The Constitutionality of the NLRA Farm Labor Exemption

Maurice Jourdane

Follow this and additional works at: https://repository.uchastings.edu/hastings_law_journal

Part of the Law Commons

Recommended Citation
Available at: https://repository.uchastings.edu/hastings_law_journal/vol19/iss2/8

This Article is brought to you for free and open access by the Law Journals at UC Hastings Scholarship Repository. It has been accepted for inclusion in Hastings Law Journal by an authorized editor of UC Hastings Scholarship Repository.
THE CONSTITUTIONALITY OF THE NLRA
FARM LABOR EXEMPTION

In the autumn of 1965, national attention was focused upon the small community of Delano, California, when a group of Filipino and Mexican-American farm workers, who had too long suffered under intolerable working conditions, put their futures on the line, formed a union, and went out on strike against 32 of the world's largest grape growers.\(^1\) Today, the nation's attention has subsided, but the workers' struggle continues. It is being perpetuated by the refusal of the growers to recognize and bargain collectively with the chosen representatives of their employees.

It is an historical fact that until employees are granted the right to bargain collectively, any attempt to improve their working conditions is futile.\(^2\) For this reason, Congress passed the National Labor Relations Act,\(^3\) which unequivocally provides that it is an unfair labor practice "for an employer to refuse to bargain collectively with the representatives of his employees . . . ."\(^4\) In light of such a provision, one would assume that since a grower is an employer and farm workers are his employees, the grower would be compelled to recognize and meet with the representatives chosen by his workers. But such is not the case. Under the NLRA, farm workers are not considered employees,\(^5\) and as a result they are deprived of the rights and protection the Act affords other workers.

Legislative History\(^6\)

When in 1934, Senator Wagner first introduced Senate Bill 2926,\(^7\) which was to become the National Labor Relations Act, agricultural workers were clearly within the scope of its coverage. The Senator's bill applied to all employees, and as that term was defined, it included "any individual employed by an employer" other than one replacing a striking employee.\(^8\) However, several months later when the bill was reported out of the Senate Committee on Education and Labor, through a redefinition of the term "employee," persons engaged in agricultural work were excluded from the bill's coverage.\(^9\)

---


\(^6\) For an excellent discussion of the legislative history of the NLRA as related to agricultural laborers, see Morris, Agricultural Labor and National Labor Legislation, 54 CALIF. L. REV. 1939, 1951-56 (1966).

\(^7\) 73d Cong., 2d Sess. (1934).

\(^8\) S. 2926, 73d Cong., 2d Sess. § 3(3) (1934).

\(^9\) S. REP. No. 1184, 73d Cong., 2d Sess. 1 (1934).
No explanation for the exclusion was given, and the Committee Report reveals no reason for the change.

In 1935, hearings on Senator Wagner's bill\(^{10}\) commenced in the House Committee on Education and Labor and were resumed by the Senate Committee on Labor. Before the House Committee, testimony was given which vividly portrayed the miserable working conditions of persons engaged in farm labor and the violence which confronted those who attempted union organization.\(^{11}\) Also introduced was a report by Pelham D. Glassford, representing the Department of Agriculture, Department of Labor, and National Labor Board, which manifested the deep need in farm communities for the protection and rights provided by the proposed act.\(^{12}\) Further support for the inclusion of farm workers within the bill was evidenced by Representative Marcantonio, who strenuously argued that the need for the bill's protection was not limited to industrial workers, but extended to agricultural workers as well.\(^{13}\) In the face of such a vast array of support for the inclusion of farm workers, only once throughout the entire record of the hearings was any explanation for their exclusion put forth: from the Senate Committee came the declaration that it was deemed wise for "administrative reasons" to exclude agricultural laborers, domestic servants, and persons employed by their parent or spouse.\(^{14}\) Why it was "deemed wise," or what the "administrative reasons" were, was not stated. When the bill reached the House floor, Congressman Marcantonio strongly urged that farm workers be included,\(^{15}\) but apparently his plea fell on deaf ears, for the bill became law without their inclusion.

