

# DID OLD MACDONALD HAVE A FARM? *HOLLY FARMS CORP. V. NATIONAL LABOR RELATIONS BOARD*

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E-I-E-I-O

Seven years after Tyson Foods (“Tyson”) bet the farm to prevent some of its workers from unionizing, its gamble was lost when the Supreme Court decided *Holly Farms Corp. v. NLRB*.<sup>1</sup> Tyson, a billion-dollar food processor famous for its chickens, claimed that approximately 157 employees<sup>2</sup> working at its subsidiary, Holly Farms Corporation (“Holly Farms”), should not have been allowed to unionize because they were agricultural laborers, exempt from the jurisdiction of the National Labor Relations Board (“NLRB”).<sup>3</sup> The NLRB disagreed, finding that the employees were more like manufacturing employees than farm workers<sup>4</sup> and so were within its jurisdiction.<sup>5</sup> The NLRB ordered Holly Farms to bargain with the union, but Holly Farms refused, gambling that the courts would disagree with the NLRB’s statutory interpretation and find that its workers were indeed agricultural laborers.<sup>6</sup>

If Holly Farms had prevailed, the employees would have been exempt agricultural laborers and would have been prevented from unionizing under the National Labor Relations Act (“NLRA”).<sup>7</sup> To have prevailed, Holly Farms would have had to

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1. 116 S. Ct. 1396 (1996) (Holly Farms III).
  2. See *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1370 n.3 (4th Cir. 1995) (Holly Farms II).
  3. See *Holly Farms Corp.*, 311 N.L.R.B. 273, 294 (1993) (Holly Farms I).
  4. See *Holly Farms III*, 116 S. Ct. at 1403.
  5. See *infra* text accompanying note 100.
  6. See discussion *infra* Part II.B.
  7. National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1994). The reason agricultural employees are exempted from the NLRA is not clear; it can be justified either by the seasonal nature of the work or by the strength of the agricultural lobby. See Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 *HAMLIN L. REV.* 649, 652-54 (1989); see also Martha L. Noble, *Erosion of Agricultural Labor Exemptions in Employment Law: Recent Developments Relevant to Arkansas*, 1996 *ARK. L. NOTES* 71, 72 (1996) (noting that as a result of hard lobbying by large-scale agricultural operations, the agricultural laborer was excluded from many employment laws in the New Deal era). If a state’s

convince the courts that its workers were agricultural laborers because: (1) they worked for a farmer; or (2) they worked on a farm performing work that was incident to or in conjunction with such farming operations.<sup>8</sup> The first option was not plausible because of Supreme Court precedent,<sup>9</sup> but according to the plain language of the agricultural exemption, Holly Farms did have a reasonable claim under the second option.<sup>10</sup>

Nevertheless, Holly Farms was unsuccessful in its appeals to both the United States Court of Appeals for the Fourth Circuit<sup>11</sup> and the United States Supreme Court.<sup>12</sup> The Supreme Court, in a 5-to-4 decision, found that even though Holly Farms' interpretation was reasonable, the statute was ambiguous.<sup>13</sup> Therefore, the court deferred to the NLRB's interpretation that the employees were not agricultural laborers, but instead were manufacturing employees subject to the agency's jurisdiction.<sup>14</sup> In a classic statutory interpretation debate, the dissent did not agree with the majority's deference to the NLRB because the dissenters found that the statute was unambiguous.<sup>15</sup> According to the dissent, the workers were clearly within the exemption, and the NLRB had overstepped its authority.<sup>16</sup>

If one looks beyond the plain language of the statute, the dissent's view is incorrect for two reasons. First, it does not recognize that Congress, in adopting the agricultural exemption,

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labor law does not exempt agricultural workers, the employees could unionize under that state law even though there is no protection under federal labor law. See DONALD B. PERDERSEN & KEITH G. MEYER, *AGRICULTURAL LAW IN A NUTSHELL* 346-49 (1995).

8. See *Bayside Enters., Inc. v. NLRB*, 429 U.S. 298, 302 (1977). The agricultural laborer exemption states:

"Agriculture" includes farming in all its branches and among other things includes the . . . harvesting of any agricultural . . . commodit[y], . . . the raising of . . . poultry, and any practices . . . performed by a farmer or on a farm as 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.

Fair Labor Standards Act § 3(f), 29 U.S.C. § 203(f) (1994).

9. See *Bayside*, 429 U.S. at 301-02 (holding that a vertically-integrated poultry producer loses its status as a farmer when it contracts with independent growers to raise its chickens).

10. See Fair Labor Standards Act § 3(f), 29 U.S.C. § 203(f) (1994).

11. See *Holly Farms II*, 48 F.3d at 1360.

12. See *Holly Farms III*, 116 S. Ct. at 1399.

13. See *id.* at 1401-02.

14. See *id.* at 1403.

15. See *id.* at 1407.

16. See *id.* at 1409.

intended to protect manufacturing employees and only exempt small family farms.<sup>17</sup> In the case of a vertically-integrated operation,<sup>18</sup> like that at Holly Farms, the employees could be defined as either farm workers or manufacturing workers depending on the tasks they perform. The NLRB's interpretation of the statute recognizes this distinction and draws a clear line between small farming operations and that of the large, vertically-integrated farmer to narrow the exemption. The second problem with the dissent's view is that it ignores congressional intent to charge the NLRB with making the distinction between exempt agricultural laborers and non-exempt manufacturing employees.<sup>19</sup>

The dissent's failure to produce an interpretation in harmony with the very purpose of the statute demonstrates the necessity of looking to congressional intent, as well as the plain language of the statute. This is particularly true where, as here, Congress exempted agricultural laborers with the expectation that the NLRB would define the scope of that exemption, but at the time, Congress did not have the benefit of the *Chevron* doctrine, set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>20</sup> That doctrine requires the courts and the agency to defer to Congress's unambiguously expressed intent if expressed on the face of the agency's statute. This casenote uses *Holly Farms* to suggest that when courts are determining whether a statute is unambiguous on its face, legislative history should be reviewed. At a minimum, this historical review should apply to agency statutes that were established prior to *Chevron*.

In support of this argument, this casenote explores the role of the NLRB as an expert agency, as well as the agricultural exemption and its legislative history, to demonstrate that Congress intended to charge the NLRB with defining the scope of the agricultural exemption. This conclusion is then used to

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17. See *infra* text accompanying notes 229-42.

18. See Noble, *supra* note 7, at 71 (defining vertical integration in the agricultural sector as the combining of "large-scale packing, processing, and marketing enterprises, which distribute[ ] agricultural products throughout the nation.").

19. See *infra* Part III.A.

20. 467 U.S. 837, 842-43 (1984) (stating that a court, when reviewing an agency's statutory construction, should first determine if Congress has directly spoken to the issue; if Congress has not spoken, then a court should defer to the agency's interpretation if it is a permissible construction of the statute).

weaken the dissent's claim that the statute is unambiguous, suggesting that legislative history must be considered during a *Chevron* review of an agency's interpretation of its statute. As additional support, this casenote discusses Tyson's poultry empire, the union's certification at Holly Farms, the work performed by the employees in question, and the conflict among the circuits which lent support to Holly Farms' claim that these workers were agricultural laborers.

I. ON THAT FARM HE HAD SOME WORKERS WHO WANTED TO UNIONIZE

A. *History of the National Labor Relations Act*

To understand the NLRB's role as the expert agency charged with interpreting both its statute and the statute's agricultural exemption, it is first important to understand the NLRB's history and its primary functions. The NLRB gets its statutory grant of power from the NLRA.<sup>21</sup> This statute, which authorizes government regulation of collective bargaining in the private sector, evolved during the New Deal era when many federal statutes were overturned as unconstitutional violations of the government's power to regulate interstate commerce.<sup>22</sup> Of particular relevance is the National Industrial Recovery Act ("NIRA") which was created by President Roosevelt during the New Deal era as a plan to help the country recover from the Great Depression.<sup>23</sup> Section 7(a) of the statute provided "[t]hat employees shall have the right to organize and bargain collectively through representatives of their own choosing."<sup>24</sup>

From the time of its passage, the NIRA failed to assist the economy as expected. Instead, employers refused to bargain with labor unions, increasing strikes nationwide and creating a national crisis.<sup>25</sup> Recognizing that a government agency was

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21. National Labor Relations Act § 3, 29 U.S.C. § 153 (1994).

22. See WILLIAM B. GOULD IV, A PRIMER ON AMERICAN LABOR LAW, 29-31 (2d ed. 1986).

23. National Industrial Recovery Act, ch. 90, 48 Stat. 195 (1933) (repealed 1966); see JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW (VOLUME I 1933-1937), at 9 (1974) (discussing the background of the NIRA).

24. 48 Stat. 195, 198-99 (1933).

25. See GROSS, *supra* note 23, at 14-15.

needed to settle the differences between the employers and their striking employees, the National Labor Board ("NLB") was created on August 5, 1933.<sup>26</sup> The NLB was the precursor to the NLRB.

