermarket.²⁰² Because many natural ingredients contain lower amounts of fat, sodium, and sugar than their processed and prepackaged counterparts, the perimeter of the supermarket is bound to carry more three-star foods than the aisles. Thus, NPS has the potential to effectively achieve the FDA's goals, by guiding consumers to the perimeter of the supermarket and encouraging them to purchase natural, healthy ingredients.

E. Potential Drawbacks to NPS

i. Lack of Positive Nutrients

A major issue that critics and industry members may have with NPS is that it only accounts for negative nutrients and does not reflect the presence of positive nutrients, such as fiber, protein, and vitamins. These are all nutrients that the 2010 Dietary Guidelines for Americans recommends increasing in the American diet.²⁰³ Thus, such critics have a good reason to question the absence of these positive nutrients. However, two important considerations bring the IOM's choice not to include positive nutrients into a more positive light. First, the motivating force behind FDA's interest in FOP nutrition labeling is its potential to

²⁰² INST. MED., *supra* note 20, at 83.

²⁰³ 2010 DIETARY GUIDELINES, *supra* note 144, at 38-42.

stymie the growth of diet-related diseases like obesity.²⁰⁴ Thus, IOM's recommendation attempts to fulfill FDA's objective by including calories, as well as nutrients notoriously associated with those diseases: sodium, fat, and added sugar.²⁰⁵ Second, the IOM is concerned that if positive nutrients are included in the scheme, food manufactures may be encouraged to fortify their food products. It observes that this type of fortification is likely not consistent with the FDA's current policy regarding fortification.²⁰⁶ Thus, for now at least, a regulated system is likely better off not incorporating positive nutrients into its scheme.

ii. Grouping Fat and Trans Fat Together

Another potential issue that critics might have with NPS is that it only reflects the total fat content of a food product, and does not separately state the level of trans fat. This is a reasonable concern, given that trans fats tend to increase one's cholesterol more than other types of fats,²⁰⁷ and high cholesterol is one of the major risk factors leading to heart disease, heart attack and stroke.²⁰⁸ However, trans fats are still listed on the NFP, so they are still represented on the food package, just not on the front. Moreover, the IOM notes that the 2010 Dietary Guidelines suggest the reduced intake of all solid fats. Thus, by analyzing food products by their total fat content, the NPS label's encouragement will be consistent with other federal policies. The FDA has also recently proposed listing trans fat as an illegal food additive, which would

²⁰⁴ Front-of-Pack and Shelf Tag Nutrition Symbols; Establishment of Docket; Request for Comments and Information 75 Fed. Reg. at 22603.

²⁰⁵ *Phase II Report Briefing—Audio Webcast*, *supra* note 25.

²⁰⁶ INST. MED., *supra* note 20, at 71; *see also*, 21 C.F.R. § 104.20 (2013).

²⁰⁷ *Trans Fat Is Double Trouble for Your Heart Health*, MAYO CLINIC (May 6, 2011), <http://www.mayoclinic.com/health/trans-fat/CL00032>. “Trans fat is made by adding hydrogen to vegetable oil . . . [and i]t’s thought that adding hydrogen to oil makes the oil more difficult to digest.” *Id.*

²⁰⁸ *Cholesterol*, AM. HEART ASS’N., http://www.heart.org/HEARTORG/Conditions/Cholesterol/Cholesterol_UCM_001089_SubHomePage.jsp# (last visited Dec. 19, 2013).

effectively ban its continued use.²⁰⁹ If the proposal is finalized, then this issue will be moot.

Even if the proposal is not implemented, this issue is still largely moot—there has been roughly a 75% cut in the use of trans fats over the last few years. Thus, even now, the potential trans fat issue is largely de minimis. Overall, the IOM’s recommendation is sound, and has great potential to be effective at achieving the FDA’s goal of changing consumer behavior.

V. Implementing IOM’s Recommendation²¹⁰

A. FDA’s Lack of Advancement

It has been over a year since the IOM published its report on the second phase of its study, and yet there appears to be no movement from the FDA. The IOM, a fellow public entity, has presented the FDA with a proposed system that is founded on a thorough examination of the currently available research and was specifically designed to achieve the FDA’s stated objectives, with respect to FOP nutrition labeling. Yet the FDA continues to remain silent on the issue. It is possible that the FDA is currently conducting the further research that the IOM recommended at the end of its phase two report.²¹¹ However, it has provided no indication that this is what it is doing. Because the FDA is largely a transparent agency, the fact that it has not stated that it is exploring the IOM’s recommendations and suggestions is strong evidence that it has not yet begun such research.

Another possible explanation for the FDA’s lack of advancement on FOP nutrition labeling is that it may be waiting for Congress to pass the Food Labeling Modernization Act

²⁰⁹ Rachael Rettner, *Will You Even Notice The Trans Fat Ban?*, HUFFINGTON POST (Nov. 13, 2013, 9:13 AM), http://www.huffingtonpost.com/2013/11/13/trans-fat-ban-fda_n_4266612.html.

²¹⁰ Citation to the image that appears in this section can be found in Appendix A.

²¹¹ INST. MED., *supra* note 20, at 107-08.

(FLMA).²¹² The FLMA would amend the FDCA by adding a subparagraph to Section 403, which concerns misbranded foods. The subparagraph would mandate that the FDA devise mandatory regulations for front-of-pack labeling.²¹³ Perhaps, then, the FDA is awaiting this official authority from Congress. However, it is not clear that the FLMA is necessary in order for the FDA to act. Section 201(n) of the FDCA gives the FDA authority to require additional key information to appear on the food label if such a requirement is necessary to prevent consumers from being misled.²¹⁴ Pursuant to this Section, the FDA “can require the disclosure of facts that are material to the ‘consequences’ of consuming food—i.e. the possible adverse effects that could arise.”²¹⁵ The legislative history further indicates that Congress intended to give the FDA the option to implement a system like NPS.²¹⁶ Even the FDA believes that the NLEA gives it the authority to establish a “single, uniform, government-mandated symbol” system.²¹⁷ Thus, it seems likely that the FDA does indeed have the authority to implement NPS without further authorization from the FLMA. Perhaps, then, the FDA believes that the food industry has finally designed an effective labeling scheme and, therefore, no longer needs to advance its regulatory initiative. This belief would be mistaken.

²¹² H.R. ____ 113th Cong. (1st Sess. 2013), *available at* <http://cspinet.org/new/pdf/food-labeling-modernization-act.pdf>

²¹³ *Id.* at § 2(a)(1) (A food product’s “principal display panel [must] bear[] summary nutrition information that reflects the overall nutritional value of the food or specified ingredients, as specified in accordance with regulations of the Secretary . . .”).

²¹⁴ 21 U.S.C. § 321(n); *see also* Degnan, *supra* note 36, at 51.

²¹⁵ Degnan, *supra* note 36, at 51. “The NLEA was not designed just to require new information on food labels, but rather to require meaningful information that consumers need to choose food wisely.” *Id.*

²¹⁶ “Congress gave the FDA the option to use ‘universal symbols to indicate desirable or undesirable levels of particular nutrients.’” SILVERGLADE & HELLER, *supra* note 84, at III-5 (citing H.R. Rep. 101-538 at 18 (1990)).

²¹⁷ *Background Information on Point of Purchase Labeling*, *supra* note 108.

B. GMA Introduces “Facts Up Front”

In 2011, just as the IOM was completing the second phase of its study, Grocery Manufacturers of America (GMA) announced its launch of the newest private industry FOP label, Nutrition Keys,²¹⁸ later changed to “Facts Up Front.”²¹⁹ The timing of GMA’s launch makes it clear that GMA’s objective was to stymie any further development of federal regulations.²²⁰ At a meeting that the IOM held during the initial stages of its phase two study, GMA announced that it was then developing its labeling scheme, and stated that its goal was to eventually develop a “unified FOP nutrition labeling system.”²²¹ The label presents calories and essentially the same negative nutrients as NPS,²²² however it displays their quantities objectively (i.e. numerically by weight).²²³ Below each quantity is a percentage,



²¹⁸ *Food and Beverage Industry Launches Nutrition Keys Front-of-Pack Nutrition Labeling Initiative to Inform Consumers and Combat Obesity*, GROCERY MANUFACTURERS OF AMERICA (Jan. 24, 2011), <http://www.gmaonline.org/news-events/newsroom/food-and-beverage-industry-launches-nutrition-keys-front-of-pack-nutrition-/>.

²¹⁹ *Facts Up Front Front-of-Pack Labeling Initiative*, GROCERY MANUFACTURERS OF AMERICA, <http://www.gmaonline.org/issues-policy/health-nutrition/facts-up-front-front-of-pack-labeling-initiative/> (last visited Dec. 19, 2013).

²²⁰ See Marion Nestle, *FDA Says Facts-Up-Front is OK?*, FOOD POLITICS, (Feb. 27, 2012), <http://www.foodpolitics.com/tag/gmagrocery-manufacturers-association/> (“I consider the GMA[] Facts-Up-Front scheme to be an end run around the FDA’s front-of-package labeling initiatives.”); Dan Flynn, *Food Retailers Unveil Their Own FOP Label Scheme*, FOOD SAFETY NEWS (Jan. 25, 2011), <http://www.foodsafetynews.com/2011/01/food-retailers-present-their-own-fop-labeling-scheme/#.UrOk6lpgaZd> (“There is only one explanation for this move: heading off the FDA’s Front-of-Package (FOP) labeling initiatives.”).