As is evident, the legislative history of the National Labor Relations Act yields very little insight into the reasons for the exclusion of agricultural workers from the protection afforded by the Act. However, in light of the political, social, and economic conditions of the mid-1930's, no other result could be expected. One can speculate on at least three important factors, which, although not mentioned in the Congressional Record, played a significant role in the exclusion. First, the farm labor population was primarily made up of migrants, who, because they were migrants, had no voting power and could therefore exert very little grass root pressure on Congress. Second, unlike their urban brethren, farm workers were not organized.\(^{16}\) This


\(^{11}\) *Hearings on H.R. 6288 Before the House Comm. on Labor, 74th Cong., 1st Sess. 27-51 (1935)* (testimony by James Rorty, newspaper correspondent, Westport, Conn.).

\(^{12}\) *Id.* at 35-38.

\(^{13}\) H.R. Rep. No. 969, 74th Cong., 1st Sess. 28 (1935).


\(^{15}\) Representative Marcantonio, after describing the working conditions of the farm workers, declared "I, therefore, respectfully submit that there is not a single solitary reason why agricultural workers should not be included under the provisions of this bill. The same reasons urged for the adoption of this bill in behalf of industrial workers are equally applicable in the case of the agricultural workers, in fact more so as their plight calls for immediate and prompt action." 79 Cong. Rec. 9720 (1935).

\(^{16}\) For a general discussion see Jamieson, *Labor Unionism in American
lack of organization stemmed in part from the fact that they were migrants and in part from the fact that potential organizers were beaten, jailed, chased out of town, or murdered.17 The third factor, and without doubt the most important, was the opposition to inclusion of farm workers posed by the Farm Bloc. This fact was recognized by Senator Wagner, who, in a letter to Norman Thomas, expressed the belief that the opposition posed by the Farm Bloc made coverage of agricultural workers under his bill out of the question.18 The power possessed by the Farm Bloc is easily seen when one scans the important New Deal Legislation and discovers that farm workers were systematically excluded from each and every act which would have afforded them needed benefits, but which also would have created an added burden on their employers. The first two important acts were the National Industrial Recovery Act19 and the Agricultural Adjustment Act.20 Although industrial workers were covered by the NIRA,21 agricultural workers were excluded from the AAA.22 Next came the National Labor Relations Act23 which covered industrial workers and excluded agricultural workers,24 as did the Social Security Act25 and the Fair Labor Standards Act.26

There was on one side the unorganized, disenfranchised farm worker and on the other, the well organized and politically powerful Farm Bloc. In light of this situation, even liberal Congressmen who favored inclusion of the farm worker within the Act's coverage were compelled to yield to the power of the Farm Bloc under threat of defeat of the entire bill.

Constitutionality of the Exclusion

Equal Protection Under Federal Law

That legislation can constitutionally divide people or groups of people into classes and treat the different classes differently is not open to dispute.27 However, this power to classify is not unlimited. State legislation is subject to the equal protection clause of the


17 See Hearings on H.R. 6288, supra note 9, at 27-51.
20 48 Stat. 31 (1933) (declared unconstitutional in United States v. Butler, 297 U.S. 1 (1935)).
22 48 Stat. 31 (1933).
fourteenth amendment, and although some early cases seemed to say that there was no federal equal protection guarantee and therefore no right to be free from discrimination by Congress, it was generally recognized rather early that the fifth amendment due process clause was a limitation on the power of Congress to pass discriminatory legislation. However, since some decisions have indicated that the fifth amendment guarantee does not go as far as the fourteenth in protecting against such legislation, it would be wise to determine whether or not, although not expressly mentioned, there is in fact a right to equal protection under federal law.