The goal of the NLB was to gain voluntary cooperation between employers and unions.<sup>27</sup> Initially, it enjoyed some success at resolving labor disputes, but its success was short-lived.<sup>28</sup> Less than one year after its creation, the NLB's biased reputation as a pro-labor agency and its inability to mandate participation caused its failure when employers refused to take part in its mediation procedures.<sup>29</sup> On June 29, 1934, by an executive order, the NLB was replaced by the NLRB.<sup>30</sup> This order did not grant the NLRB the power to enforce its own decisions,<sup>31</sup> but its nonpartisan makeup<sup>32</sup> was viewed as an improvement over the pro-labor makeup of the NLB.<sup>33</sup> Still, employers challenged the federal government's power to regulate industry and eventually the NIRA did not survive constitutional challenge.<sup>34</sup> Nonetheless, the NLRB survived, as did the collective bargaining and labor provisions of section 7(a) of the NIRA. These provisions became the core of the United States' national labor policy as expressed in the Wagner Act.<sup>35</sup> The Wagner Act, also known as

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26. *See id.* at 15 (citing *A Bill to Equalize the Bargaining Power of Employers and Employees, to Encourage Amicable Settlement of Disputes between Employers and Employees, to Create a National Labor Board, and for Other Purposes; Hearings on S. 2926 before the Senate Committee on Education and Labor*, 73d Cong. 2d Sess. 39-40 (1934) (statement of Franklin D. Roosevelt, President)).

27. *See id.* at 16 (citing Letter from Senator Robert F. Wagner to the Honorable Marion Smith (Oct. 22, 1933) (on file with the National Archives, Record Group 25)).

28. *See id.* at 72.

29. *See id.* at 60.

30. *See* Exec. Order No. 6763.

31. *See* GOULD, *supra* note 22, at 31.

32. *See* GROSS, *supra* note 23, at 74. The new board was made up of full-time, paid neutrals, as compared to the old board which was unpaid and comprised of both representatives from labor and industry. *See id.* at 16, 74.

33. *See id.* at 32 (noting that the NLB's pro-labor reputation came from its decision in *In re Berkeley Woolen Mills*, 1 N.L.B. 5 (1933), which allowed employees to choose representatives who were not necessarily employed by the company).

34. *See* *Schechter Poultry Corp. v. United States*, 295 U.S. 495, 541-42 (1935) (holding that Congress's delegation of legislative power to the executive branch in section 3 of the NIRA was unconstitutionally broad).

35. *See* GROSS, *supra* note 23, at 91; *see also* National Labor Relations Act §§ 1-19, 29 U.S.C. §§ 151-169 (1994).

the National Labor Relations Act, was signed into law on July 5, 1935.<sup>36</sup>

After the NIRA's downfall, employers resisted collective bargaining because they questioned the constitutionality of the NLRA and the power of the NLRB.<sup>37</sup> The NLRA's test came in 1937 when the Jones and Laughlin Steel Corporation claimed that manufacturing could not be regulated by the federal government.<sup>38</sup> The Supreme Court disagreed, finding that a disruption of steel manufacturing caused by labor conflicts would have a direct effect on interstate commerce; therefore, the Court upheld the NLRA and the power of the NLRB to promote industrial peace through collective bargaining.<sup>39</sup>

### *B. Power of the NLRB*

In 1947, to ensure that the NLRB remained nonpartisan and to promote due process, Congress added the Taft-Hartley amendments to the NLRA.<sup>40</sup> These amendments split the NLRB into two branches: judicial and prosecutorial.<sup>41</sup> The judicial branch is comprised of a five-member Board,<sup>42</sup> which is located in Washington, D.C.<sup>43</sup> This centralization and the preemption doctrine—which gives the Board, not the courts, responsibility for interpreting the NLRA<sup>44</sup>—helps ensure that the Board maintains a consistent labor policy nationwide.<sup>45</sup> The second branch, the prosecutorial branch, is comprised of a General Counsel in Washington, D.C.,<sup>46</sup> thirty-four regional directors,<sup>47</sup> and numerous administrative law judges based throughout the country.<sup>48</sup> In

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36. National Labor Relations Act §§ 1-19, 29 U.S.C. §§ 151-169 (1994).

37. See GROSS, *supra* note 23, at 171-72.

38. See NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 12 (1937).

39. See *id.* at 49.

40. See Labor Management Relations (Taft-Hartley) Act, 29 U.S.C. §§ 141-91 (1994); see also GOULD, *supra* note 22, at 30. Due process is ensured because the judicial branch is separated from the prosecutorial branch. See *id.*

41. See 29 U.S.C. § 153 (1994).

42. See National Labor Relations Act § 3(a), 29 U.S.C. § 153(a) (1994).

43. See GOULD, *supra* note 22, at 32.

44. See *id.* at 34-35.

45. See *id.*

46. See *id.* at 32.

47. See 2 THE DEVELOPING LABOR LAW: THE BOARD, THE COURTS, AND THE NATIONAL LABOR RELATIONS ACT 1772 (Patrick Hardin et al. eds., 3d ed. 1992).

48. See National Labor Relations Act § 3(b), 29 U.S.C. § 153(b) (1994); see also GOULD, *supra* note 22, at 32, 59.

recognition of Congress's intent to create an expert agency, the General Counsel is given the discretion to issue complaints in unfair labor practice cases.<sup>49</sup>

The NLRB has two primary functions: (1) certifying labor representatives and holding elections for representation; and (2) preventing and remedying both employers' and unions' unfair labor practices.<sup>50</sup> Employee organization campaigns fall under the first function. The certification process at the NLRB begins when either the union, the employees, or the employer files a petition with the agency requesting a representation election.<sup>51</sup> This petition must be supported by a 30% "showing of interest" demonstrating that at least 30% of the employees in a particular unit are seeking union representation.<sup>52</sup> This requirement is usually fulfilled through authorization cards which must be signed and dated by employees within the unit seeking a representation election.<sup>53</sup>

Upon receipt of the petition, the NLRB's regional director first determines whether the NLRB has jurisdiction over the employer.<sup>54</sup> The NLRB has a relatively narrow jurisdiction.<sup>55</sup> To conserve its resources, it sets general and specific jurisdictional standards, such as a yearly gross sales requirement of \$50,000 for nonretail employers and \$500,000 for retailers.<sup>56</sup> In addition, certain employees, like agricultural workers, are specifically exempt from its jurisdiction.<sup>57</sup> If there are no restrictions to the

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49. See GOULD, *supra* note 22, at 32.

50. See KENNETH C. MCGUINNESS & JEFFREY A. NORRIS, *HOW TO TAKE A CASE BEFORE THE NLRB* 30 (5th ed. 1986).

51. See 29 C.F.R. § 102.60(a) (1996). A representation election is held to determine whether a particular union may represent the employees in collective bargaining. See GOULD, *supra* note 22, at 38-39.

52. See 29 C.F.R. § 101.18(a) (1996); see also MCGUINNESS, *supra* note 50, at 89.

53. See MCGUINNESS, *supra* note 50, at 93.

54. See 29 C.F.R. § 101.18(a) (1996). The regional director also determines: (1) whether the employer's operations affect commerce; (2) what the appropriate bargaining unit is for the employees; (3) whether the unit will effectuate the policies of the act to reflect the free choice of the employees; and (4) if there is a sufficient probability that employees have selected the union to represent them. See *id.*

55. See GOULD, *supra* note 22, at 37 (noting that public employees, agricultural laborers, domestic servants, and supervisory employees are excluded from the NLRA).

56. See MCGUINNESS, *supra* note 50, at 40-41.

57. See National Labor Relations Act § 2(3), 29 U.S.C. § 152(3) (1994). Domestic servants, persons employed by their spouse or parent, independent contractors, supervisors, and persons employed by companies subject to the Railway Labor Act are also exempt. See *id.*

NLRB's jurisdiction, the regional director then evaluates the unit of employees seeking union representation to determine whether they constitute an appropriate unit for bargaining.<sup>58</sup> Once the bargaining unit is certified, the NLRB proceeds with the representation election.<sup>59</sup> If the union receives the majority of the votes cast within the bargaining unit, it is certified by the NLRB as the employees' bargaining representative.<sup>60</sup>

If the employer objects to the union's certification, the employer cannot appeal to a court because the certification by the NLRB is not considered to be a final, appealable order; the only exception being when the certification is directly contrary to the NLRA.<sup>61</sup> This policy helps to preserve the employees' freedom of choice by preventing the dissipation of support for the union during the delay caused by the appeal.<sup>62</sup>

For an employer to get judicial review of the union's certification, the employer must engage in a relatively time consuming process. First, the employer must commit an unfair labor practice by refusing to bargain with the union.<sup>63</sup> This triggers the union to file a complaint to the NLRB, alleging that the employer has unlawfully refused to bargain.<sup>64</sup> At that point, the NLRB issues a summary judgment against the employer for his or her refusal to bargain.<sup>65</sup> This order is final. Therefore, the employer is allowed to defend its refusal to bargain in the United States Court of Appeals by claiming that the bargaining unit is invalid.<sup>66</sup>

Generally, the NLRB is given substantial deference at the appellate level because it is considered to have unique expertise in labor relations.<sup>67</sup> But, in terms of the agricultural exemption to the NLRA, the circuit courts of appeals have not been as

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58. See National Labor Relations Act § 9(b), 29 U.S.C. § 159(b) (1994). Typically, the NLRB uses a "community of interest" standard to determine if the unit of employees is appropriate. See GOULD, *supra* note 22, at 38. Among the factors that suggest a community of interest are common supervision of the employees and whether employees have contact at the workplace, perform similar tasks, and have similar demands. See *id.*

59. See 29 C.F.R. § 102.69(a) (1996).

60. See 29 C.F.R. § 101.19(a)(5) (1996).

61. See GOULD, *supra* note 22, at 47.

62. See *id.*

63. See *id.*

64. See *id.*

65. See generally LEE MODJESKA, NLRB PRACTICE, § 1.12-1.13 (1983).

66. See GOULD, *supra* note 22, at 31.

67. See *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

deferential to the NLRB's interpretation.<sup>68</sup> Perhaps it was this lack of deference that led Holly Farms and its new owner, Tyson, to seek review of the NLRB's certification of a bargaining representative for 157 of Holly Farms' workers.