²²¹ REGINA HILDWINE, GROCERY MANUFACTURERS ASSOCIATION INITIATIVE AND THE INTERNATIONAL FOOD INFORMATION COUNCIL FOUNDATION CONSUMER RESEARCH (Oct. 26, 2010), available at <http://www.iom.edu/~media/Files/Activity%20Files/Nutrition/NutritionSymbols/Regina%20Hildwine%2020101025IOMPresentationUpdated1ppt%20Compatibility%20Mode.pdf>.

²²² The system accounts only for saturated fat, not total solid fat content. *Facts Up Front Front-of-Pack Labeling Initiative*, *supra* note 224.

²²³ *Id.*

which represents the amount of one's daily value for that nutrient.²²⁴ Unlike NPS, however, it also gives manufacturers the option to add up to two positive nutrients to the label.²²⁵ While not officially endorsing the new label, the FDA responded very positively to the introduction of Facts Up Front. On December 13, 2012, Deputy Commissioner for Foods, Michael Taylor, wrote a letter to GMA.²²⁶ He wrote that Facts Up Front had the potential to alleviate some of the FDA's concerns regarding the potential for products to mislead consumers, and if uniformly adopted, it might contribute to the FDA's public health goals.²²⁷ Thus the arrival of Facts Up Front to the scene may very well be what has stalled the FDA's progress.

C. Possible Entrenchment of "Facts Up Front"

If this state of affairs persists, Facts Up Front might become entrenched in the American food system. At that point, the industry would have a strong basis for arguing that further FOP regulations would be redundant. This would not be beneficial to the American public; Facts Up Front does not actually achieve any of the FDA's goals for its FOP labeling initiative. It does not effectively inform the average consumer about the nutrition value of various food products. Many aspects of the label require considerable knowledge to understand.²²⁸ Not only does the consumer need to know what each individual nutrient is and how it affects her health, she also needs to understand what the geometric units indicate, what a daily value is, and what a percentage means.²²⁹ Remembering that almost half of Americans read at an eighth grade reading level or lower, Facts Up Front requires many consumers to learn a substantial amount of

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Caroline Scott-Thomas, *FDA Offers Support in Industry Roll-out of Facts Up Front Labeling*, FOODNAVIGATOR-USA.COM (Feb. 24, 2012), <http://www.foodnavigator-usa.com/content/view/print/616127>.

²²⁷ *Id.*

²²⁸ *Phase II Report Briefing—Audio Webcast*, *supra* note 25.

²²⁹ *Id.*

information, before they can effectively utilize the label. For these reasons, and because the nutrient information is presented objectively, Facts Up Front does not have the potential to effectively guide consumers to the healthier areas of the supermarket. NPS, on the other hand, does—it is simple and interpretive and it focuses only on those nutrients that are related to chronic disease.²³⁰ Thus, if it wishes to achieve its goals, the FDA is well advised to move quickly to develop and implement the IOM's recommended FOP nutrition labeling system.

VI. Conclusion

Obesity is becoming an epidemic in this country. If we do not actively work to curb our dangerous lifestyles, obesity and other diet related diseases are bound to worsen over the 21st Century. The issue is so pervasive, as are its causes, that a sound FOP nutrition labeling scheme will not alone solve the problem. However, a well-designed FOP label does have the potential to be a catalyst for change. The FDA had the right idea when it announced its FOP labeling initiative, back in 2010. Now that the IOM has provided it with a model framework through which to devise a successful scheme, the FDA ought to take the next steps toward introducing a regulated FOP label. It is important that the FDA conduct further consumer research, both before and after implementation, in order achieve optimal success. Most importantly, however, no label will be effective if it is not introduced alongside a substantial education campaign. Not only can an education campaign increase the likelihood that consumers will use the label as intended; it also has the potential to raise the overall level of nutrition knowledge in our country. Deeper understanding often leads to meaningful change in perspective, and in the case of nutrition knowledge, it could lead to meaningful change in the American lifestyle.

²³⁰ *Id.*

Appendix A

Below is the citation to the webpage that contains each image that appears in the paper.

PepsiCo – Smart Spot

- *Human Sustainability*, PEPSICO 2007 ANNUAL REPORT, <http://www.pepsico.com/Annual-Reports/2007/purpose-human.html> (last visited Dec. 19, 2013).

General Mills – Goodness Corner

- *American General Mills Fruity Cheerios: 12 oz, (340g), Box*, THE STATESIDE CANDY CO., <http://www.americansweets.co.uk/american-general-mills-fruity-cheerios-12oz-340g-box-8109-p.asp> (last visited Dec. 19, 2013).

Kraft – Sensible Solutions

- Alisha, *Another Front-of-Package Food Labeling System*, SAVORTHEFLAVOUR (Mar. 5, 2012), <https://savorthe flavour.wordpress.com/2012/03/05/another-front-of-package-food-labeling-system/>.

Kellogg's – Nutrition at a Glance

- Guest 123, *Kellogg Scales Back Ads for Sugary Cereals Aimed at Children*, ALGERIA.COM, (June 15, 2007), <http://www.algeria.com/forums/health-science/20529-kellogg-scales-back-ads-sugary-cereals-aimed-children.html>.

Hannaford Brothers – Guiding Stars

- *Food Finder*, GUIDING STARS, <http://food.guidingstars.com/> (last visited Dec. 19, 2013).

American Heart Association – Heart Check

- *Heart-Check Mark*, AM. HEART ASS'N., http://www.heart.org/HEARTORG/GettingHealthy/NutritionCenter/HealthyDietGoals/Heart-Check-Mark_UCM_441105_Article.jsp# (last visited Dec. 19, 2013).

Keystone Center – Smart Choices

- David Friedlander, *Questionable Intelligence Surrounding "Smart Choices" Food Label*, TREEHUGGER (Sept. 6, 2009), <http://www.treehugger.com/green-food/questionable-intelligence-surrounding-smart-choices-food-label.html>.

Institute of Medicine – Nutrition Points System

- William Neuman, *Label Plan Offered to Rate Food Nutrition*, NEW YORK TIMES (Oct. 20, 2011), <http://www.nytimes.com/2011/10/21/business/a-plan-to-rate-nutrition-of-food-with-stars.html>.

UK – Multiple Traffic Light Label

- Caroline Scott Thomas, *Combined Traffic Light and GDA Labeling May Improve Teens' Food Choices: Study*, FOODNAVIGATOR.COM (Jun. 17, 2013), <http://www.foodnavigator.com/Science-Nutrition/Combined-traffic-light-and-GDA-labelling-may-improve-teens-food-choices-Study>.

Griffin Hospital – NuVal

- Jennifer Lintz, *Owatonna Dietitian Answers the Question: “What on Earth is NuVal?”*, OWATONNA PEOPLE’S PRESS, http://www.southernminn.com/owatonna_peoples_press/features/article_78083b33-fafd-5304-be58-40015645cfea.html (last updated Mar. 14, 2013, 1:14 PM).

Grocery Manufacturers of America – Facts Up Front

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Nutrition Facts	
8 servings per container	
Serving size	2/3 cup (55g)
Amount per 2/3 cup	
Calories	230
% DV*	
12%	Total Fat 8g
5%	Saturated Fat 1g
	<i>Trans</i> Fat 0g
0%	Cholesterol 0mg
7%	Sodium 160mg
12%	Total Carbs 37g
14%	Dietary Fiber 4g
	Sugars 1g
	Added Sugars 0g
	Protein 3g
10%	Vitamin D 2mcg
20%	Calcium 260mg
45%	Iron 8mg
5%	Potassium 235mg
* Footnote on Daily Values (DV) and calories reference to be inserted here.	

²³¹ Citation to the image that appears in this Appendix can be found in Appendix A.

Repealing the Agricultural Exemption
in the FLSA and the NLRA

By: David Winston

Table of Contents

	<u>Page</u>
I. INTRODUCTION	1
II. THE AGRICULTURAL EXEMPTIONS IN THE FAIR LABOR STANDARDS ACT AND NATIONAL LABOR RELATIONS ACT.....	3
A. The FLSA and The FLSA’s Agricultural Exemption	3
B. The NLRA and the Agricultural Exemption in the NLRA.....	6
III. THE BASIS FOR THE AGRICULTURAL EXEMPTION IN THE FAIR LABOR STANDARDS ACT AND THE NATIONAL LABOR RELATIONS ACT	7
A. Constitutional Concerns	7
B. The Effect of the Precedent Established by Agricultural Exemptions in Previous New Deal Legislation and the Influence of Southern Congressmen	9
IV. POLICY SHIFTS, ECONOMIC DEVELOPMENTS, AND THE ECONOMIC CONSEQUENCES OF REPEALING THE FLSA AND NLRA’S AGRICULTURAL EXEMPTION	12
V. RECOMMENDATIONS FOR AMENDING THE FLSA AND THE NLRA	19
A. Amending the FLSA Agricultural Exemption	19
B. Amending the NLRA’s Agricultural Exemption.....	22

I. Introduction

Since the American Revolution, when Thomas Jefferson conceptualized the Yeoman farmer as the backbone of America and Benjamin Franklin championed farming as the “only honest way for a nation to acquire wealth,” agriculture has had a special place in the American economy.¹ Due to the special status accorded farmers, the U.S developed a series of public entitlements and policies to support farmers.² One of the primary mechanisms used to protect the economic standing of farmers was the exclusion of agricultural workers from labor laws and health and safety legislation designed to protect workers.³ Consequently, agricultural exceptionalism today possesses a starkly different connotation. Today, agricultural exceptionalism in academia symbolizes the harsh working conditions agricultural workers endure due to their historic exclusion from worker protection laws. As a result of their exclusion, “farm workers on large farms constitute the only numerically significant group of adult minimum-wage workers wholly excluded from the maximum hours and overtime provisions of the Fair Labor Standards Act (“FLSA”)” and the largest group of workers excluded from the National Labor Relations Act (“NLRA”).⁴

Due to their exclusion from the FLSA and the NLRA, agricultural workers continue to suffer from harsh working conditions and lack the tools necessary to improve their working conditions. In order to improve the working conditions of agricultural workers, Congress should repeal the agricultural exemption promulgated in the FLSA and the NLRA. Repealing these two

¹ Guadalupe T. Luna, *An Infinite Distance?: Agricultural Exceptionalism and Agricultural Labor*, 1 U. Pa. J. Lab. & Emp. L. 487, 491 (1998).