In 1954, the Supreme Court in Brown v. Board of Education held that state legislation which segregates schools is unconstitutional as an arbitrary classification in violation of the fourteenth amendment guarantee of equal protection under the laws. On the same day, in Bolling v. Sharpe, the Court applied the principle laid down in Brown to the District of Columbia, notwithstanding the absence of an express guarantee of equal protection to the District. Chief Justice Warren, speaking for a unanimous court, justified applying the Brown doctrine to federal legislation in the following language:

The Fifth Amendment, which is applicable to the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection and due process, both stemming from our American ideal of fairness, are not mutually exclusive. The "equal protection of the laws" is a more explicit safeguard of prohibited unfairness than "due process of law", and therefore, we do not imply that the two are always interchangeable phrases. But as this court has recognized, discrimination may be so unjustifiable as to be violative of due process.

Had the Chief Justice stopped here, he would have done little more than echo statements made by the Court on numerous occasions. However, he continued, declaring that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government [than it imposes on the states]."

The interpretations of what the Chief Justice said in Bolling have been far from uniform. Out of 22 federal cases decided since Warren spoke, 10 have treated the guarantees of the fifth and fourteenth amendment as identical or have said that the fifth incor-

---

31 347 U.S. 483.
32 Id. at 495.
34 Id. at 499.
porates the equal protection clause of the fourteenth.38 3 have said that the fourteenth is a more explicit safeguard than the fifth39 or that there is a greater "burden" under the fifth,40 and 9 have applied the pre-Bolling due process test, while remarking that there is no equal protection clause applicable to federal legislation.41

The Supreme Court has three times dealt with discriminatory classification since Bolling. In Pennsylvania Railroad v. Day,42 the Court was confronted with a problem dealing with a provision in the Railway Labor Act43 allowing employers to have wage claims heard in the courts while requiring employees to submit their claims to the National Railroad Adjustment Board for final determination. Although the majority did not discuss the equal protection problem, Justice Black, in a dissenting opinion concurred in by Chief Justice Warren and Justice Douglas, declared that such a discrimination "denies employees equal protection of the law in violation of the Due Process Clause of the Fifth Amendment."44 This language clearly indicates that at least three Justices, including Chief Justice Warren, who had written the Bolling opinion, consider the equal protection and due process clauses to be interchangeable.

In the second case dealing with discriminatory classification, Colorado Anti-Discrimination Commission v. Continental Air Lines, Inc.45 the Court adopted the language Justice Black used in the Pennsylvania Railroad case and cited Bolling as authority.46 Then, in Schneider v. Rusk,47 the Court held that classifying citizens into natural and naturalized was an unconstitutional classification, but reverted to the language used prior to Bolling. The Court said that "while the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative

653, 656 (9th Cir. 1959); Cunningham v. United States, 256 F.2d 467, 473 (5th Cir. 1958) (dictum); Stagg, Mather & Hough v. Descartes, 244 F.2d 578, 583 (1st Cir. 1957) (dictum); Schneider v. Rusk, 216 F. Supp. 302, 320 (D.D.C. 1963) (dissenting opinion), rev'd, 377 U.S. 163 (1964); Guillory v. Administrators of Tulane Univ., 208 F. Supp. 855, 857 (1962).


40 Employing Lithographers v. NLRB, 301 F.2d 20, 24 (5th Cir. 1962).

41 Schneider v. Rusk, 377 U.S. 163, 168 (1964); Jensen v. United States, 326 F.2d 891, 895-96 (9th Cir. 1964); Hyser v. Reed, 318 F.2d 225, 255 (D.C. Cir. 1963) (dictum); Boylan v. United States, 310 F.2d 493, 500 (9th Cir. 1962); Pacific Natural Gas Co. v. FPC, 276 F.2d 350, 353 (9th Cir. 1960); Bertelson v. Cooney, 213 F.2d 275, 277 (5th Cir. 1954); Brown v. Lithographers Local 17, 180 F. Supp. 294, 305 (N.D. Cal. 1960); Oliphant v. Brotherhood of Locomotive Firemen, 156 F. Supp. 89, 92 (N.D. Ohio 1957); Dyer v. Kazuhiza Abe, 138 F. Supp. 220, 227 (D. Hawaii 1956).