## II. OLD MACDONALD NEEDED MORE CHICKENS

Tyson acquired Holly Farms in July 1989, when Holly Farms was in the midst of a union bid for representation.<sup>69</sup> As the largest producer of chicken in the United States, Tyson had facilitated its own growth by purchasing other businesses within the poultry industry.<sup>70</sup> In particular, Tyson pioneered brand name recognition of poultry.<sup>71</sup> This led to Tyson's interest in Holly Farms. Prior to its acquisition by Tyson, Holly Farms sold the leading brand of supermarket chicken with an 18% market share.<sup>72</sup> Although vertically-integrated farm production operations, like Tyson's, were around during the passage of the NLRA,<sup>73</sup> Tyson's poultry empire, increased by acquisitions of other companies, demonstrates the recent trend to consolidate into even larger corporate farms.<sup>74</sup>

Tyson's acquisition of Holly Farms provides an example of how important this consolidation is to the poultry industry. Tyson paid \$1.4 billion for Holly Farms after a hostile takeover battle with ConAgra<sup>75</sup> forced Tyson to raise its initial offer from \$52 to \$70 per share.<sup>76</sup> This saddled Tyson with heavy debt amounting to 100% of its capital<sup>77</sup> which posed a tremendous risk to Tyson because of the cyclical nature of the poultry business.<sup>78</sup>

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68. See *infra* Part III.C.

69. See *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1364 (4th Cir. 1995).

70. See Kevin Kelly, *For Chicken Biggie Tyson, the Sky Could Be Falling*, BUS. WK., Dec. 5, 1988, at 32.

71. See Bradley H. Gendell, *Cockfight*, FIN. WORLD, July 11, 1989, at 26-27.

72. See *id.*

73. See Noble, *supra* note 7, at 71.

74. See Gendell, *supra* note 71, at 27.

75. See Nicholas Brown, *Tyson Wants Truck Drivers at Holly Farms to Drop Union*, GREENSBORO NEWS & REC., Sept. 20, 1989, at B5.

76. See Kelly, *supra* note 70; Susan A. Thorp, *Tyson Acquisition Cloud Near-Term Stock Outlook*, MEMPHIS BUS. J., July 17, 1989, available in 1989 WL 2504217.

77. See Kelly, *supra* note 70.

78. See Gendell, *supra* note 71, at 27 (noting that the chicken industry has suffered ups and downs because chickens have been perceived as commodities without brand name recognition; now that brand names like Perdue chickens are popular, that perception is changing).

For example, in 1988, Holly Farms experienced a 50% decrease in revenue when chicken prices fell from overproduction.<sup>79</sup> Yet, Tyson was willing to take this risk because in the late 1980s every major fast-food chain was offering chicken as an alternative to beef.<sup>80</sup> With lucrative contracts to supply chicken to McDonald's, Burger King, and Wendy's, Tyson was scrambling for ways to increase its chicken production.<sup>81</sup> Adding to Tyson's desperation was the potential two-year lead time required to build a new production facility.<sup>82</sup> If the Holly Farms deal had not gone through, Tyson likely would have had to seek out other, less attractive take-over candidates to meet its customer obligations.<sup>83</sup>

### A. *Farming and Processing Combined*

Although the acquisition of Holly Farms did not add another step to the vertical integration<sup>84</sup> of Tyson's poultry business, it did add to its capacity. At the time of its acquisition by Tyson, Holly Farms was the nation's leading supplier of fresh chicken, with a 1988 income of \$36.2 million.<sup>85</sup> At its two plants in North Carolina, 5,000 Holly Farms employees processed 3.8 million chickens per week.<sup>86</sup> In one year, at its Wilkesboro, North Carolina, plant alone, employees processed 96 million chickens.<sup>87</sup> Among the employees seeking union representation at Holly Farms were fifteen live-haul workers who worked out of the Wilkesboro plant.<sup>88</sup>

The live-haul unit is comprised of one live-haul truck driver, nine chicken catchers, and one forklift operator.<sup>89</sup> The work done by this group is only one step in a sophisticated process used by vertically-integrated poultry producers to bring broiler chickens

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79. See Kelly, *supra* note 70.

80. See Gendell, *supra* note 71, at 27.

81. See Kelly, *supra* note 70.

82. See *id.*; see also Gendell, *supra* note 71.

83. See Gendell, *supra* note 71, at 27.

84. See Noble, *supra* note 7.

85. See Kelly, *supra* note 70.

86. See Brown, *supra* note 75.

87. See Holly Farms Corp., 311 N.L.R.B. 273, 353 n.222 (1993) (citing figures for 1989).

88. See *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396, 1400 (1996). Election petitions are filed at the NLRB as the first step towards union certification. See ARCHIBOLD COX ET AL., *LABOR LAW* 109 (12th ed. 1996); see also National Labor Relations Act § 9(c)(1), 29 U.S.C. § 159(c)(1) (1994).

89. See *Holly Farms III*, 116 S. Ct. at 1400.

to market.<sup>90</sup> Work once done by individual farmers has, through vertical integration, become segregated into distinct stages to improve efficiency and maximize broiler chicken production.<sup>91</sup> These distinct stages include: (1) the management of breeder flocks which produce eggs that are hatched as broiler chicks; (2) the hatching of the chicks and their placement with independent growers; (3) the raising of the chicks by the independent growers; (4) the production of their feed by the poultry producer; (5) the catching and the hauling of the birds to processing facilities after they have attained a certain age; and (6) the processing of the broilers for market.<sup>92</sup> A vertically-integrated poultry producer, like Holly Farms, manages all of these different stages of production. Holly Farms' live-haul crew enters the process at stage five.

Generally, the third step of raising the broiler chickens is done by independent growers on their own farms.<sup>93</sup> In a typical operation, the poultry producer provides the independent grower with feed and medicine for the birds, and the grower is paid for supplying the henhouses and tending to the young birds.<sup>94</sup> The live-haul teams retrieve the chickens from the independent growers when the birds have reached approximately seven weeks of age, and then the live-haul workers transport the birds to Holly Farms for slaughter.<sup>95</sup>

### *B. Union Certification at Holly Farms*

The NLRB's certification of a bargaining representative for the Wilkesboro live-haul workers was not uncomplicated. The process began on February 16, 1989, when the Chauffeurs, Teamsters, and Helpers, Local Union No. 391 ("Teamsters") filed a representation petition with the NLRB.<sup>96</sup> The Teamsters sought to be designated as the bargaining representative for the live-haul workers as well as for Holly Farms' hatchery workers

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90. *See id.* at 1399.

91. *See National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816, 821 (1978).

92. *See id.* at 820-21.

93. *See Holly Farms III*, 116 S. Ct. at 1400.

94. *See NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025, 1026 (5th Cir. 1969).

95. *See Holly Farms III*, 116 S. Ct. at 1400.

96. *See Holly Farms I*, 311 N.L.R.B. at 292.

and feed-haul employees.<sup>97</sup> Initially, the NLRB's director for Region Eleven dismissed the Teamsters' petition because the regional director determined that some of the workers, including the hatchery workers, were agricultural laborers exempt from the NLRB's jurisdiction.<sup>98</sup> The Teamsters requested that the NLRB review its unit designation and agreed to be the representative for whatever unit the regional director deemed appropriate.<sup>99</sup> On July 20, 1989, the regional director certified a bargaining unit composed of the live-haul and feed-haul laborers but not the hatchery workers.<sup>100</sup>

A representation election was carried out on July 27, 1989.<sup>101</sup> When the union failed to win a majority of the votes cast, it complained to the NLRB that the results were tainted because Holly Farms had engaged in unfair labor practices prior to the election.<sup>102</sup> These alleged unfair practices included threatening employees with arrest for distributing union literature during their free time in non-working areas of the company, threatening an employee with discharge for union activism, interrogating employees about their union sentiments, granting a pay raise, and expanding the work week.<sup>103</sup> After an investigation, the NLRB determined that the Teamsters' allegations were true<sup>104</sup> and that Holly Farms' actions were violations of the NLRA.<sup>105</sup>

The NLRB's General Counsel brought an action in front of an NLRB administrative law judge ("ALJ") for Region Eleven<sup>106</sup> seeking a "Gissel bargaining order."<sup>107</sup> A Gissel bargaining order requires the employer to recognize and bargain with the union

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97. *See id.*

98. *See id.*

99. *See id.* at 292-93.

100. *See id.* at 293, 307.

101. *See Holly Farms I*, 311 N.L.R.B. at 290.

102. *See id.* at 293.

103. *See id.* at 290-91.

104. *See id.* at 363.

105. *See* National Labor Relations Act § 8, 29 U.S.C. § 158 (1994). Section 8(a)(1) makes it an unfair labor practice to "interfere with, restrain, or coerce employees in the exercise" of their right to self-organization. *Id.* Section 8(a)(3) makes it an unfair labor practice for an employer to "discriminat[e] in regard to . . . any term or condition of employment to . . . discourage membership in any labor organization." *Id.* Section 8(a)(5) adds to this list the employer's refusal "to bargain collectively with the representatives of his employees." *Id.*

106. Region Eleven is headquartered in Winston-Salem, N.C., and has jurisdiction over North and South Carolina. *See* MCGUINNESS, *supra* note 51, at 711.