² *Id.* at 490.

³ *Id.*

⁴ Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 Tex. L. Rev. 1335, 1335 (1987).

agricultural exemptions will enable agricultural workers to obtain wage protections and empower agricultural workers to act collectively to improve their working conditions.

This paper will begin by providing background information about the agricultural exemptions in the NLRA and the FLSA. Specifically, Part II provides an overview of the agricultural exemptions and the protections available to workers under both statutes, including the protections extended to agricultural workers under the 1966 FLSA Amendment. Part III examines in detail the basis for the Agricultural Exemption in the FLSA and the NLRA including Constitutional concerns, the influence of Southern Congressman, and the effect created by the inclusion of agricultural exemptions in earlier New Deal Legislation. After investigating the basis for the agricultural exemption, Part IV considers the effects of policy shifts and economic developments since the enactment of the NLRA, FLSA, and the 1966 FLSA Amendment. Additionally, Part IV compares the economic conditions in 1966 to today in order to assess the potential economic consequence of repealing the agricultural exemption in the FLSA and NLRA. After comparing the circumstances under which the agricultural exemptions were enacted and amended to the current economic and political climate, Part V provides a series of recommendations about how to repeal the agricultural exemptions.

Part V offers a comprehensive solution to the harsh working conditions, detailed in Part IV, that agricultural workers face as a result of the two agricultural exemptions. This comprehensive solution requires a series of Congressional actions. First, Congress should repeal the FLSA agricultural exemption – Section 13(A)(6) – and expand the statute’s jurisdiction by lowering the standards for a covered enterprise under FLSA Section 3(s)(1)(A)(i). Second, Congress should amend the NLRA by repealing the agricultural exemption, direct the NLRB to use its discretionary powers under Sections 10(a) and 14(c) of the NLRA to cede jurisdiction

over the agricultural industry to state agencies in states that offer workers greater protections than the NLRA and adopt the definition of agriculture included in the NLRB's annual appropriations rider. Thus, Congress should repeal the agricultural exemption in the FLSA and NLRA.

II. The Agricultural Exemptions in the Fair Labor Standards Act and National Labor Relations Act

Prior to considering how Congress should amend the agricultural exemptions in the FLSA and the NLRA without depriving agricultural workers of additional protections available under state laws, one must first understand the protections available to workers under both statutes as well as the scope of both exemptions.

A. The FLSA and The FLSA's Agricultural Exemption

The FLSA, established the national minimum wage, required employers to pay employees overtime wages at time and a half, and protected children from oppressive labor conditions.⁵ As originally enacted, Congress expressly excluded agricultural workers from the labor protections authorized by the FLSA.⁶ However, in 1966 Congress amended the FLSA to provide certain agricultural workers with minimum wage protections by creating Section 13(a)(6).⁷ Section 13(a)(6) of the FLSA states that "the minimum wage and hour requirements shall not apply with respect to...any employee employed in agriculture if such employee is

⁵ Fair Labor Standards Act, 29 U.S.C. §§ 206-207, 213 (1938); Autumn L. Canny, *Lost In A Loophole: The Fair Labor Standards Act's Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 Drake J. Agric. L. 355, 365 (2005); J.W. Looney, *The Changing Focus of Government Regulation*, 44 Mercer L. Rev. 763, 803 (1993).

⁶ Fair Labor Standards Act, 29 U.S.C. § 213 (1938); Jennifer J. Kalyuzhny, *Cultivating The Next Generation: Why Farming Internships Should Be Legal*, 21 S.J. Agric. L. Rev. 131, 133-134 (2011); Canny *supra* note 5, at 365;

⁷ Fair Labor Standards Act, 29 U.S.C. §213 (1966); S. Rep. No. 89-1487, at 5 (1966); Canny *supra* note 5, at 365; Martha L. Noble, *Erosion of Agricultural Labor Exemptions In Employment Law: Recent Development to Arkansas*, 1996 Ark. L. Notes 71, 73 (1996).

employed by an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor.”⁸ As a result of the 1966 amendments, agricultural laborers who work for large-scale employers receive minimum wage protections.⁹ However, agricultural workers who work for small-scale farming operations currently do not receive minimum wage protections. Furthermore, while the 1966 amendment extended minimum wage protections to certain agricultural employees, the 1966 amendment did not extend overtime protections to agricultural laborers.¹⁰ As a result, 2-3 million agricultural workers remain exempt from the FLSA’s overtime provisions.¹¹ Since agricultural employers can require their employees to work overtime hours without paying higher overtime compensation rates, agricultural employers have no incentive to hire additional workers. Consequently, agricultural employees often work long hours without overtime pay.¹²

In addition to understanding the protections available to workers under the FLSA, one must also understand the scope of the FLSA’s agricultural exemption. The scope of the FLSA’s agricultural exemption depends upon the interpretation of the term *agriculture* under the act.

Section 3(f) of the FLSA defines agriculture as

“farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as

⁸ Fair Labor Standards Act, 29 U.S.C. §213 (1966).

⁹ Looney *supra* note 5, at 803; Canny *supra* note 5, at 365; Kalyuzhny *supra* note 6, at 133-134; Noble, *supra* note 7, at 73.

¹⁰ S. Rep. No. 89-1487, at 5 (1966).

¹¹ Juan F. Perea, *The 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, 97 (2011).

¹² Canny *supra* note 5, at 366.

an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market.”¹³

Whether an employee in the agricultural field can avail themselves of the protections of the FLSA depends upon whether the worker is engaged in a primary or secondary agricultural occupation as defined by the FLSA and its judicial interpretation.¹⁴ Primary agricultural occupations under the FLSA consist of traditional farming activities including cultivating crops and dairy farming.¹⁵ Secondary agricultural activities under the FLSA include any practice “performed whether by a farmer or on a farm, incidentally or in combination with such farming operations.”¹⁶ Examples of secondary agricultural activities include employees involved in the processing, sorting, washing, waxing, packaging, or shipping agricultural products. Employees engaged in secondary agricultural activities may fall within the scope of the agricultural exemption if their work is performed on a farm.¹⁷ Courts view employees who work offsite processing or transporting agricultural products as engaged primarily in industrial processing because the agricultural nature of the product is incidental in these circumstances.¹⁸ Moreover, the Supreme Court clarified in *Mitchell v. Budd*, that it is not enough for an employee to process crops on a farm in order for the agricultural exemption to apply the activity performed must be

¹³ Fair Labor Standards Act, 29 U.S.C. §203 (2004).

¹⁴ Ronald H. Barsamian & E. Mark Hanna, *ALRB or NLRB: Where Do We Draw The Line?*, 11 S.J. Agric. L. Rev. 1, 1 (2001).

¹⁵ Barsamian & Hanna *supra* note 14, at 3; *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 766-767 (1949).

¹⁶ Barsamian & Hanna *supra* note 14, at 3; *Farmers Reservoir & Irrigation Co.* 337 U.S. at 766-767.

¹⁷ Barsamian & Hanna *supra* note 14, at 6; *Farmers Reservoir & Irrigation Co.* 337 U.S. at 766-767.

¹⁸ *Bowie v. Gonzalez*, 117 F. 2d. 11 (1st Cir. 1941); *Calaf v. Gonzalez*, 127 F. 2d 934 (1st. Cir 1942).

“more akin to agriculture than industry.”¹⁹ Though the applicability of the FLSA remains limited, the NLRA is another potential source of protection available to agricultural workers.

B. The NLRA and the Agricultural Exemption in the NLRA

The NLRA grants employees the right to organize, form unions, collectively bargain, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.²⁰ Section 2(3) of the NLRA defines employees covered by the NLRA as “any employee...but shall not include any individual employed as an agricultural laborer.”²¹ Although the NLRA does not offer agricultural laborers any coverage or protections under the act, “agricultural laborers may lawfully organize and attempt to bargain with employers.”²² However, agricultural laborers who lawfully organize and attempt to bargain with employers remain subject to retaliation for their organizing efforts. Unfortunately, the lack of certainty regarding who qualifies as an agricultural laborer under the NLRA creates barriers against organizing for employees who work in agricultural-related processing industries. The lack of certainty regarding who qualifies as an agricultural laborer under the NLRA derives from the absence of a definition of agricultural laborer in the NLRA.²³ Since 1946, Congress has attached a legislative rider to the National Labor Relations Board’s (NLRB) appropriation act expressly prohibiting the NLRB from apportioning any part of its annual appropriation towards agricultural laborers as defined in Section 3(f) of the FLSA.²⁴ Since the NLRB utilizes the FLSA’s definition

¹⁹ *Mitchell v. Budd*, 76 S. Ct. 527, 532 (1956).