46 Id. at 721-22.

of due process." 48

Thus, although the Supreme Court has had no less than three opportunities to clarify the ambiguity created in Bolling, it has failed to do so. However, in light of the Chief Justice's unequivocal declaration that "it would be unthinkable that the same Constitution would impose a lesser duty on the Federal Government," 49 it is more than arguable that the Court is approaching the position that the guarantee of equal protection should be read into the fifth amendment with exactly the same force as it carries in the fourteenth.

Leaving the realm of the fifth amendment temporarily, one finds that even more prestige is lent to the equal protection argument when the potential of the ninth amendment is considered. The ninth amendment to the Constitution of the United States declares that "[t]he enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." 50 For the first 174 years of its history, this amendment was nearly forgotten. 51 Then in 1965, in Griswold v. Connecticut, 52 Justice Douglas mentioned it in his search for a peg on which to hang the right of privacy, 53 and Justice Goldberg, in a concurring opinion joined in by Chief Justice Warren and Justice Brennan, more fully developed the concept. 54 Justice Goldberg observed that:

[The] language and history of the Ninth Amendment reveal that the Framers of the Constitution believed that there are additional fundamental rights, protected from governmental infringement, which exist along side those fundamental rights specifically mentioned in the first eight constitutional amendments. 55

Under a system of government by law, such as exists in this country, it is believed that no right could be more fundamental than the right to equal protection under those laws. If the constitutional framers meant anything by the ninth amendment, they meant to guarantee that a right so basic as the right to equal protection of law would not be denied through the exercise of the legal maxim inclusio unius est exclusio alterius. 56

In light of the Bolling decision and the rebirth of the ninth amendment in Griswold, it seems to follow that federal legislation is subject to the same test of equal protection as legislation in the states. The problem lying ahead, which is a more difficult problem than that already confronted, is whether or not the exclusion of farm workers from the protection afforded by the NLRA is indeed a denial of equal protection.

To determine whether or not the classification created by the NLRA deprived agricultural workers of equal protection of law, it is necessary at the outset to ascertain as explicitly as possible what is

48 Id. at 168.
50 U.S. CONST. amend. IX.
52 381 U.S. 479 (1965).
53 Id. at 484.
54 Id. at 487-93.
55 Id. at 488.
56 "The inclusion of one is the exclusion of another." BLACK'S LAW DICTIONARY 906 (4th ed. 1951).
meant by “equal protection of law.” It is clear that “equal protection” does not mean that all laws must apply universally to all people in all circumstances.\textsuperscript{57} Legislatures, in dealing with the diverse problems arising out of an infinite variety of human activities, must necessarily have the power to classify persons into groups, and for this reason, “[t]he Constitution does not require things which are different in fact . . . to be treated in law as though they were the same.”\textsuperscript{58} This in itself creates no problem. The problem arises because of the fact that implied in every classification is a certain amount of inequality,\textsuperscript{59} and inequality is the antithesis of equal protection.

Thus there is a dilemma. On one side lies the right to equal protection of law and on the other, the necessity of classification. The courts have sought to reconcile these conflicting interests by evolving the Doctrine of Reasonable Classification. In the words of the Supreme Court:

[T]he classification “must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” That is to say, mere difference is not enough; the attempted classification “must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis.”\textsuperscript{60}

Or as the Court said in a recent case, “‘[t]he courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose.’”\textsuperscript{61} This is the question which must now be faced.

The purpose for the passage of the NLRA can be found in section 1 of the Act itself. It is declared therein, that:

The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce . . . .

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners . . . .

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce . . . .

\textsuperscript{57} Truax v. Corrigan, 257 U.S. 312 (1921); Yick Wo v. Hopkins, 118 U.S. 356 (1886).
\textsuperscript{58} Tigner v. Texas, 310 U.S. 141, 147 (1940).
It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.\(^6\)

It is evident that Congress intended the foregoing statement to serve a dual purpose. First, it wanted to make it clear that it was dealing with interstate commerce and was therefore acting within the scope of power granted by the Commerce Clause. In light of the Supreme Court decisions handed down in the years immediately preceding 1935,\(^6\) this was imperative. Second, and most important, the legislators wanted to guarantee workers the right to organize and bargain collectively. Keeping these aims in mind, it can now be determined whether or not the classification created by the Act was reasonable in light of its purpose.

The Act created two classes. One class, the class which Congress called "employees," encompassed all employed persons not specifically mentioned in the second class.\(^4\) The second class included farm workers, domestic servants, and persons who worked for their parent or spouse.\(^5\) It is evident that domestic servants and persons employed by their parent or spouse were excluded because they had no need for the protection afforded by the Act. But the same cannot be said for farm workers. What Congress said in section 1 applies as well to farm workers as to any other kind of employee. Farm workers were being denied the right to organize and bargain collectively;\(^6\) there was the same if not more inequality of bargaining power in the agricultural industry as in any other industry;\(^7\) they were working under deplorable conditions;\(^8\) and in view of the fact that an agricultural strike would obstruct the flow of commerce as effectively as would a steel strike, to most efficiently carry out the purpose of the Act, it would have been reasonable to classify farm workers along with all other workers. Therefore, unless there is some real and substantial difference between farm workers and the workers protected by the Act which would justify the exclusion, the classification cannot be found to be a valid exercise of congressional power.

To ascertain whether or not there is a real and substantial reason for a particular classification, one would normally look to the legislative history of the act. However, when one looks to the his-

\(^{65}\) Id. It should be noted that because of the definition of the term "employer" in section 152(2), government, railroad, and union employees were also excluded from the Act's coverage. When the Act was amended in 1947 (Act of June 23, 1947, ch. 120, § 101, 61 Stat. 137), the number of persons excluded from the term "employee" was enlarged to include independent contractors and supervisors, in addition to those originally named.
\(^{66}\) See Hearings on H.R. 6238, supra note 11, at 27-51.
\(^{67}\) Id.
\(^{68}\) Id.
tory of the NLRA, the only justification to be found for the classification set up therein is that it has been deemed wise for "administrative reasons." Since Congress did not say what it meant by "administrative reasons," one can do no more than speculate on the matter. However, it would seem that the greatest administrative problems would arise through the inclusion within the Act's coverage of persons working in a situation of one employer to one or two employees. In spite of the problem this would cause, Congress chose to include such persons within the Act's coverage, recognizing that "[t]he rights of employees should not be denied because of the size of the plant in which they work." By including those who would create the greatest administrative difficulties, Congress manifested its belief that the need to guarantee all employees the right to organize and bargain collectively outweighs any administrative burden created thereby. Thus, it is clear that the only reason given to support the classification created by the legislators had no merit whatsoever. As a result, if one were limited to the legislative history of the Act to find a reason capable of justifying the classification, the exclusion would fail. If any justification for the exclusion of farm workers then existed, it must be found elsewhere.

In an article on agricultural labor and national labor legislation, Austin P. Morris found that those who favor excluding agricultural workers from such legislation give two reasons to justify their position. They contend that farm workers did not and do not need the protection afforded by legislation such as the NLRA. This view was expressed by Ivan McDaniel while testifying before the Senate Committee on Education and Labor in hearings on an amendment which would have enlarged the scope of the term "agricultural employee." He said:

The workers and the farmer are thrown into daily close contact with one another, in many cases they eat at a common table, their children attend the same schools, they bow down together in religious worship; in other words, there is that unity of contact between the farm labor . . . and the farmer that you do not find in industrial centers . . . [A]nd this unity . . . does more to cement the labor and employer . . . than all the laws Congress can ever pass . . . . The need for collective bargaining does not exist where one employer has to deal with only one or two employees . . . . Where few persons are employed on a farm . . . there is little likelihood of any labor dispute arising which needs collective bargaining as a means of settlement.