107. *See Holly Farms I*, 311 N.L.R.B. at 290.

even though the union has not won a majority in a representation election.<sup>108</sup> This type of order is issued when an ALJ has determined that the union achieved majority status through union authorization cards but then lost its majority because of the employer's unlawful conduct.<sup>109</sup> On March 12, 1992, the ALJ granted the Gissel bargaining order, concluding that Holly Farms had indeed engaged in unfair labor practices in violation of sections 8(a)(1), 8(a)(3), and 8(a)(5) of the NLRA.<sup>110</sup>

Holly Farms appealed the ALJ decision to the NLRB's five-member Board in Washington, D.C.; the Board assigned three of its members to hear the appeal.<sup>111</sup> In 1993, the panel affirmed the Gissel bargaining order.<sup>112</sup> On appeal to the Fourth Circuit, Holly Farms claimed that the NLRB did not have jurisdiction because the employees fell within the agricultural exemption.<sup>113</sup> After losing at that level, Holly Farms appealed to the Supreme Court which granted certiorari to resolve the conflicting interpretation of the agricultural exemption that had developed between the NLRB and some of the circuit courts of appeals; the appeal was limited to the status of the live-haul workers.<sup>114</sup>

### III. HERE A CLUCK, THERE A CLUCK: CONFLICT AMONG THE CIRCUITS

The conflict between the circuit courts of appeals and the NLRB centered around the scope of the agricultural exemption. When the conflict first arose in 1969, the role of the courts in deferring to an agency's interpretation of its statute was still unclear.<sup>115</sup> The courts often interpreted a statute *de novo*, without considering the agency's expertise in that area of the law. As demonstrated below, in the context of the agricultural exemption, some of the circuit courts showed little deference to

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108. See *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

109. See *id.* at 610.

110. See *Holly Farms I*, 311 N.L.R.B. at 363-64. See generally National Labor Relations Act § 8, 29 U.S.C. § 158 (1994).

111. See *Holly Farms I*, 311 N.L.R.B. at 273.

112. See *id.* at 284-85.

113. See *Holly Farms Corp. v. NLRB*, 48 F.3d 1360, 1369 (4th Cir. 1995).

114. See *Holly Farms Corp. v. NLRB*, 48 F.3d 1360 (4th Cir. 1995), *cert. granted*, 116 S. Ct. 416 (1995) (No. 95-210).

115. See *infra* Part V.A. See generally *NLRB v. Strain Poultry Farms, Inc.*, 405 F.2d 1025 (5th Cir. 1969).

the NLRB's attempts to narrow the scope of the exemption, hindering its efforts at maintaining a consistent labor policy.

A. *Why Exempt Agricultural Laborers? Background of the FLSA*

The recurring use of the agricultural exemption language in many statutes partly explains why some courts have refused to defer to the NLRB's interpretation of the scope of the agricultural exemption. For example, there is no definition of the agricultural laborer listed within the NLRA.<sup>116</sup> Instead, the Act incorporates the definition of agriculture found within section 3(f) of the Fair Labor Standards Act ("FLSA"),<sup>117</sup> which was adopted by the NLRB in 1946.<sup>118</sup>

The FLSA sets minimum wages and maximum hours for industries that engage in interstate commerce.<sup>119</sup> According to the Congressional Record, these wage and hour provisions were meant to provide collective bargaining to manufacturing employees who worked in industries that were too small to unionize and were thereby "subject to the tyranny and oppression of sweatshops and chislers."<sup>120</sup> In recognition that a large percentage of these manufacturing employees worked in industries that employed 200 people or less, Congress adopted the FLSA's wage and hour provisions as protection for these employees.<sup>121</sup>

Although one might think that agricultural employees also needed this type of protection, they were exempted from the FLSA for reasons that are unclear. Some commentators speculate that it was hard lobbying by large-scale farmers.<sup>122</sup> If true, this reason would support Holly Farms' claim that its Wilkesboro employees should be exempt, but the legislative history of the FLSA provides a counterargument.

The Congressional Record demonstrates that the bill's origin in the Commerce Clause justified the need for an agricultural

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116. See National Labor Relations Act § 2, 29 U.S.C. § 152 (1994).

117. Fair Labor Standards Act § 3(f), 29 U.S.C. § 203(f) (1994).

118. National Labor Relations Board Appropriation Act, ch. 672, 60 Stat. 698 (1947).

119. See 81 CONG. REC. 7648 (1937) (statement of Sen. Black).

120. See *id.* at 7652 (statement of Sen. Walsh).

121. See *id.*

122. See Anderson, *supra* note 7; Noble, *supra* note 7; GOULD, *supra* note 22, at 35.

exemption.<sup>123</sup> At the time of the enactment of the FLSA, the Commerce Clause was interpreted by the courts and Congress to forbid federal regulation of "businesses of a purely local type which serve a particular local community, and which do not send their products into the streams of interstate commerce."<sup>124</sup> Agriculture was characterized as a local activity, more properly regulated by the local authorities. Manufacturing, on the other hand, was viewed as more closely linked to interstate commerce, thus requiring federal regulation because local authorities were not able to properly regulate the shipment of goods throughout the nation.<sup>125</sup>

As illustrated in the legislative history, the seasonal nature of some types of agricultural work provided additional support for its exemption. Recognizing that harvesting required quick work to prevent the product from perishing, the legislators worried that smaller communities could not supply enough harvesters to prevent overtime work.<sup>126</sup> The senators speculated that crops would be lost if the workers' hours were limited by the maximum hour provisions of the FLSA.<sup>127</sup> Rather than attempting to distinguish work that required seasonal labor, the senators supported giving the Fair Labor Standards Board ("FLSB") the power to exempt seasonal workers.<sup>128</sup>

Both of these reasons for the agricultural exemption appear to have been eliminated by the consolidation of the poultry industry into larger, more diversified operations. Tyson's billion-dollar poultry business, built on America's search for a health conscious alternative to beef, has reduced the number of poultry processors which has reduced the seasonal nature of its business.<sup>129</sup> In addition, the poultry industry ships goods throughout the nation. This raises the question of whether the poultry industry has become so mechanized and sophisticated as to eliminate itself from the agricultural exemption altogether. The deference given to the NLRB to respond to these types of

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123. See 81 CONG. REC. 7652 (1937) (statement of Sen. Black).

124. *Id.* at 7648 (citing *Houston, E. & W. Tex. Ry. Co. v. United States* [The Shreveport Rate Case], 234 U.S. 342 (1914)).

125. See *id.*

126. See *id.* at 7652-53 (statements of Sen. Tydings & Sen. Black).

127. See *id.* (statement of Sen. Tydings).

128. See *id.* (statement of Sen. Black).

129. See Gendell, *supra* note 71; see also Kelly, *supra* note 70.

changes within the industry is important to the resolution of this question.

A review of the Congressional Record reveals that Congress intended to give discretion to the FLSB to interpret the FLSA. Not only was the FLSB given the power to exempt seasonal workers, but it was also given the power to distinguish between manufacturing employees and farm workers. While addressing a suggestion from the International Apple Association that the exemption could include employees who prepare raw goods for market, Senator Black noted that the exemption would not include industries whose sole business was packing, yet it would include the farmer who packed his own apples alone or with the help of neighboring farmers.<sup>130</sup> Acknowledging that the distinction between packing as an industry and packing performed by the farmers of such products would not always be clear, Senator Black stated that the FLSB would have discretion to resolve the question.<sup>131</sup> From this delegation, one can infer that when the FLSA's definition of the agricultural exemption was adopted by the NLRA, the NLRB was given the same discretion as the FLSB to make these distinctions.

### *B. The Definition of Agriculture from the FLSA*

Indeed, soon after its adoption by the NLRA in 1947, the scope of the agricultural exemption was refined by both the courts interpreting the FLSA and by the NLRB. The agricultural exemption states:

"Agriculture" includes farming in all its branches and among other things includes the . . . harvesting of any agricultural . . . commodit[y], . . . the raising of . . . poultry, and any practices . . . performed by a farmer or on a farm as 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.<sup>132</sup>

In *Farmers Reservoir & Irrigation Co. v. McComb*, the Supreme Court interpreted the FLSA's definition of agriculture

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130. See 81 CONG. REC. 7657 (1937) (statement of Sen. Black).

131. See *id.*

132. Fair Labor Standards Act § 3(f), 29 U.S.C. § 203(f) (1994).

as including both a primary and secondary meaning of farming.<sup>133</sup> The primary meaning, which comes from the language "farming in all its branches" includes, but is not limited to, those types of farming listed within the definition.<sup>134</sup> The secondary meaning is broader and includes the practices that are not listed "whether or not themselves farming practices, which are performed either by a farmer or on a farm, incidently to or in conjunction with 'such' farming operations."<sup>135</sup>

In *Farmers Reservoir*, an irrigation company whose sole activity was to collect and distribute water to farmers, claimed that its employees should be exempt from the wages and hour provisions of the FLSA because they were agricultural workers as defined by the Act.<sup>136</sup> While interpreting the agricultural exemption, the Court noted that many aspects of agriculture such as tool manufacturing, fertilizing, and irrigation could fall within the primary definition, but they could also be excluded even though they are necessary to farming because "in the process of economic development and specialization, separate and independent productive functions [are] operated in conjunction with the agricultural function but [are] no longer a part of it."<sup>137</sup>

Therefore, the Court held that the question to be asked is not whether the activity is necessary to agriculture, but whether the activity has become separate and distinct from the farming operation.<sup>138</sup> In finding that the irrigation workers were not exempt agricultural workers, it was important to the Court that the work completed by the irrigation employees was clearly divided from that of the farmers.<sup>139</sup> The employees did not cultivate soil; they released water from the company-owned canals onto the farms, a task which the farmers were forbidden to do.<sup>140</sup>

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133. See 337 U.S. 755, 762 (1949).