²⁰ National Labor Relations Act, 29 U.S.C. §157 (2000).

²¹ National Labor Relations Act, 29 U.S.C. §152 (2000).

²² Noble, *supra* note 7, at 73.

²³ *Id.*

²⁴ Barsamian & Hanna *supra* note 14, at 2; Noble, *supra* note 7, at 73.

of agricultural laborer it assumes the same primary and secondary agricultural definition as the FLSA discussed above.²⁵

III. The Basis for the Agricultural Exemption in the Fair Labor Standards Act and the National Labor Relations Act

In order to assess the feasibility of removing or modifying the agricultural exemption promulgated in the FLSA and NLRA, one must first understand the basis of the exemption. Congress included an agricultural exemption in the original FLSA in 1938 due to the convergence of dynamic political factors. These considerations included Constitutional concerns, the precedent of exclusion established in previous New Deal Legislative Acts, the influence of Southern Congressman, and the strength of the agricultural lobbies.

A. Constitutional Concerns

Congress's concern about the constitutionality of the FLSA and NLRA in light of the Supreme Court's decision in *A.L.A. Schechter Poultry Corp. v. United States*, led to the inclusion of the agricultural exemption in the FLSA and NLRA. Prior to the enactment of the NLRA and the FLSA, Congress and President Roosevelt collaborated on the passage of a series of legislation known as the New Deal Legislation, including the National Industrial Recovery Act.²⁶ In *A.L.A. Schechter Poultry Corp. v. United States*, the Supreme Court invalidated the National Industrial Recovery Act.²⁷ In their holding, the Court reasoned "the authority of the federal government may not be pushed to such an extreme as to destroy the distinction, which the commerce clause itself establishes, between commerce 'among the several States' and the

²⁵ See Barsamian & Hanna *supra* note 14, at 2 (discussing how the NLRB and DOL use the same definition of agricultural occupation the Supreme court articulated in *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755 (1949)).

²⁶ Canny *supra* note 5, at 363.

²⁷ *A.L.A. Schechter Poultry Corp. v. U.S.*, 295 U.S. 495, 520-525, 550 (1935).

internal concerns of a state.”²⁸ The Supreme Court’s invalidation of the *National Industrial Recovery Act* in *A.L.A. Schechter Poultry Corp. v. United States*, led President Roosevelt to seek a legislative response in the form of the FLSA.²⁹

In order to avoid the Constitutional pitfalls that plagued the National Industrial Recovery Act, the President and Congress exempted the predominantly intrastate agricultural industry from the purview of the NLRA and the FLSA. Senator Hugo Black’s introduction of the original FLSA in 1938 directly addresses Congress’ concerns about the Commerce Clause issues that befell the National Industrial Recovery Act. When Senator Black, the sponsor of S. 2475 introduced the original FLSA, he offered two reasons for the agriculture exemption:

“In the first place, the bill rests squarely upon the interstate commerce clause of the Constitution. In the second place, I believe it was the prevailing sentiment of the committee that business of a purely local type which serve a particular community, and which did not send their products into the streams of interstate commerce, can be better regulated by the laws of the communities and of the States in which business units operate.”³⁰

By exempting the intrastate, local agricultural industry from the Fair Labor Standards Act, Congress reduced the likelihood the judiciary would invalidate this exercise of federal power. Although Senator Black’s explanation for the inclusion of the agricultural exemption may explain why lawmakers sought to exclude “small agricultural operations, which sold their products locally, [it] had no logical relation to the huge agricultural combines of California and the cotton plantations of the South which employed thousands of workers and marketed their

²⁸ *Id.* at 550.

²⁹ *Id.* at 523-525; Jim Chen, *Of Agriculture’s Fris Disobedience and Its Fruit*, 48 Vand. L. Rev. 1261, 1281-1282 (1995); Canny *supra* note 5, at 363-364.

³⁰ 81 Cong. Rec. 7808 (1937); Patrick M. Anderson, *The Agricultural Employee Exemption From the Fair Labor Standards Act of 1938*, 12 Hamline L. Rev. 649, 653 (1989); Canny, *supra* note 5, at 366.

products almost exclusively in interstate commerce.”³¹ Moreover, Senator’s Black speech also did not take into consideration the exemption of individual producers...whose products were marketed out of state.³² The disconnect between the rhetoric of Senator Black’s speech and the inclusion of large interstate agricultural combines within the exemption suggest that Constitutional concerns regarding the FLSA and NLRA were likely minor or possibly even pretextual. Nevertheless, the efforts of legislators to avoid the Constitutional Commerce Clause issues that plagued the National Industrial Recovery Act might have motivated Congress to pass an overly inclusive agricultural exemption.

B. The Effect of the Precedent Established by Agricultural Exemptions in Previous New Deal Legislation and the Influence of Southern Congressmen

Another factor that contributed to the FLSA and NLRA’s agricultural exemption was the precedent of excluding agricultural laborers in earlier New Deal Legislation. In 1933, Congress enacted the National Industrial Recovery Act in an attempt to stimulate the economy through the adoption of fair competition codes. Although the National Industrial Recovery Act did not contain a specific statutory exclusion for agricultural laborers, the National Recovery Administration interpreted the National Industrial Recovery Act as applying only to industry

³¹ Anderson, *supra* note 30, at 653 (discussing how attributing the creation of the agricultural exemption in the FLSA to the commerce clause fails to account for the large agricultural operations in California and the cotton plantations in the South and individual producers who distributed their products in interstate commerce).

³² Anderson, *supra* note 30 at 653.

because “Congress did not intend that codes of fair competition under the NIRA be set up for farmers or persons engaged in agricultural production.”³³

President Roosevelt’s previous acceptance of an agricultural exemption in the NIRA based upon the racial and economic concerns of Southern Congressman, conditioned Congress and President Roosevelt to accept an explicit agricultural exemption to NLRA in 1935.³⁴ The consistent inclusion of an agricultural exemption in New Deal Legislation lowered the transaction cost for Southern Congressman to insist on the exemption in future legislation. Thus, “by 1938, when the FLSA became law, the exclusion had become routine in New Deal legislation.”³⁵ Since President Roosevelt knew he could not pass his New Deal legislation without the support of the South, and the South would not support any legislation without the routine inclusion of the agricultural exemption, President Roosevelt permitted Congress to obtain an agricultural exemption to the NLRA and the FLSA.³⁶

As with previous New Deal Legislation, the entrenchment of Southern Congressman in key committee chairmanships and majority leader positions in the New Deal Congress enabled Southern Congressmen to obtain exemptions from the FLSA and the NLRA for the agricultural industry. During the 1930’s, Southern Congressman held key Congressional positions due to the dominance of the Republican Party in the South and Congress’ reliance upon the seniority rule in

³³ Linder, *supra* note 4, at 1336; Robert Woodbury “Limits of Coverage of Labor in Industries Closely Allied to Agriculture Under Codes of Fair Competition Under NLRA 4 (Division of Review, Office of National Recovery Administration., Work Materials No. 45 The Labor Program Under the NIRA, p. A (1936).

³⁴ Linder, *supra* note 4, at 1361-1365; Perea, *supra* note 11, at 109-118.

³⁵ Linder, *supra* note 4, at 1336.

³⁶ Anderson, *supra* note 30, at 656; Canny, *supra* note 5, at 367; Linder, *supra* note 4, at 1350; Perea *supra* note 11, at 99-100.

assigning leadership and committee positions.³⁷ Due to their seniority, Southern Congressman held the most powerful positions in the House and Senate including the chairmanships of the Agriculture Committee in both houses and the Speaker position in the House of Representatives.³⁸ As a result of the influential positions held by Southern Congressman, President “Roosevelt had no alternative but to cooperate with the Southerners who ran Congress.”³⁹ In order to appease the Southern Congressmen he depended upon for support, President Roosevelt included agricultural exemptions in the original drafts he introduced into both houses of Congress.⁴⁰

Southern Congressmen pressed for the inclusion of an agricultural exemption because of the important position agriculture occupied in the Southern economy at the time. At the time of the NLRA and the FLSA’s enactment, the primary economic activity of the South consisted of cotton farming.⁴¹ In fact, the agricultural industry accounted for 42.8 percent to 66 percent of all jobs in Southern states during this period.⁴² This Southern agricultural system depended upon inexpensive and unregulated labor as its backbone.⁴³ As a result of their dependence upon the availability of cheap, unregulated labor, Southern lawmakers feared that requiring employers to pay the same wages to whites and blacks would deprive the South of the cheap labor it depended

³⁷ Anderson, *supra* note 30, at 656; Canny, *supra* note 5, at 367; Linder, *supra* note 4, at 1351; Perea, *supra* note 11, at 102-103.