It is regrettable that the rosy picture painted by Mr. McDaniel does not exist, and did not exist in 1935. Throughout the 1930's there

---

69 See note 14 supra.
70 The Senate Committee on Education and Labor extensively considered excluding from the Act all persons whose employer had less than 10 employees. 1 N.L.R.B., LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT 1320 (1st ed. 1949).
71 Id.
72 Morris, supra note 6, at 1968.
73 Id.
75 Id.
was labor strife in the agricultural arena as is substantiated by historical fact as well as by testimony presented in the hearings on the NLRA. Furthermore, it was not one employer sitting down to dinner with one or two employees, it was a corporation or farmers association using hundreds of employees, who, if they complained could be replaced by hundreds more. A less distorted view of the agricultural laborer's circumstance was given in the LaFollette Committee Report, where, in referring to California, it was said that:

> It is an historical fact that the civil rights of agricultural laborers have never been successfully exercised despite a long record of unrest, misery, and repression. Both the cause and effect of this situation are the completely disadvantaged economical, social, and political status of agricultural laborers.

Notwithstanding Mr. McDaniel's statement to the contrary, it is clear that farm workers did need the protection provided by the NLRA as much if not more than other workers, and if need is considered to be the criterion, the classification is unreasonable.

The second reason given to justify the classification by those who support the exclusion is that to guarantee farm workers the right to organize and bargain collectively would impose a much greater hardship on farmers than on other employers. Those who would support the classification on this basis stress the perishable nature of agricultural commodities and the damage which would result if a harvest were interrupted by a strike. While this is a more reasonable argument than any heretofore expounded, it too lacks merit. Assuming that a farmer's circumstance is such that to guarantee workers the right to organize and bargain collectively would impose upon him a hardship such as to outweigh the need of the workers to possess these rights, Congress could not reasonably exclude farm workers without excluding all other workers, who, by striking could damage the farmer to the same extent as could farm workers. That there are such workers who are not excluded from the Act is indisputable. A farm worker can do no greater harm to a farmer by refusing to pick his crop than a teamster can by refusing to haul it, than a warehouseman can by refusing to handle it, or than a packing shed worker can by refusing to pack it. In each case, the

---

76 The United States Department of Labor, in Bulletin No. 836 (1945), compiled a table of agricultural strikes in the United States from 1930 to 1939. It shows 275 strikes involving 177,788 strikers, in 28 states. Considering that striking deprived farm workers of what little they had to feed their families and generally got them blacklisted, the statistics do not begin to indicate the extent of dissatisfaction existent among farm labor. Jamieson, supra note 16, at 17.

77 See Hearings on H.R. 6288 supra note 11, at 27-51.


79 Id. at 394.

80 See Morris, supra note 6, at 1970-72.

81 See Hearings on S. 1864, S. 1865, S. 1866, S. 1867, and S. 1868, supra note 1, at 95-96 (testimony of Matt Triggs, Assistant Legislative Director, American Farm Bureau Federation).


83 Packing shed workers devoted exclusively to handling the produce of
farmer is going to lose his crop, and a classification which discrimi-
nates against farm workers but not against those who are in an iden-
tical position is unreasonable, arbitrary, irrational, and therefore
invalid.

Neither the reason given in the legislative history of the NLRA
nor the reasons proposed by the proponents of the classification are
sufficient to sustain the exclusion. Thus it is clear that under the
Reasonable Classification Doctrine, the classification found within
the NLRA, excluding farm workers from the Act's protective meas-
ures, has denied farm workers the equal protection of law. However,
this does not conclusively answer the question of whether or not
there has been a denial of equal protection. The Supreme Court has
developed a corollary to the Reasonable Classification Doctrine, which
is used when, for some reason it feels that a strict application of the
basic rule would be undesirable. This corollary, or modification, gen-
erally takes a form similar to that expressed in Railway Express
Agency v. New York,84 wherein the Supreme Court said, "[i]t is no
requirement of equal protection that all evils of the same genus be
eradicated or none at all."