134. See *Farmers Reservoir*, 337 U.S. at 762.

135. *Id.* at 763 (emphasis added).

136. See *id.* at 757.

137. *Id.* at 761.

138. See *id.*

139. See *id.* at 763.

140. See *id.*

C. *The Line Is Drawn, But the Conflict Remains*

Since that initial refining of the agricultural exemption, the NLRB has applied *Farmers Reservoir* to several different types of workers in the poultry industry.<sup>141</sup> In particular, the NLRB's analysis from *Bayside Enterprises, Inc. v. NLRB*<sup>142</sup> provided precedent for the NLRB's assertion that Holly Farms' live-haul workers did not fall within the exemption.<sup>143</sup> Holly Farms' poultry operation was nearly the same as that at Bayside Enterprises.<sup>144</sup> The main distinction was that the workers in *Bayside* were truck drivers hauling feed to the independent growers, whereas the live-haul crews in *Holly Farms* retrieved and hauled chickens grown on the farms of the independent grower.<sup>145</sup>

Before comparing *Bayside* to *Holly Farms*, it should be noted that the Court's analysis in *Bayside* did not include a discussion of whether the work performed by the truck drivers fell within the primary meaning of agriculture. The Court dismissed this contention because the *Bayside* truck drivers were hauling products to the farms; hauling products is not listed within the primary meaning of the agricultural exemption.<sup>146</sup> Instead, the question addressed in *Bayside* was whether the work came within the secondary meaning.<sup>147</sup>

To determine whether an employer was a farmer under the secondary meaning, the *Bayside* analysis focused on the work done by the employer.<sup>148</sup> The employer in *Bayside* did not raise its own chickens; instead, the chickens were raised by independent growers. This distinction was key to the Court in *Bayside* which held that because the chickens were raised by the independent growers, they, not the vertically-integrated poultry processor, were the farmers under the secondary meaning.<sup>149</sup> In upholding this distinction, which was first made by the NLRB,

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141. See generally, John A. Bourdeau, Annotation, *Who Are "Agricultural Laborers" Exempt from Coverage of National Labor Relations Act § 2(3) (29 USCS § 152(3))*, 130 A.L.R. FED. 1, 69-85 (1996).

142. 429 U.S. 298 (1977).

143. See *Holly Farms III*, 116 S. Ct. at 1403.

144. See *Bayside*, 429 U.S. at 299, 301-02; *Holly Farms III*, 116 S. Ct. at 1400.

145. See *Bayside*, 429 U.S. at 299; *Holly Farms III*, 116 S. Ct. at 1400.

146. See *Bayside*, 429 U.S. at 300.

147. See *id.* at 301. See generally *supra* text accompanying note 135.

148. See *Bayside*, 429 U.S. at 301.

149. See *id.* at 303.

the Supreme Court noted that the NLRB has "consistently rejected the argument" put forth by Bayside Enterprises and other vertically-integrated poultry producers that the work done by the independent contractors is part of the poultry producers' farming operations.<sup>150</sup> Although the "issue might 'with nearly equal reason be resolved one way rather than another,'"<sup>151</sup> the Court recognized that deference should be given to the NLRB's interpretation of a farmer as defined through the agricultural laborer exemption.

Although Holly Farms was similar to Bayside Enterprises in that its chickens were raised by independent growers, Holly Farms argued against using the *Bayside* analysis, claiming that the NLRB's interpretation was incorrect under the plain meaning of the statute.<sup>152</sup> Holly Farms' argument was supported by two circuit courts of appeals decisions exempting agricultural workers whose jobs were more like the work done by the Holly Farms employees than the work performed by the *Bayside* truck drivers. These decisions, one in the Fifth Circuit<sup>153</sup> and one in the Ninth,<sup>154</sup> both resulted in a finding that the live-haul workers in question were exempt agricultural laborers.

For example, the Ninth Circuit, in *NLRB v. Victor Ryckebosch, Inc.*,<sup>155</sup> relied on an earlier Fifth Circuit case, *NLRB v. Strain Poultry Farms, Inc.*,<sup>156</sup> to overrule the Board and find that the live-haul drivers employed by Victor Ryckebosch were exempt agricultural workers.<sup>157</sup> These drivers transported chickens from the farms of independent growers to Ryckebosch's processing plants.<sup>158</sup> The court found that the work done by the live-haul drivers was similar to that done by the workers in *Strain Poultry*,<sup>159</sup> the only difference being that the live-haul drivers in *Strain Poultry* shipped the chickens from independent growers to processing plants not owned by Strain Poultry Farms.<sup>160</sup> In a

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150. *Id.* at 302.

151. *Id.* (citing *Farmers Reservoir & Irrigation Co. v. McComb*, 337 U.S. 755, 770 (1949) (Frankfurter, J., concurring)).

152. *See Holly Farms III*, 116 S. Ct. at 1402.

153. *Coleman v. Sanderson Farms, Inc.*, 629 F.2d 1077 (5th Cir. 1980).

154. *NLRB v. Victor Ryckebosch, Inc.*, 471 F.2d 20 (9th Cir. 1972).

155. 471 F.2d 20 (9th Cir. 1972).

156. 405 F.2d 1025 (5th Cir. 1969).

157. *See Ryckebosch*, 471 F.2d at 21.

158. *See id.* at 20.

159. *See id.* at 21.

160. *See Strain Poultry*, 405 F.2d at 1027.

brief opinion, the court found that under the plain language of the agricultural exemption, the Ryckebosch drivers were indeed exempt because they transported chickens "to market."<sup>161</sup> At that time, the court rejected the NLRB's argument that the court's interpretation was contrary to congressional intent.<sup>162</sup>

Although *Ryckebosch* was decided before *Bayside's* holding that an employer lost its status as a farmer after contracting with independent growers, the controversy did not end with the *Bayside* decision. Three years later, *Bayside* was distinguished by the Fifth Circuit in *Coleman v. Sanderson Farms, Inc.*<sup>163</sup> Relying again on *Strain Poultry*,<sup>164</sup> the court, in a dispute over overtime wages under the FLSA, exempted the live-haul workers employed by Sanderson Farms.<sup>165</sup> Recognizing that the status of employees is defined by the type of work performed for their employer, the court ignored the *Bayside* finding and used the plain language of the agricultural exemption to conclude that Sanderson Farms' activities were agricultural, even though it utilized contract farmers.<sup>166</sup>

Despite the fact that the Supreme Court heard *Bayside* to resolve a conflict between the First Circuit, which upheld the NLRB in *Bayside*, and the circuit courts of appeals in *Strain Poultry* and *Ryckebosch*,<sup>167</sup> the Fifth Circuit, in *Sanderson*, rejected any assertion that *Strain Poultry* was overruled by *Bayside*.<sup>168</sup> The court distinguished *Bayside* because Bayside Enterprises operated a feedmill which was a "nonagricultural activity."<sup>169</sup> The *Sanderson* court also rejected the reasoning in the Eighth Circuit, *Valmac Industries v. NLRB*,<sup>170</sup> which held

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161. See *Ryckebosch*, 421 F.2d at 20-21 (citing the Fair Labor Standards Act § 3(f), 29 U.S.C. § 203(f) (1994) (the NLRA's definition of the agricultural laborer is codified in the Fair Labor Standards Act)). The Ninth Circuit's two page opinion was concerned primarily with avoiding a conflict among the circuits; so it deferred to the Fifth Circuit's holding in *Strain Poultry* and noted that Congress, not the courts, should resolve the conflict. See *id.* at 21.

162. See *id.* at 21.

163. 629 F.2d 1077, 1081 (5th Cir. 1980).

164. 405 F.2d 1025 (5th Cir. 1969).

165. See *Sanderson*, 629 F.2d at 1079-81 (citing *Strain Poultry*, 405 F.2d at 1025).

166. See *id.* at 1079.

167. See *Bayside*, 429 U.S. at 299.

168. See *Sanderson*, 629 F.2d at 1080.

169. See *id.* (claiming that although the *Strain Poultry* rationale was rejected in *Bayside*, the underlying principle of *Bayside* uses the same analysis).

170. 599 F.2d 246 (8th Cir. 1979).

that live-haul drivers and chicken catchers were not exempt agricultural employees.<sup>171</sup> In doing so, the court noted that no deference to the NLRB was required because this was a case under the FLSA, not the NLRA.<sup>172</sup>

Although *Sanderson* did not involve the chicken catchers component of the live-haul crew, the employees represented in *Sanderson* performed the same duties as Holly Farms' forklift operators and both Holly Farms' and Valmac Industries' live-haul drivers. As a result of the lingering conflict between these and the *Bayside* line of cases, the Supreme Court granted certiorari to Holly Farms.<sup>173</sup>

#### IV. OLD MACDONALD WAS NOT A FARMER AND DID NOT HAVE FARMING CONNECTIONS

In *Bayside*, the Court's analysis of the secondary meaning, while somewhat helpful, did not completely resolve the issues in *Holly Farms*. Although the live-haul workers in *Holly Farms* hauled chickens to and from the independent farms, they could be distinguished from the truck drivers in *Bayside* because the live-haul workers actually worked on the farms to catch the chickens.<sup>174</sup> The drivers in *Bayside* did not work on the farms of the independent contractors; rather, they merely hauled feed to the independent growers.<sup>175</sup> This distinction is important because the work done by the *Holly Farms* laborers could be deemed secondary farming if it could be characterized as work: "[1] performed 'by a farmer or [2] on a farm as an incident to or in conjunction with such farming operations.'"<sup>176</sup> Because the truck drivers in *Bayside* did not claim to be working on a farm, the *Bayside* Court did not analyze the "on a farm" element of the secondary farming test. Therefore, although this second element is applicable to *Holly Farms*, *Bayside* did not provide much guidance.<sup>177</sup>

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171. See *id.* at 249.