³⁸ Linder, *supra* note 4, at 1350 (describing in depth the leadership positions held by Southern Congressmen in both houses).

³⁹ Linder, *supra* note 4, at 1350; Harvard Stikoff, *A New Deal for Blacks: The Depression Decade 45* (1978).

⁴⁰ S. 2475, 75th Cong., 1st Sess. §2(7) (1937); H.R. 7200, 75th Cong., 1st Sess. §2(7) (1937).

⁴¹ Linder, *supra* note 4, at 1343.

⁴² J. Folsom & O. Baker, *A Graphic Summary of Farm Labor and Population*, at 4 (table 2); Linder, *supra* note 4, at 1343.

⁴³ Canny, *supra* note 5, at 367.

upon and result in pay equity between whites and blacks.⁴⁴ Congressman J. Mark Wilcox remarks during the floor debate on the FLSA provide strong evidence of the South's fear of the economic and racial consequences of the FLSA and NLRA: "This is just another instance of the well-intentioned but misguided interference of our uniformed neighbors in a delicate racial problem that is gradually being solved by the people of the South."⁴⁵ Thus, the protection of agricultural workers was sacrificed "in order to secure votes from this southern block, and gain protection for the rest of the Nation's employment."⁴⁶

IV. Policy Shifts, Economic Developments, and the Economic Consequences of Repealing the FLSA and NLRA's Agricultural Exemption

Significant shifts in the application of the Commerce Clause, the economic scale of agricultural production, the diminished influence of Southern Congressmen, and the erosion of the legislative precedent of the agricultural exemption suggest Congress could repeal the agricultural exemption. Moreover, the continued economic viability of states that repealed the FLSA and NLRA's agricultural exemption by enacting state protections offers convincing evidence the U.S. economic concerns that limited motivated Congress to exercise restraint when it amended the agricultural exemption in 1966 no longer exist.⁴⁷ Therefore, Congress could and should repeal the agricultural exemption in the FLSA and NLRA's agricultural exemption.

When Congress enacted the FLSA and NLRA, the agricultural industry consisted predominantly of small-scale agricultural operations, which sold their products locally. As a result of their perception of the agricultural industry as merely intrastate commerce, Congress

⁴⁴ Anderson, *supra* note 30, at 656; Linder, *supra* note 4, at 1373.

⁴⁵ 82 Cong. Rec. 1404 (1937); See Linder, *supra* note 4, at 1374-1375 (for further discussion on the comments of Southern Congressman during the Floor Debate on the FLSA).

⁴⁶ Canny, *supra* note 5, at 367; Perea, *supra* note 11, at 102-103.

⁴⁷ Cal. Lab. Code § 1140-1166 (1996); Idaho code §22-4101-4113 (1997); Kan. Stat. Ann. §44-818-830 (1995).

remained reluctant to impose the same burdens upon the agricultural industry as other industries.⁴⁸ However the Supreme Court's reconsideration of the applicability of the Commerce Clause in *Wickard v. Filburn* in 1942 and the exponential growth of the agricultural industry since the enactment of the FLSA and NLRA militates towards a reconsideration of the agricultural exemption. In *Wickard v. Filburn* the Supreme Court held the Commerce Clause applied even when the activity in question was local and non-commercial in nature if it exerts a substantial economic effect on interstate commerce.⁴⁹ The court reasoned production of wheat, even for self-use, effects commerce by removing the person who grew the wheat from the open market.⁵⁰ The court's application of the Commerce Clause to a farmer who grew wheat for his own consumption left little doubt that Congress could regulate local agricultural producers. This expansion of Congress' power under the Commerce Clause enabled Congress to take greater control in regulating the agricultural industry, as evidenced by the 1966 amendment to the FLSA.

Congress used its enhanced regulatory authority over the agricultural industry following *Wickard* to respond to growing concern regarding the treatment of farm workers by repealing part of the agricultural exemption from the FLSA in 1966. Since its enactment in 1938, Congress has regularly amended the FLSA in response to the changing conditions of the American workforce.⁵¹ For example, Congress has increased the minimum wage rate and expanded or reduced the scope of FLSA due to economic and industrial changes.⁵² During the early 1960s, Cesar Chavez and other labor leaders brought national attention to the conditions

⁴⁸ *Id.* at 652-653; Canny, *supra* note 5, at 367.

⁴⁹ *Wickard v. Filburn*, 317 U.S. 111, 125 (1942).

⁵⁰ *Id.* at 128.

⁵¹ Canny, *supra* note 5, at 366.

⁵² *Id.*

endured by farm workers.⁵³ Chavez, “linked the poverty-level wages, lack of meaningful job security and poor working conditions experienced by farm laborers to...the agricultural industry’s exemption from New Deal reforms.”⁵⁴ As part of their commitment to amending the FLSA to reflect changes in economic and industrial conditions, Congress repealed the agricultural industry’s exemption from the FLSA’s minimum wage requirements in 1966 for employers who met certain criteria.⁵⁵ Congress amended the FLSA in 1966 by extending the FLSA’s minimum wage protections to all employee engaged in agriculture and agricultural processing whose employer used 500-man days of labor in the preceding calendar year.⁵⁶ In addition to extending minimum wage protections to workers engaged in the agricultural industry, the 1966 amendment also extended the FLSA’s overtime compensation provisions to workers employed in the agricultural processing industry.⁵⁷ This amendment benefitted an estimated 390,000 agricultural workers.⁵⁸ More importantly, the willingness of Congress to repeal part of the agricultural exemption from the FLSA in 1966 represented a shift away from the precedent of exclusion established in the New Deal legislation.

The diminished influence of Southern Congressmen during the 1960s also permitted President Johnson, with Congress’ support, to enact a more limited agricultural exemption to the FLSA. In his State of the Union Address on January 8, 1964, President Johnson unveiled his

⁵³ Todd Holmes, *The Swing of the Political Pendulum: Congressman John Moss, the Democratic Party, and the United Farm Workers’ Grape Strike and Boycott, 1965-1970*, Southern California Quarterly, Vol. 88, No. 3 pg 295-338, 300 (Fall 2006).

⁵⁴ *Id.*

⁵⁵ Anderson, *supra* note 30, at 661-662; Canny, *supra* note 5, at 381; Bruce Goldstein et al., *Enforcing Fair Labor Standards In The Modern American Sweatshop: Rediscovering The Statutory Definition of Employment*, 49 UCLA L. Rev. 983, 1007 (1999).; Noble, *supra* note 7, at 72.

⁵⁶ Anderson, *supra* note 30, at 661-662; Canny *supra* note 5, at 381; Goldstein, *supra* note 55, at 1007; Noble, *supra* note 7, at 72.

⁵⁷ Canny, *supra* note 5, at 381.

⁵⁸ *Id.*

“War on Poverty” to Congress. One of the central tenets of President Johnson’s war on poverty was to “extend the coverage of our minimum wage laws to more than 2 million workers now lacking this basic protection of purchasing power.”⁵⁹ Although the Southern Congressman, including Congressman Harold Cooley of North Carolina, vehemently opposed the extension of minimum wage protections to farm workers, their political influence had waned since the New Deal era.⁶⁰ As a result, Congress, under the leadership of sponsors Congressman Henry Gonzalez and Senator Thomas Kuchel enacted the 1966 amendments with broad support from both parties.⁶¹ The enactment of the Civil Rights Act of 1964 over the vehement objections of Southern Congressman served as further evidence of the diminished power of Southern Congressman. Due to their diminished power, Southern Congressman lacked the influence to continue to protect the southern agricultural system through the FLSA’s agricultural exemption.

Despite their diminished influence, Southern Congressmen managed to limit the application of overtime provisions of the FLSA to agricultural workers. Several Congressmen expressed doubt regarding “whether the change [was] one which the industry could absorb without any resultant unemployment.”⁶² Due to these concerns, Congress commissioned a series of reports from Secretary of Labor W. Willard Wirtz and the Department of Labor regarding the economic consequences associated with removing the exemptions.⁶³ Secretary Wirtz expressed concern regarding the ability of the economy to withstand the outright repeal of the agricultural

⁵⁹ President Lyndon Baines Johnson, State of The Union Address (January 8, 1964), available at <http://www.pbs.org/wgbh/americanexperience/features/primary-resources/lbj-union64/>.

⁶⁰ Anderson, *supra* note 30, at 661-662; 111 Cong.Rec. 21871 (1965).

⁶¹ Anderson, *supra* note 30, at 664; 111 Cong. Rec. 624 (1965); 111 Cong. Rec. 1351 (1965).

⁶² Anderson, *supra* note 30, at 664; A Bill to Amend the Fair Labor Standards Act to Extend Its Protection to Additional Employees, to Improve its Maximum Hours Standards, and For Other Purposes. Hearings on H.R. 8259 Before the Gen. Subcomm. On Labor of the House Comm. On Education and Labor, 89th Cong. 1st Sess. 18 (1965).

⁶³ Anderson, *supra* note 30, at 664.

exemption.⁶⁴ Ultimately, the economic concerns articulated in Secretary Wirtz' report, persuaded Congress to exercise restraint in amending the FLSA.