If a decision can be based solely on this rule, one is compelled
to conclude that the attempt by Congress to eradicate the inequality
existing between industrial workers and their employers without do-
ing the same for farm workers did no violence to equal protection.
However, it is suggested that this rule, standing alone, is invalid.
Through its application, inequality of the grossest form can be in-
flicted without being violative of equal protection. For example,
suppose Congress, wishing to eradicate discrimination in the sale of
housing, makes it unlawful to refuse to sell to any person on the
basis of race or color, and then declares that the term "person" shall
not include Negroes. Such a classification would clearly deprive
Negroes of the equal protection of law, yet under the rule recited in
the Railway Express case, this would be a valid exercise of classifi-
cation.

It is thus made clear that the rule expressed in Railway Ex-
press, when used as the sole test to determine whether or not there
has been a denial of equal protection, is not a valid test. However, it
must be remembered that the rule is not a test in itself, but rather
a corollary to the Reasonable Classification Doctrine. This is made
evident in the Railway Express case itself. In that case, the Railway
Express Agency attacked as a denial of equal protection, a New York
Statute which prohibited the owner of a vehicle from carrying adver-
tising for another, but which did not prohibit the use of such vehicles
for the owner's own advertising. While the court recited the "all evils"
rule, it made it clear that the "classification had a relation to

84 336 U.S. 106 (1949).
85 Id. at 110.
the purpose for which it was made ..., and, therefore, did no violation to equal protection." Whether or not the court was correct in considering the relation to be a "real and substantial" one, is not here in issue. The important point is that the court, although applying the "all evils" test, used it as a corollary to the Reasonable Classification Test.

When the rule is properly used, as it was in the Railway Express case, it can be applied to the hypothetical situation without an unjust result being reached. The exclusion of Negroes from the antidiscrimination act would be violative of equal protection because it has no relation to the purpose of the legislation, not because Congress can indiscriminately attack part of an evil while allowing another part to continue to exist. And the exclusion of farm workers from the NLRA is an analogous situation. The only difference being, that it involves occupational rather than racial discrimination.

The Traditional Due Process Test

It is generally recognized that the fifth amendment due process clause is a limitation on the power of Congress to pass discriminatory legislation. Here, as in the equal protection area, there is a conflict between congressional need to create classifications, which inherently cause some inequality, and the fifth amendment requirement that legislation not be discriminatory. And again a rule has been created to reconcile that conflict. In the frequently cited case of Nebbia v. New York, the Supreme Court said that due process demands that the classification "not be unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be attained."

Applying this rule to the classification created within the NLRA, it is obvious that the exclusion is a violation of fifth amendment due process. As was seen in the discussion on equal protection, the object of the NLRA was twofold. Congress intended to remove from interstate commerce the obstruction caused by labor strife and to create equality of bargaining power between labor and management. One of the means used to obtain this objective was to classify farm workers so as to exclude them from the Act's coverage. The question then is whether or not excluding farm workers had a real and substantial relation to either the removal of the obstruction to commerce caused by labor strife or to the creation of equality of bargaining power between employees and their employers. Clearly it did not. The exclusion had no relation to the object of the Act.

Thus, if the test the Court used in Nebbia can be literally applied, the conclusion that farm workers were deprived of their fifth amendment rights appears to be unavoidable. However, as was seen in the discussion of equal protection, Supreme Court language cannot always be applied literally. For this reason, it would be wise to examine any cases that are somewhat analogous to the present issue. Three such cases have been decided.