172. See *Sanderson*, 629 F.2d at 1079 n.2.

173. See *Holly Farms III*, 116 S. Ct. at 1400.

174. See *id.* at 1402-03.

175. See *Bayside*, 429 U.S. at 299.

176. See *id.* at 300; see also Fair Labor Standards Act § 3(f), 29 U.S.C. § 203(f) (1994).

177. See *id.* at 301.

### A. *Performed by a Farmer*

For the first element, though, *Bayside* was helpful. The Court in *Holly Farms* relied on *Bayside* for its analysis of the “performed by a farmer” element of the secondary test, finding that *Holly Farms* was not a farmer.<sup>178</sup> Citing *Bayside*, the Court focused on the status of the employer and held that once “an integrated poultry producer ‘contracts with independent growers for the care and feeding of [its] chicks, [its] status as a farmer engaged in raising poultry ends with respect to those chicks.’”<sup>179</sup> Therefore, once *Holly Farms* contracted with an independent grower to raise the broiler chickens, *Holly Farms* lost its status as a farmer, and any *Holly Farms* employee that entered the process after that point could no longer qualify as a farm employee.<sup>180</sup>

*Holly Farms* argued that its status as a farmer did not end when the independent grower entered the process and that the NLRB’s interpretation was “irrational and contrary to the intent of Congress.”<sup>181</sup> *Holly Farms* relied on *Sanderson*<sup>182</sup> to distinguish *Bayside*.<sup>183</sup> Under the *Sanderson* analysis, an employer does not lose its status as a farmer if it contracts with independent growers because this work is “incident to or in conjunction with” its primary task of raising poultry.<sup>184</sup> *Holly Farms* argued that because the truck drivers in *Bayside* were delivering feed to the growers and were not performing agricultural tasks like delivering the chickens to market, *Bayside* did not apply.<sup>185</sup>

Although the distinction between the drivers is accurate, there are two fundamental flaws in *Holly Farms*’ argument. First, the Court in *Bayside* did address the question of whether poultry processing was considered an agricultural task, and it concluded that a vertically-integrated poultry operation could include both agricultural and nonagricultural activities.<sup>186</sup>

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178. See *Holly Farms III*, 116 S. Ct. at 1402.

179. *Id.*

180. See *id.*

181. Brief for *Holly Farms Corp.* at 31, *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396 (1996) (No. 95-210).

182. 629 F.2d 1077 (5th Cir. 1980).

183. See Petitioner’s Brief at 33, *Holly Farms III* (No. 95-210).

184. *Sanderson*, 629 F.2d at 1081 (citing Fair Labor Standards Act § 3(f), 29 U.S.C. § 203(f) (1938)).

185. See Petitioner’s Brief at 32, *Holly Farms III* (No. 95-210).

186. See *Bayside*, 429 U.S. at 301.

Among the activities the court listed as nonagricultural were Bayside Enterprises' poultry feed mill and its poultry processing plant.<sup>187</sup> Since the *Bayside* truck drivers worked for its feedmill division, that work was defined as nonagricultural, and the Court deferred to the NLRB's finding that Bayside Enterprises was not a farmer.<sup>188</sup> Although not mentioned by the Court in *Holly Farms*, this same analysis could have been applied to find that Holly Farms was not a farmer because Holly Farms conceded that its employees were working for its poultry processing division.<sup>189</sup>

The second flaw in Holly Farms' argument is that *Sanderson* was decided under the FLSA, not the NLRA.<sup>190</sup> In *Sanderson*, the court noted that judicial deference need not be given to the NLRB's interpretation of the agricultural exemption because it was not charged with interpreting the statute in this situation.<sup>191</sup> Therefore, the court was free to apply its own interpretation of the agricultural exemption even though both the FLSA and the NLRA use the same definition of a farmer.<sup>192</sup> In *Holly Farms*, where the NLRA applies, the Supreme Court was required to defer to agency interpretations of ambiguous statutes and examine only its reasonableness.<sup>193</sup>

After deferring to the NLRB's application of the *Bayside* analysis, the Court's analysis was only partly completed because the live-haul crew in *Holly Farms*, unlike the employees in *Bayside*, was comprised of more than just truck drivers. In addition to one live-haul truck driver, the crew typically included nine chicken catchers and one forklift operator.<sup>194</sup> Noting this distinction, the Supreme Court concluded that no further analysis was needed to hold that the live-haul truck drivers were protected by the NLRA.<sup>195</sup> Since the rest of the crew actually performed work on the independent growers' farms, they had to be analyzed under the next element of the secondary farming analysis:

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187. *See id.* The processing plant is where the company slaughters and dresses its poultry. *See id.*

188. *See id.* at 301, 303.

189. *See* Petitioner's Brief at 20, *Holly Farms III* (No. 95-210).

190. *See Sanderson*, 629 F.2d at 1078.

191. *See id.* at 1081 n.4.

192. *See id.*

193. *See Holly Farms III*, 116 S. Ct. at 1401 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)); *see also infra* Part V.A.

194. *See Holly Farms III*, 116 S. Ct. at 1400.

195. *See id.* at 1402.

whether they worked "on a farm as an incident to or in conjunction with such farming operations."<sup>196</sup>

### B. *On a Farm*

To simplify the analysis under the second element, the Court split this language into two parts: (1) "on a farm" and (2) "as an incident to or in conjunction with such farming operations."<sup>197</sup> Since the Court had already determined that Holly Farms did not regain its status as a farmer, it quickly dismissed the possibility that work done by the remaining members of the live-haul crew after the chickens were returned to Holly Farms could be considered work "on a farm."<sup>198</sup> The focus then turned to the work done on the farms of the independent growers.

Having determined that the "on a farm" language could only apply to the work done on the farms of the independent growers, the analysis of the second part, the "incident to or in conjunction with" language, required drawing a line between the work done by the independent growers and the work done by Holly Farms. The NLRB argued that the employees were working not as an incident to or in conjunction with the independent growers' farming operations, but instead were working as an incident to or in conjunction with Holly Farms' processing operation.<sup>199</sup> The NLRB claimed that the language of the agricultural exemption was ambiguous regarding where agriculture ended and processing began.<sup>200</sup> Therefore, using NLRB precedent and congressional intent, the NLRB drew the line by looking at who receives the benefit of the work.<sup>201</sup> The NLRB supported its position with a Department of Labor interpretive regulation which states that work done by an employer on another's farm is not within the exemption if it is done solely in furtherance of the employer's own enterprise.<sup>202</sup>

Holly Farms argued that the plain meaning of the agricultural exemption included the work done by its employees because they

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196. See *supra* text accompanying note 176.

197. See *Holly Farms III*, 116 S. Ct. at 1403.

198. See *id.* at 1402.

199. See Brief for the National Labor Relations Board at 3, *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396 (1996) (No. 95-210).

200. See *id.* at 4.

201. See *id.* at 5.

202. See *id.* at 27-28 (citing 29 C.F.R. § 780.143 (1996)).

performed activities in "preparation for market," including "harvesting of agricultural commodities."<sup>203</sup> Even if the employer was not acting as a farmer, Holly Farms argued, its employees were engaged in secondary farming and so should have been included within the exemption.<sup>204</sup> Although the Court recognized that this interpretation was possible, it deferred to the NLRB's interpretation and only looked at the reasonableness of the NLRB's conclusions.<sup>205</sup>

A number of factors were used by the Court to justify its finding that the NLRB's interpretation was reasonable. First, the Court noted that when the live-haul crew arrived at the farm, the independent grower's obligations had been completed and there was hardly any overlap between the independent grower's work and that done by the live-haul crew.<sup>206</sup> Second, the work of the live-haul crew was more aligned with Holly Farms' processing operations because they worked out of the processing plant and were functionally integrated with the processing employees.<sup>207</sup> Third, the court reasoned that it was sensible to look at the employer's status "respecting the particular activity at issue" because this helps to distinguish between a vertically-integrated poultry producer's farming activities and its processing activities.<sup>208</sup> Finally, the Court noted that the NLRB's determination had adhered to twenty-three years of NLRB precedent and the interpretations of the agricultural exemption as adopted by the Department of Labor.<sup>209</sup>

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203. See Petitioner's Brief at 9, *Holly Farms III* (No. 95-210); see also *supra* text accompanying note 132.

204. See Brief for the National Labor Relations Board at 10, *Holly Farms III* (No. 95-210).

205. See *Holly Farms III*, 116 S. Ct. at 1402.

206. See *id.* at 1403.

207. See *id.* at 1404. In the NLRB's petition for certiorari, they noted that there was a correlation between the slaughter rate and the amount of work available for the live haul crews. See *id.* In addition, a production manager at Holly Farms stated that catching the grown broilers was the first step in the producer's processing operations. See *id.*

208. *Holly Farms III*, 116 S. Ct. at 1404.

209. See *id.* at 1404-05.

## V. WHO DECIDES? STATUTORY CONSTRUCTION AND WHY LEGISLATIVE HISTORY IS IMPORTANT

The Court's deference to the NLRB's interpretation upon a finding of reasonableness was mandated by the rule of statutory construction set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>210</sup> Recognizing that there are many theoretical approaches to statutory construction, including a plain meaning approach and approaches reviewing legislative intent,<sup>211</sup> this casenote does not attempt a detailed contrast of these approaches in order to reach its conclusion. Instead, this casenote demonstrates that, at least in pre-*Chevron* statutes, legislative intent should be explored because the face of the statute might not express the agency's interpretative role.