The nature of the agricultural industry and the economic conditions that exist today differ substantially from the economic conditions that led to the codification of the FLSA and NLRA's original agricultural exemption and limited the 1966 amendment. According to agricultural data provided by the USDA, the agricultural output of the U.S., adjusted for inflation, more than tripled since the both agricultural exemptions were enacted.⁶⁵ In 1940, the total agricultural output of the United States totaled \$7,813,644,567⁶⁶ and the average farm was 174 acres.⁶⁷ Although the average farm size decreased in subsequent decades,⁶⁸ the value of agricultural products brought to market markedly increased to \$297,220,491,000.⁶⁹ Although the total agricultural output of the U.S. more than tripled since the enactment of the FLSA, the U.S.'s economic reliance on the agricultural industry declined. When Secretary Wirtz expressed concern that appealing the agricultural exemption would lead to an economic collapse, agriculture accounted for 19.7% of the U.S. economy.⁷⁰ Today, agriculture represents only 1.1%

⁶⁴ *Id.*

⁶⁵ U.S.D.A. *Agricultural Productivity in the U.S 1948-2011* (2013), available at <http://www.ers.usda.gov/data-products/agricultural-productivity-in-the-us.aspx#28247>.

⁶⁶ U.S.D.A., CENSUS OF AGRICULTURE: 1940 (1940), available at <http://usda.mannlib.cornell.edu/usda/AgCensusImages/1940/03/02/1275/Table-01.pdf>.

⁶⁷ *Id.*

⁶⁸ U.S.D.A., CENSUS OF AGRICULTURE: 2007 (2007), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Custom_Summaries/Media_n_Farm_Size.pdf

See Table 1, which shows the median farm size in the United States was 80 acres in 2007).

⁶⁹ U.S.D.A., CENSUS OF AGRICULTURE: 2007 (2007), available at http://www.agcensus.usda.gov/Publications/2007/Online_Highlights/Fact_Sheets/Economics/economics.pdf

⁷⁰ U.S.C.B., U.S. CENSUS OF POPULATION: 1966 (1966), available at http://www.census.gov/prod/www/statistical_abstract.html

of the GDP of the U.S.⁷¹ The U.S.'s decreased economic reliance upon the agricultural industry suggests that the U.S. economy could withstand the minimum wage increases associated with repealing the agricultural exemption in the FLSA.

Despite Secretary Wirtz's concern that raising the minimum wage within one industry would lead to an economic collapse, the U.S. increased the minimum wage 14 times since the 1966 FLSA Amendment.⁷² The 14 economy-wide minimum wages increases since the 1966 FLSA Amendment provides clear and convincing evidence that Secretary Wirtz and Congress's concerns over the strength of the economy were overblown.⁷³ Given the decreased role of agriculture production within the U.S. economy and the historic ability of the U.S. economy to withstand 14 economy wide minimum wage increases, the U.S. economy can likely withstand the repeal of the FLSA and NLRA's agricultural exemption. Moreover, several states already enacted legislation that invalidated the FLSA and NLRA's agricultural exemption.⁷⁴ The ability of these states to withstand the repeal of the agricultural elimination through the enactment of additional state level protections for agricultural workers provides clear and convincing evidence the U.S. economy could tolerate the removal of the agricultural exemption.

⁷¹ C.I.A., *The World Factbook* (2013), <https://www.cia.gov/library/publications/the-world-factbook/fields/2012.html>.

⁷² U.S. Congressional Research Service, *The Fair Labor Standards Act (FLSA): An Overview* (R42713; June 4, 2013) <http://www.fas.org/srg/crs/misc/R42713.pdf>.

⁷³ While an economic collapse did indeed follow the 2007 FLSA Amendment, the ensuing economic recession has been attributed largely to unsafe lending and mortgage practices. See Lauren E. Willis, *Introduction: Why Didn't The Courts Stop the Mortgage Crisis?*, 43 Loy. L.A. Rev. 1195, 1196-1198 (2010); Dale Arthur Oesterle, *The Collapse of Fannie Mae And Freddie Mac: Victims or Villains?*, 5 Entr. Bus. L.J. 733, 734-735 (2010); Bruce I. Jacobs, *Tumbling Tower of Babel: Subprime Securitization and the Credit Crisis*, Vol. 65 No. 2 FINANCIAL ANALYSTS JOURNAL 17,17 (2009); Robert J. Samuelson, *Rethinking the Great Recession* Vol. 35 No. 1 THE WILSON QUARTERLY 16, 16 (2011).

⁷⁴ Cal. Lab. Code § 1140-1166 (1996); Idaho code §22-4101-4113 (1997); Kan. Stat. Ann. §44-818-830 (1995).

Since the U.S. economy can support the removal of the agricultural exemption, Congress can and should repeal the agricultural exemption in order to alleviate the economic vulnerability of agricultural workers. The precarious economic condition of agricultural workers and the ability of farmers to exploit laborers in order to maximize profits during the recession necessitates the immediate termination of the FLSA and NLRA's agricultural exemption.⁷⁵ "Farm workers constitute an extraordinarily low paid stratum of the working class"⁷⁶ and one of "the most exploited groups in the American labor force."⁷⁷ Recent studies determined seventy-five percent of farm laborers earn less than \$1000 per year, and their median income is \$7,500 or less per year." In addition to substandard wages, agricultural workers often endure harsh working conditions and work long hours in unsafe working environments.⁷⁸

Although eliminating the FLSA and the NLRA's will not alleviate all of the issues agricultural workers encounter on a daily basis, the termination of the agricultural exemption will empower 2-3 million agricultural workers to act collectively to improve their working conditions.⁷⁹ This figure does not include undocumented immigrants who cannot "receive the

⁷⁵ The success of the Coalition of Immokalee Workers ("CIW") in obtaining wage increases for agricultural employees of producers in the fast food and citrus industries suggest other approaches exist than amending the FLSA and NLRA. Though the CIW should be commended for their efforts and success, regulatory change represents a more comprehensive means of providing agricultural workers relief from harsh working conditions and insufficient wage protections. See Jeffrey M. Hirsch, *Making Globalism Work for Employees*, 54 St. Louis U. L.J. 427, 467 (2010); Greg Asbed & Sean Sellers, *The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers*, 16 U. Pa. J. L. & Soc. Change 39, (2013)(a founding member of the CIW acknowledging that while the CIW "brought new visibility to Florida's farmworkers, and even succeeded in eliminating proposed wage cuts and the most egregious abuses in the fields, the CIW was unable to significantly raise wages across the board or to even compel growers to join its members at the negotiating table.").

⁷⁶ Linder, *supra* note 4, at 1335.

⁷⁷ Perea, *supra* note 11, at 97.

⁷⁸ Linder, *supra* note 4, at 1335-1337; Perea, *supra* note 11, at 97.

⁷⁹ Perea, *supra* note 11, at 97.

remedy of back pay for NLRA violations”⁸⁰ due to the Supreme Court’s Ruling in *Hoffman Plastics v. NLRB*.⁸¹ Although, the repeal of the agricultural exemption will not give undocumented immigrants access to remedies under the NLRA, it will assist them indirectly. The removal of the agricultural exemption from the NLRA will empower all agricultural laborers by providing agricultural workers with a legal means to organize without fear of retaliation. This ability to organize will give agricultural workers additional leverage to negotiate with employers to improve their working conditions. Additionally, the increased financial strength of agricultural laborers, due to their eligibility for overtime compensation, will enhance the ability of laborers to pool their financial resources to organize and effectuate broader change. Therefore, Congress could and should repeal the FLSA and NLRA’s agricultural exemption.

V. Recommendations for Amending the FLSA and the NLRA

In order to create a comprehensive solution to the harsh working conditions agricultural workers face as a result of the agricultural exemptions in the NLRA and FLSA, Congress must undertake a series of legislative actions. This section will provide recommendations regarding how Congress should amend the agricultural exemptions in the FLSA and NLRA.

A. Amending the FLSA Agricultural Exemption

As discussed above, eliminating the agricultural exemption would improve the working conditions of millions of agricultural laborers. However, a legislative act that merely removes the agricultural exemption from the overtime provisions of the FLSA without altering the definition of a covered enterprise constitutes an imperfect solution. This section proposes one

⁸⁰ John Leschak, *Food Prices Soar As Farmworkers Suffer: Agribusiness, Government, and the Denial of Farm Labor Rights*, Regional Labor Review 1, 9 (2008). Available at http://www.hofstra.edu/pdf/academics/colleges/hclas/cld/cld_rlr_fall08_foodprices_leschak.pdf

⁸¹ *Id.*; *Hoffman Plastics v. NLRB*, 535 U.S. 137, 151-152 (2002).

comprehensive solution to amending the FLSA and two possible alternative approaches Congress could pursue if the ideal solution proves politically unpalatable.

Congress should amend the agricultural exemption in Section 13(A)(6) of the FLSA as it in order to provide all agricultural laborers eligible for protection under the FLSA's minimum wage and overtime provisions. Amending Section 13(a)(6) of the FLSA would extend minimum wage protections to agricultural workers subject to the other limitations of the FLSA. Currently Section 13(a)(6) of the FLSA permits "an employer who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor" to avoid paying agricultural workers minimum wages.⁸² This exemption permits small agricultural employers who regularly employ less than six non-familial employees to avoid paying their employees minimum wage.⁸³ By removing the agricultural exemption from the FLSA, employers who meet the conditions specified in Section 3(s)(1)(A)(i) of the FLSA would be required to pay a minimum wage.⁸⁴

Moreover, the removal of the agricultural exemption from the FLSA represents a politically feasible solution as demonstrated by Congress's successful repeal of a similar industry specific exemption for the retail industry. In 1989, Congress "repealed the retail exemption under which employees of almost all small retail enterprises were exempt from the minimum wage and overtime rates."⁸⁵ The removal of the small retail exemption established a precedent for

⁸² Fair Labor Standards Act, 29 U.S.C. §213 (2004).