86 Id.
87 See e.g., Detroit Bank v. United States, 317 U.S. 329, 338 (1943).
89 Id. at 525.
The first two cases, *Brown v. Lithographers Local 17*\(^{90}\) and *Employing Lithographers v. NLRB*\(^{91}\) involve identical factual situations and can therefore be discussed together. In both cases, lithographers' unions brought actions to have the exemption of garment workers from section 8(e) of the Labor Management Relations Act\(^{92}\) declared unconstitutional on the ground that lithographers' work is similar to that of garment workers, yet lithographers were not exempted from the section.\(^{93}\) In both decisions the exemption was upheld. In *Brown* the court said:

> Assuming, that there might be a discrimination of such injurious character as to bring into operation the due process clause of the Fifth Amendment, ... mere lack of uniformity in the Congressional exercise of the Commerce Power does not constitute a denial of due process. . . .

> In this field the Congress need not deal at one time with all the evils it may observe.\(^{94}\)

While *Brown* can be distinguished from the NLRA situation in that valid reasons for the exemption of garment workers can be found in the Act's legislative history,\(^{95}\) it is worth noting that the Court relied on the "all evils" test discussed earlier. The *Brown* Court has fallen into the same trap courts fall into when deciding cases under the equal protection clause. Instead of saying that the classification is valid because it is reasonable, it says it is valid because Congress can focus on an evil and apply its legislation only to some of the people creating the evil. As was seen above, this is not only erroneous, but can be dangerous as well. The court in *Employing Lithographers v. NLRB*\(^{96}\) decided the case on the correct ground. It looked into the legislative history of the Act and discovered therein that there were valid reasons for the classification created. Since there was a valid reason for the classification, neither case can be used as support for the claim that the exclusion of farm workers from the NLRA is not a denial of fifth amendment due process.

The third case is *NLRB v. Edward G. Budd Manufacturing Company*.\(^{97}\) This involved an attack on the exclusion of foremen from the protection afforded by the Labor Management Relations Act. In upholding the exclusion, the court said:

> It is equally well recognized that Congress has broad discretion in making statutory classifications, [and] that such a classification is not invalid if it bears a reasonable relation to the purposes of the legislation . . . .\(^{98}\)

It is then pointed out that "[i]n enacting the Labor Management Relations Act of 1947, Congress gave careful consideration to the proposal to exclude supervisory personnel from the definition of em-

---

\(^{90}\) 180 F. Supp. 294 (N.D. Cal. 1960).
\(^{91}\) 301 F.2d 20 (5th Cir. 1962).
\(^{93}\) Section 8(e) is a prohibition against secondary boycotts.
\(^{95}\) Id. at 306.
\(^{96}\) 301 F.2d 20 (5th Cir. 1962).
\(^{97}\) 168 F.2d 571 (6th Cir. 1948).
\(^{98}\) Id. at 578.
ployees." The court concludes that in light of the fact that "[t]rade union history shows that foremen were the arms and legs of management in executing labor policies" and that "in industrial conflicts, they were allied with management," the decision by Congress to treat them as part of management "was based upon substantial and real considerations, and was not an arbitrary or unjustifiable classification." Thus, the Budd case could not be used to support the constitutionality of the classification which excluded farm workers. In creating that classification, Congress did not base its decision on real and substantial considerations, but instead upon the demand of the Farm Bloc.

Conclusion

For over 30 years the working class in the United States has been protected by the National Labor Relations Act. This protection has without doubt created the prosperity which the mainstream of American life is today experiencing. However, because of the political power of the Farm Bloc, the agricultural worker has not had the opportunity to join in this prosperity. Whether or not the courts will remedy this injustice is yet to be seen. It is possible that they will close their eyes and merely repeat the statement so often heard, that Congress has no obligation to eradicate all genera of an evil at one time, or they may find the classification reasonable, thereby leaving the farm worker to the mercy of the grower with whom he cannot possibly compete. On the other hand, if the enlightened Supreme Court with which we are presently endowed were confronted with the issue, it is not at all unlikely that it would arrive at the conclusion that cannot be avoided: farm workers for 32 years have been deprived of their constitutional right to equal protection and due process of law, without which they will remain impoverished in a land of plenty.

Maurice Jourdane*

---

99 Id.
101 Id.
102 Id.
* Member, Third Year Class.