### A. *The Chevron Doctrine*

Prior to 1984, it was unclear how a court should review an agency's interpretation of its statute.<sup>212</sup> The debate centered on whether, in interpreting a statute, the court should only resolve whether the agency had sufficient support for its interpretation or whether the court should interpret the statute de novo.<sup>213</sup> *Chevron* resolved that question by providing a two-step analysis for reviewing an agency's construction of its statute.<sup>214</sup> The first step requires the court to determine whether Congress had "directly spoken to the precise question at issue."<sup>215</sup> If so, and if the congressional intent was clear, then both the court and the agency must give effect to Congress's unambiguously expressed intent.<sup>216</sup> If Congress had not unambiguously expressed its intent, then the court determines whether the agency's interpre-

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210. 467 U.S. 837, 842-43 (1984).

211. See generally WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION STATUTES AND THE CREATION OF PUBLIC POLICY* 571-639 (1988).

212. See generally Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 512.

213. See *id.* at 513.

214. See *Chevron*, 467 U.S. at 842.

215. See *id.*

216. See *id.* at 842-43.

tation is a permissible construction of the statute.<sup>217</sup> Therefore, the court does not substitute its own interpretation.<sup>218</sup>

Gaps in an agency's statutory mandate provide the rationale for a court's deference to that agency's reasonable interpretation of its statute.<sup>219</sup> Gaps left either explicitly or impliedly by Congress should be filled by the agency.<sup>220</sup> This deference recognizes the agency's expertise in resolving questions of statutory interpretation where two or more reasonable interpretations of the statute exist.<sup>221</sup>

This seemingly straightforward analysis may have resolved part of the pre-*Chevron* statutory interpretation debate, but it did not completely resolve all issues. One issue left open, and of particular interest in *Holly Farms*, was addressed by Justice Antonin Scalia in his seminal speech to Duke Law School.<sup>222</sup> The question posed by Justice Scalia was directed towards the first step of *Chevron* and its requirement that the statute be ambiguous before the court should defer to the agency's reasonable interpretation of the statute.<sup>223</sup> He predicted that future debates over an agency's interpretation of its statute would start with step one and the question of whether a statute is ambiguous.

In his speech, Justice Scalia also predicted that if courts looked only at a statute's plain meaning and not its legislative history, the courts would be less likely to find that the statute was ambiguous.<sup>224</sup> As one of the dissenters in *Holly Farms*, he joined Justice Sandra Day O'Connor in arguing that the plain meaning of the agricultural exemption was clear from the statute, virtually ignoring the legislative history.<sup>225</sup> As this casenote demonstrates, the legislative history of an agency's statute that was passed before *Chevron* should not be completely ignored when resolving the question of whether a statute is ambiguous because that history may, as it does in the agricultural exemption, explicitly address the question of deferring to the agency's expertise.

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217. See *id.* at 843.

218. See *id.*

219. See *id.* at 844-45.

220. See *id.* at 844.

221. See *id.* at 845; see also Scalia, *supra* note 212, at 520.

222. See Scalia, *supra* note 212, at 520.

223. See *id.*

224. See *id.* at 521.

225. See *infra* Part VI.

### B. *Legislative Intent Regarding the Agricultural Exemption*

In *Holly Farms*, the Court noted that both the NLRB's and Holly Farms' positions were plausible but that deference was justified by the NLRB's expertise in interpreting its statutory mandate and through its experience in labor relations.<sup>226</sup> This casenote has already demonstrated that Congress intended the courts to defer to the NLRB's expertise.<sup>227</sup> As additional support, a review of the legislative history behind the agricultural exemption demonstrates that in *Holly Farms* the Court's deference was reasonable because the position taken by the NLRB does not detract from legislative intent.<sup>228</sup>

#### 1. Processors Must Be Excluded

The legislative history of the agricultural exemption demonstrates that Congress intended a narrow application.<sup>229</sup> Initially, the "Elliott amendment" was proposed, which attempted to define agricultural laborers through section 409 of the Social Security Act.<sup>230</sup> This amendment provided a long list of agricultural tasks that would be included within the exemption.<sup>231</sup> Voicing their opposition to this broad definition of the agricultural laborer, some of the representatives who voted against the amendment claimed that the Elliott rider was a vicious attempt to exclude broad groups of laborers such as industrial food processing workers.<sup>232</sup> "The attack against food processing workers was launched by large-scale grower-shippers . . . . It smacks of cowardice as well as falsehood for businessmen to hide behind the

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226. See *Holly Farms III*, 116 S. Ct. at 1401 (citing *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 (1984)).

227. See *supra* Part III.A.

228. See *Holly Farms III*, 116 S. Ct. at 1403 n.8.

229. See 92 CONG. REC. 6689 (1946) (statement of Rep. Elliott).

230. See *id.*

231. See *id.* The proposed amendment defined agricultural labor to include work such as "handling, planting, drying, packing, packaging, processing, freezing, grading, storing, or delivering to storage or to a carrier for transportation to market any agricultural . . . commodity." *Id.* at 6689.

232. See *id.* at 6690-91 (statements of Rep. Rooney, Rep. Miller, Rep. Coffee, Rep. Neely).

name of farmer in an attempt to steal the rights of industrial workers."<sup>233</sup>

Claiming that the amendment was slipped in by the Associated Farmers of California as a rider to an appropriation bill, these representatives complained that the broader definition changed the purpose of the amendment from protecting the family-size farm to protecting private industrial operations.<sup>234</sup> For example, employees of the American Fruit Growers would have been excluded even though American Fruit was a large, multi-million dollar corporation that purchased agricultural products from farmers and then processed and distributed the products in commercial outlets under its own brand name.<sup>235</sup>

Although these representatives were outvoted 202 to 134, this broad definition of the agricultural worker did not survive.<sup>236</sup> It was later rejected in July of 1946 by a majority of the Senate, who voiced the same concerns as the representatives opposed to the Elliott rider, and replaced it with the narrower definition found in the FLSA.<sup>237</sup> At that time, one concern specifically mentioned by the Senators was that under the former, broader definition, an independent packing house could exempt its employees from the protection of the FLSA.<sup>238</sup> Under the FLSA's narrower definition, the independent packers would be construed as industrial employees and thus be protected.

Recognizing that the FLSA was intended to protect industrial food processing workers from oppression by their employers, the Senators explained that the exemption for preparing goods for market was limited to the incidental operations on a farm.<sup>239</sup> This exemption was not meant to include enterprises, like packing operations, which were solely concerned with processing already produced goods for market.<sup>240</sup> In making this distinction, the Senators were protecting the industrial worker by limiting the applicability of the agricultural exemption to the employees who worked on a single farm. As Senator McCarran explained:

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233. *Id.* at 6691 (statement of Rep. Coffee).

234. *See id.* (statement of Rep. Coffee & Rep. Miller).

235. *See id.* at 6690 (statement of Rep. Rooney).

236. *See id.* at 6693.

237. *See* 92 CONG. REC. 9514-15 (1946).

238. *See id.* at 9515 (statement of Sen. Pepper).

239. *See id.* at 9515.

240. *See id.*

If the process is on the farm and a part of the production that belongs to the farm, then it is a farm activity. But if it is *off the farm*, or if an agency even comes on the farm and, acting by itself, processes on the farm, but is separate entirely from the producer, the production, or the farm activity, then it comes in a different category.<sup>241</sup>

While it is true that Holly Farms has production and processing activities because it hatches its own eggs into chicks, Senator McCarran's example was intended to draw a line between producers and processors. Therefore, the line drawn in *Bayside*—that the processor has lost his status as a farmer once he turns over part of his farming operation to the independent farmer—is a reasonable distinction and not arbitrary, as demonstrated by the additional testimony of Senator McCarran, who was a member of the joint House and Senate committee that discussed the Elliott amendment. Responding to Senator Andrews' comment that the packers and pickers in nearly one-half of the Florida Citrus industry were employed by the citrus growers, Senator McCarran explained further that as soon as the packing activity had left the farm and moved to a packing house far from the farmer's activity, the packing house employees would be protected by the FLSA.<sup>242</sup> Therefore, at a minimum, a line can be drawn so that any of Holly Farms' employees who enter into the poultry process after the chickens have left the farm would not be exempt agricultural workers.

The NLRB's extension of this line in *Bayside* to include the live-haul employees derived from an example of a wheat threshing operation employed during the adoption of the FLSA.<sup>243</sup> At that time, Senator Tydings expressed his concern that a loophole existed within the agricultural exemption.<sup>244</sup> He wanted assurance that independent contractors who entered the farm and contracted with the farmers to thresh the farmers' wheat would fall within the exemption.<sup>245</sup> Since he interpreted the agricultural exemption to include "farming in all its operations, from the time the grain is put into the ground until it leaves the farm," he felt

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241. See *id.* (emphasis added).