⁸³ The six or more non-familial employees calculation is based upon the assumption that six employees work every day available within a quarterly period. As such, the number of non-familial employees who work for the agricultural employer likely exceeds six because it is unlikely each one of the six employees works everyday within the quarter. Fair Labor Standards Act, 29 U.S.C. §213 (2004).

⁸⁴ Fair Labor Standards Act, 29 U.S.C. §203 (2006).

⁸⁵ P.L. 101-157 (1989); U.S. Congressional Research Service, The Fair Labor Standards Act (FLSA): An Overview (R42713; June 4, 2013) <http://www.fas.org/sgp/crs/misc/R42713.pdf>.

removing an industry specific exemption without affecting other covered industries. Congress should draw upon the precedent created by the repeal of the small retail exemption to justify applying the FLSA to all agricultural employers.

While the removal of the agricultural exemption will expand the number of employees within the agricultural industry covered by the FLSA's minimum wage and overtime provisions, the removal of the agricultural exemption alone represents an imperfect solution because some agricultural employers may not qualify as a covered enterprise under the FLSA. Section 3(s)(1)(A)(i) states the FLSA applies to enterprises that have "employees engaged in commerce or in the production of goods for commerce....and whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated)."⁸⁶ In order to expand the scope of the minimum wage protections to all agricultural employees, Congress should amend the definition of a covered enterprise to include all enterprises. Such an amendment would allow all employees within the agricultural industry to receive minimum wage protections. However, since amending the definition of enterprise in the FLSA will affect all industries, may prove politically unpalatable. The collective lobbying power of other industries and the large potential economic consequences of redefining the definition of a covered enterprise under the FLSA present serious obstacles to the enactment of this proposed amended. These obstacles and agricultural workers' comparative lack of political capital to big business will likely prevent Congress from redefining the definition of a covered enterprise to include all enterprises.

Due to these political realities, Congress may need to adopt a different approach for amending the definition of a covered enterprise under the FLSA. Three possible alternative

⁸⁶ *Id.*

approaches exist to amending the definition of a covered enterprise under the FLSA. First, Congress could create a special definition of a covered agricultural enterprise for the minimum wage and overtime provisions of the FLSA. Second, Congress could revise the definition of covered employers to permit industry-specific tailoring of the jurisdictional threshold. While industry-specific tailoring offers the best possibility of adopting a bill that extends minimum wage protections to the greatest number of employees, the difficulty in implementing a bill that would affect each industry makes it unlikely Congress would adopt this policy. Third, Congress could lower the jurisdictional threshold for applying the minimum wage requirement from 500 man-days of labor to 250 man-days of labor. By lowering the jurisdictional threshold for the application of the minimum wage requirements from 500 man-days of labor to 250 man-days of labor, additional agricultural laborers will gain coverage under the act.

B. Amending the NLRA's Agricultural Exemption

In addition to amending the FLSA, Congress should repeal the agricultural exemption promulgated in section 2(3) of the NLRA, replace the annual appropriations rider with a permanent definition of agriculture within the NLRA, and direct the NLRB to decline to assert and cede jurisdiction over the agricultural industry to state agencies in states that offer agricultural workers greater protections than the NLRA. This proposed amendment of the NLRA would set a minimum standard for the protection of agricultural workers without changing how the NLRB regulates unfair labor practices.

Congress should repeal the NLRA's agricultural exemption by amending the definition in Section 2(3) of the NLRA. Section 2(3) of the NLRA defines an employee as "any employee, and shall not be limited to a particular employer...but shall not include any individual employed as an agricultural laborer."⁸⁷ This definition of employee expressly precludes agricultural workers from coverage under the NLRA. Congress should amend the definition of employee by removing the exclusion from the definition of employee in Section 2(3). This revision will permit agricultural laborers to avail themselves of the protections granted to employees by the NLRA. Repealing the agricultural exemption will benefit agricultural workers by granting them the right to organize, form unions, collectively bargain, unionize, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection.⁸⁸ This grant of rights would empower agricultural workers by supplying them with increased bargaining power. The increased bargaining power generated through collective action will permit agricultural laborers to improve their working conditions beyond the standards set forth in the NLRA and the FLSA.

In addition to repealing the agricultural exemption in section 2(3) of the NLRA, Congress should add a definition of agricultural laborer to Section 2 of the NLRA instead of including an annual rider in the NLRB's appropriations act directing the NLRB to use the definition of agriculture in the FLSA.⁸⁹ The express adoption of the definition of agriculture in the FLSA

⁸⁷ National Labor Relations Act, 29 U.S.C. §152 (2000).

⁸⁸ National Labor Relations Act, 29 U.S.C. §157 (2000).

⁸⁹ The FLSA defines agriculture as: "'Agriculture'" includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of Title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as an incident to or in conjunction

offers several advantages over drafting a new definition of agriculture. First, the consistency of the definition of agriculture in the FLSA and NLRA will insure the equal coverage of workers within the agricultural industry under both statutes. Second, the use of the same definition will substantially decrease the likelihood a court would find the definition invalid because of its ubiquitous presence in annual appropriation riders. Third, the use of a judicially valid definition will promote judicial economy by preventing needless litigation that often surrounds the inclusion of a new definition within a bill.

Although the removal of the agricultural exemption from the FLSA and NLRA would improve the working conditions of farmers in many states within the U.S., an outright termination of the agricultural exemption would nullify important gains achieved by agricultural workers in certain states. In order to protect against the erosion of these important protections, any amendment of the FLSA and NLRA must not infringe upon or mitigate the rights of agricultural laborers under state law. As such, in order to analyze the proper method for amending the FLSA and NLRA's agricultural exemption, one must consider mechanisms for preserving the rights of agricultural workers under state laws.

Due to their dissatisfaction with the agricultural exemption several states enacted legislation that provided agricultural workers with additional protections.⁹⁰ For instance, the California Agricultural Labor Relations Act grants agricultural employees freedom in association, the right to negotiate the terms and conditions of their employment, and to engage in collective bargaining.⁹¹ In addition to providing agricultural workers the same protections

with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market." Fair Labor Standards Act, 29 U.S.C. §203 (2006).

⁹⁰ Cal. Lab. Code § 1140-1166 (1996); Idaho Code §22-4101-4113 (1997); Kan. Stat. Ann. §44-818-830 (1995).

⁹¹ Cal. Lab. Code § 1140.2 (1996).

available to non-agricultural workers under the NLRA, the California Agricultural Labor Relations Act (“ALRA”) provides workers additional protections not available under the NLRA or the FLSA.⁹² For instance, the ALRA requires employers who violate the act’s to provide make-whole remedies that compensate employees for all of their losses in pay from the employer’s refusal to bargain, whereas the NLRA only permits employees to obtain a “a cease and desist order and/or a Gissel Bargaining Order.”⁹³

Another key difference between the rights available to agricultural workers in the ALRA rests in the Access Rule. The ALRA’s Access Rule grants union organizers the right to access agricultural workers under certain conditions specified in Section 20900(e)(3).⁹⁴ Conversely, the NLRA Access Rule only permits union organizers access to the work place if the employer’s facility is open to the general public or if a union cannot, after making a reasonable effort, reach employees through other available channels.⁹⁵ These two key differences are two of eleven differences between the rights available to agricultural workers under the NLRA and the ALRA.⁹⁶ In order to preserve these essential rights, Congress should pass a bill requiring the NLRB to decline to assert and to cede its jurisdiction over the agricultural industry to state agencies when the state regulations offer agricultural workers greater protections.

⁹² Although in *Produce Magic Inc.*, the NLRB declined to cede jurisdiction because the ALRA was not identical in regards to the secondary boycott and union-security provisions. Indeed in the dissent, NLRB Chairman Gould and Member Browning stated the Board should not have declined to enter into a Section 10(a) cessation agreement because it was not clear that the Board was applying the identical protection standard of Section 10(a) properly. *Produce Magic Inc.*, 318 N.L.R.B. 1171, 1172-1173 (1995).

⁹³ Jordan T.L. Halgas, *Reach an Agreement or Else: Mandatory Arbitration Under the California Agricultural Relations Act*, 14 S.J. Agri. L. Rev. 1, (2004) citing (Tracy E. Sagle, *The ALRB – Twenty Years Later*, 8 S.J. Agri. L. Rev. 139, 157 (1998) and *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 610 (1969)).

⁹⁴ Cal. Code. Regs. Ti. 8 §20900(e)(3).

⁹⁵ *N.L.R.B. v. Babcock & Wilcox Co.*, 76 S. Ct. 679, 684 (1956); *Eastex, Inc. v. N.L.R.B.*, 98 S. Ct. 2505, 2521 (1978).

⁹⁶ See Sagle, *supra* note 93, at 145-170.

In addition to preserving the rights of agricultural workers in states that offer workers greater protections than the NLRA, the proposed actions would also decrease the probability of federal preemption of these state laws. NLRB Chairman William Gould IV argues that efforts to increase the protections of employees encourage employers to challenge such statutes on preemption grounds.⁹⁷ As such, employers will likely seek to challenge any extension of rights granted to agricultural laborers by this proposed amendment to the NLRA. In order to limit the ability of employers to challenge the extension of rights to agricultural workers under the proposed amendment Congress should act within the NLRA's existing legislative framework. Acting within the existing NLRA legislative framework represents the best chance of enacting legislation that survives preemption challenges.⁹⁸ This conservative approach offers the greatest possibility of success because it does not interfere with the NLRA's current regulatory framework and thereby diminishes the grounds by which employers can challenge the extension of rights. Moreover, acting within the existing framework of the NLRA will also limit disruptions to other industries and avoid setting a precedent for providing preferential treatment to particular industries. Additionally, working within the NLRA's regulatory framework will impede interest groups from other industries from attempting to use the repeal of the agricultural exemption as a basis to introduce industry-specific carve outs within the NLRA.

The NLRA's current regulatory framework grants the NLRB broad discretionary powers in regulating unfair labor practices, collective bargaining and union organizing. As part of their discretionary powers, the NLRB can decline to exercise jurisdiction under certain circumstances.

⁹⁷ Kevin J. McKeon, *NLRA Preemption Put Simply: Livadas v. Bradshaw*, 33 Duq. L. Rev. 887, 901 (1995).

⁹⁸ Arthur N. Read, *Let the Flowers Bloom and Protect the Workers Too – A Strategic Approach Toward Addressing the Marginalization of Agricultural Workers*, 6 U. Pa. J. Lab. & Emp. L. 525, 533 (2004).

In order to avoid the erosion of state rights promulgated to counteract agricultural worker's exclusion from the NLRA, Congress should pass a bill that directs the NLRB to use its discretionary powers under Sections 10(a) and 14(c) of the NLRA to cede jurisdiction over the agricultural industry to state agencies in these states.

Congress should direct the NLRB to enter into cession agreements with any state or state agency that offers agricultural laborers greater protections than the NLRA. Section 10(a) of the NLRA authorizes the NLRB to come to an "agreement with any agency of any State or Territory to cede such agency jurisdiction over any cases in any industry...even though such cases may involve labor disputes affecting commerce."⁹⁹ Under Section 10(a), the NLRB can enter into a cessation agreement with state agencies whereby it concedes entire jurisdiction over an entire industry or part of an industry to a state or state agency.¹⁰⁰ In 1998, California's Agricultural Labor Relations Board ("ALRB") filed a petition seeking a cession agreement under Section 10(a) "whereby the Board would cede to the ALRB jurisdiction "with respect to all agricultural employees over whom the ALRB asserts jurisdiction under the ALRA."¹⁰¹ Ultimately, the NLRB denied the ALRB's petition because it did not consider the statutes substantially identical in regards to the ALRA.¹⁰² Despite the additional protections available to agricultural workers, the NLRB considered the ALRA's union-security provisions and secondary boycott provisions substantially different. Due to the difference between these provisions it may or may not have

⁹⁹ National Labor Relations Act, 29 U.S.C. §160 (2000).

¹⁰⁰ See *In Re: State of Minnesota*, 219 NLRB No. 170 (1975)(seeking cession of NLRB's jurisdiction over all nongovernmental, nonprofit hospitals in Minnesota pursuant to Section 10(a) of the NLRA); *In re Chicago Science Academy Charter School, Inc.* 359 NLRB No. 41 (2012)(the NLRB stated it would consider ceding jurisdiction over dog racing and to the state of Illinois if the NLRB received a petition under Section 10(a) of the NLRA).

¹⁰¹ *Produce Magic Inc.*, 318 N.L.R.B. at 1171; Read, *supra* note 98, at 540.

¹⁰² *Produce Magic Inc.*, 318 N.L.R.B. at 1172.

provided agricultural workers with additional protections.¹⁰³ Due to this uncertainty, the NLRB determined it could not enter into a cession agreement with the ALRB.¹⁰⁴

As the NLRB's decision in *Produce Magic* demonstrates, the difficulty in assessing whether or not state laws grant agricultural workers additional protections will require Congress to establish a system for evaluating state laws.¹⁰⁵ Due to the difficulty in assessing the degree of protections available under state laws due to differences in the methods used to protect workers, Congress should require the NLRB to promulgate the standards for evaluating whether or not a state law grants workers additional protections that would merit a Section 10(a) cession of jurisdiction. Any cession of jurisdiction under a Section 10(a) agreement must include a provision that permits the NLRB to reassert jurisdiction if the state agency fails to adequately enforce the protections or if an amendment of a state law renders the cession of jurisdiction inappropriate.

In addition granting state agencies jurisdiction over unfair labor practices under Article 10(a) in states that offer agricultural workers greater protections than the NLRA, Congress should direct the NLRB to decline to assert jurisdiction in agricultural matters in these states pursuant to Section 14(c)(1) of the NLRA. The NLRB's discretion under Section 14(c)(1) differs from their discretion under Section 10(a) in regards to the scope of the exercise of discretion. While Section 10(a) deals exclusively with the NLRB's discretion over unfair labor practices, Section 14(c) applies to all jurisdictional matters that the NLRB would refrain from asserting jurisdiction over under the standards prevailing upon August 1, 1959.¹⁰⁶ Specifically, Section 14(c)(1) permits the NLRB to "decline to assert jurisdiction over any labor dispute involving any

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Read, *supra* note 98, at 540.

¹⁰⁶ National Labor Relations Act, 29 U.S.C. §164 (2000).

class or category of employers, where, in the opinion of the Board, the of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction.”¹⁰⁷ When the NLRB declines to exercise its jurisdiction over any labor dispute in accordance with Section 14(c)(1), Section 14(c)(2) authorizes state agencies and courts to assume jurisdiction over these labor disputes.¹⁰⁸ As such, a Congressional resolution that directed the NLRB to decline to assert jurisdiction pursuant to 14(c)(1) in states that afford agricultural workers additional rights beyond those specified in the NLRA would allow agricultural workers to retain their rights without diminishing the rights of agricultural workers in other states.

In addition to preserving the rights of agricultural workers, this proposed legislative mandate would not interfere with organized activity in other industries because it works within the existing framework of the NLRA. By continuing to operate within the existing legislative framework established by the NLRA, Congress would minimize the disruption to other industries. Utilizing the NLRB’s discretionary authority would as a matter of law produce a limited effect on other industries since Section 14(c)(1) that prohibits the NLRB from exercising its rights under this section if it would otherwise “assert jurisdiction under the standards prevailing upon August 1, 1959.”¹⁰⁹ The jurisdictional limit in Section 14(c)(1) would prevent industries subject to the NLRA prior to 1959 from seeking a similar delegation of regulatory to the state. Though other industries exempt from the NLRA prior to 1959 might attempt to lobby the NLRB for similar treatment, the NLRB could decline to use its discretionary authority under Section 14(c)(1). Thus, the NLRB could continue to assert their jurisdiction over other industries

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

independent of any external pressures if it declined to assert jurisdiction over the agricultural industry under Section 14(c)(1).

While eliminating the NLRA and FLSA's agricultural exemption and requiring the NLRB to cede its jurisdiction over unfair labor practices and jurisdiction over the agricultural industry to states that offer worker's greater protections than those available under the NLRA will greatly improve the working conditions of farmers, agricultural workers should seek out alternative means for enforcing their rights until Congress repeals the agricultural exemption.

I. Conclusion

In order to enhance the working conditions of agricultural laborers, Congress should repeal the agricultural exemption promulgated in the FLSA and the NLRA. Although removing the FLSA and the NLRA agricultural exemption would empower agricultural workers in many states, repealing the agricultural exemption would nullify important gains achieved by agricultural workers in certain states that offer agricultural workers greater protections than the NLRA. In order to preserve these essential protections, Congress should undertake a more nuanced approach to amending the FLSA and the NLRA. Specifically, Congress should amend the NLRA by repealing the agricultural exemption, direct the NLRB to use its discretionary powers under Sections 10(a) and 14(c) of the NLRA to cede jurisdiction over the agricultural industry to state agencies in these states, and adopt the definition of agriculture included in the NLRB's annual appropriations rider. These amendments would empower agricultural workers by enabling them to improve their working conditions through collective action without fear of reprisal.

In addition to amending the NLRA as detailed above, Congress should also amend the overtime and minimum wage provisions of the FLSA. Congress extended the minimum wage

protections to agricultural workers whose employers used more than 500 man-days of labor during the preceding calendar year in 1966.¹¹⁰ Though this reform provided agricultural laborers with a certain level of minimum wage protection, the reforms enacted by the 1966 amendment of the FLSA did not go far enough. As such, Congress should repeal the agricultural exemption in Section 13(A)(6) of the FLSA and expand the jurisdiction of the FLSA by lowering the standards for a covered enterprise under Section 3(s)(1)(A)(i) of the FLSA. Repealing the agricultural exemption will improve the working conditions of agricultural laborers by increasing the amount of pay they receive. Therefore, Congress should repeal the agricultural exemptions in the FLSA and NLRA.

¹¹⁰ Fair Labor Standards Act, 29 U.S.C. §213; S. Rep. No. 89-1487, at 5 (1966).