242. See *id.*

243. See 81 CONG. REC. 7653 (1937).

244. See *id.*

245. See *id.*

the independent contractor would be included.<sup>246</sup> Senator Black, who originally introduced the agricultural exemption of the FLSA to the Senate, provided clarification by stating that although he agreed that wheat threshing was very much a part of agriculture, the exemption would only apply if the activity was seasonal.<sup>247</sup> He noted that if the work was not seasonal, the wheat thresher would not fall within the exemption and the wheat thresher would be subject to the wage and hour provisions of the FLSA.<sup>248</sup>

## 2. The NLRB Draws a Clear Line

This wheat thresher example was very important to Holly Farms' argument that the live-haul workers should be exempted as agricultural laborers. Holly Farms claimed that this example illustrated an exemption for independent companies that go onto farms and do work normally done by farmers.<sup>249</sup> Since Holly Farms was doing work that was necessary to the independent grower's operation, its work was analogous to that done by the wheat thresher and thus should be exempted.<sup>250</sup> The NLRB claimed that Congress intended to limit the exemption to companies formed for the sole purpose of performing a service for the farmer. If the companies were formed to perform work for industry, then Congress did not intend the companies' workers to be exempted.<sup>251</sup> Under the NLRB's interpretation, Holly Farms' live-haul crews were performing a service for Holly Farms and not for the independent farmers. Had the live-haul crews been employed by the farmer, they would have been exempt.<sup>252</sup>

The NLRB's characterization more closely addresses the distinctions between agricultural and industrial workers. The work done by the independent grower is less likely to be seasonal in nature because the vertically-integrated poultry industry has been streamlined to produce a constant supply of chickens. Any overtime necessary to complete the rounding up of chickens is not due to the urgent need to harvest the chickens under a seasonal

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246. *See id.* (statement of Sen. Tydings).

247. *See id.* (statement of Sen. Black).

248. *See id.* (statement of Sen. Tydings).

249. *See* Petitioner's Brief at 24-25, *Holly Farms III* (No. 95-210).

250. *See id.* at 23-25.

251. *See* Brief for the National Labor Relations Board at 24-25, *Holly Farms III* (No. 95-210).

252. *See Holly Farms III*, 116 S. Ct. at 1403 n.8.

deadline. Instead, the live-haul crews work at a pace required by the vertically-integrated poultry industry so that it may capitalize on the growing market for chicken. Therefore, even though the "on a farm" language was added to that statute to include the wheat thresher within the exemption, the Supreme Court deferred to the NLRB and noted that this applied where the farmer employed the wheat thresher, not where the person who worked on a farm was employed by another.<sup>253</sup>

## VI. EVERYWHERE A CLUCK, CLUCK: TOO MANY HENS IN THE HEN HOUSE

Using the statute's plain meaning as justification, Justice O'Connor—joined by Chief Justice Rehnquist, Justice Scalia, and Justice Kennedy—concurred in part of the *Holly Farms* decision and dissented in part.<sup>254</sup> Justice O'Connor agreed that the live-haul truck drivers could not be considered agricultural workers and were therefore within the jurisdiction of the NLRB.<sup>255</sup> She disagreed with the remaining portion of the opinion because she found that the majority had given too much deference to the NLRB's interpretation of the agricultural exemption and therefore, had ignored the plain meaning of the statute.<sup>256</sup>

Justice O'Connor disagreed with the majority's deference because she felt that the plain meaning of the agricultural exemption unambiguously expressed the intent of Congress.<sup>257</sup> The majority, she stated, had misread the statute in two ways. The first misreading occurred when the majority tied the "on a farm" language to the employment relationship between the live-haul crew and the independent grower.<sup>258</sup> The second misreading occurred after the majority changed the application of the agricultural exemption by requiring that the work done by the live-haul crew be "mainly" rather than "incident[ly]" tied to the primary activities of the independent growers.<sup>259</sup>

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253. See *id.*

254. See *id.* at 1406.

255. See *id.*

256. See *id.* at 1406-07.

257. See *Holly Farms III*, 116 S. Ct. at 1407.

258. See *id.*

259. See *id.*

A. *Is "on a Farm" Meaningless?*

Because the plain language of the statute did not require an employment relationship, the dissent concluded that under the NLRB's interpretation, the "on a farm" language is rendered meaningless.<sup>260</sup> The majority responded that the additional language of "incident to or in conjunction with" actually spoke to that question by requiring a relationship to the farmer.<sup>261</sup> The dissent argued that the employment relationship distinction drawn by the NLRB was "readily manipulable" by the employer.<sup>262</sup> For example, Holly Farms could get around the distinction by contracting with the independent growers to hire the chicken catchers and forklift operators.

Although the dissent's argument has force, it does not recognize the congressional intent of adopting the FLSA's narrower definition of agriculture.<sup>263</sup> As Senator McCarran explained, if an agency comes on the farm to process and is entirely separate from the farm activity, it is in a different category.<sup>264</sup> Arguably, Holly Farms is not entirely separate from the farm activity because of its relationship with the independent grower, but Senator McCarran's focus was on the difference between raising goods and processing.<sup>265</sup> By its own admission, Holly Farms considered the chicken catching to be the first stage of processing.<sup>266</sup> Strengthening the argument that Holly Farms was more concerned with processing at this stage was the NLRB's finding that Holly Farms occasionally bought chicken from growers not under contract to keep up with production; in 1989, it purchased 575,000 chickens from other farmers.<sup>267</sup>

Contrary to Justice O'Connor's argument, the "on a farm" language has not lost its meaning. A worker could fall within the agricultural exemption and still work on a farm, employed by someone other than the farmer, if his work was "incident to or in conjunction with such farming operations."<sup>268</sup> The farmer could

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260. *See id.*

261. *See id.* at 1403 n.9.

262. *Id.* at 1408.

263. *See discussion supra* Part V.B.1.

264. *See supra* text accompanying note 229-42.

265. *See id.*

266. *See supra* note 207.

267. *See Holly Farms I*, 311 N.L.R.B. at 353 n.222.

268. Fair Labor Standards Act § 3(f), 29 U.S.C. § 203(f) (1994); *see supra* text

engage the worker to help with his farming operations. In *Holly Farms*, the work of the independent growers was finished; the chickens were already raised.<sup>269</sup> Another problem with the dissent's argument was its erroneous claim that the wheat thresher example demonstrates that Congress intended to include workers employed by another.<sup>270</sup> That example was inapplicable here because the work at *Holly Farms* was not seasonal.<sup>271</sup>

Finally, the dissent's argument that the employment relationship is readily manipulable does not recognize the importance of the independent growers to the vertically-integrated chicken producer. These independent growers provide a service that the poultry producer cannot perform cost-effectively; therefore, it is the one stage not controlled by the poultry producer. Because of the round-the-clock attention required to raise the chickens, a small, independent farmer is better suited to providing the service under contract wages. The hourly cost is minimal compared to that which the poultry producer would have to pay its own laborers. Effectively, the poultry producer is taking advantage of the farmers who have lost a market for their own chickens because of the low chicken prices garnered by the vertically-integrated poultry producer.<sup>272</sup> In addition, if the independent grower was to take on the employment of the forklift operators and the chicken catchers, from the producer's point-of-view, the effectiveness of the vertical integration would be reduced. Vertical integration takes advantage of efficiencies gained by the consolidation of the stages of the production process.<sup>273</sup> If the chicken catchers and forklift operators were indeed employed by the independent grower, vertical integration would break down, creating a reduction in efficiency.

### *B. Incident or Mainly*

Finally, the dissent claimed that the focus of the "incident" language was changed to "mainly" when the majority tied the

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accompanying note 201-02.

269. See *supra* text accompanying note 92.

270. See *Holly Farms III*, 116 S. Ct. at 1407-08.

271. See *supra* text accompanying notes 85-87.

272. See generally Paul B. Ginsburg, *The Dynamics of Market-Level Change*, 22 J. HEALTH POL. POL'Y & L. 363, 363 (1997).

273. See generally *id.*

work done by the live-haul crew to that done by its employer.<sup>274</sup> Using the wheat thresher example as evidence of the congressional intent, the dissent argued that the work done by the Holly Farms employees was necessary to the work done by the independent farmer, just as the threshing of grain was necessary to the work of the grain grower.<sup>275</sup> Neither producer would be worth much without the work of the threshers or the live-haul workers.<sup>276</sup> Noting that the language, "incident to or in conjunction with such farming operations," is so plain that only one meaning can be derived, the dissent stated that the NLRB's interpretation with respect to the chicken catchers and the forklift operators was directly contrary to the statute.<sup>277</sup>

Although the dissent in *Holly Farms* did address part of the legislative history, its selective use of the wheat thresher example ignores the intent of the drafters to charge the NLRB with interpreting the scope of the agricultural exemption. As noted by Congress during the adoption of the FLSA, where the wheat thresher analysis originated, Congress recognized the difficulty of drawing the lines between processors and producers as well as seasonal employees and so left this task to the agency interpreting the statute.<sup>278</sup> In recognition of this ambiguity, the dissent's claim that the NLRB's interpretation is directly contrary to the "on a farm" language becomes less convincing.

## VII. E-I-E-I-O

For reasons not clear, the drafters of the agricultural exemption did not express on the face of the exemption their intent to charge the agency with its interpretation. However, this omission should not detract from deferring to the NLRB because the congressional intent to defer is clear from the agricultural exemption's legislative history. The importance of respecting this intent is demonstrated here, where the poultry industry has changed so much that a stagnant interpretation of a statute does not do justice to the intent of its drafters.

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274. See *Holly Farms III*, 116 S. Ct. at 1407.

275. See *id.* at 1408.

276. See *id.* at 1409.

277. See *id.* at 1408-09.

278. See *supra* Part III.A.

The dissent's interpretation is incorrect because it ignores the intent of Congress to distinguish between producers and processors and not create, as would happen through the dissent's interpretation, a nice loophole for large poultry processors.<sup>279</sup> This loophole comes from the dissent's failure to recognize that the justifications for the agricultural exemption come from its origin in the Commerce Clause. At the time of the exemption's adoption, even the work done by large, vertically-integrated poultry producers was considered to be too local in character to be regulated by the federal government.<sup>280</sup> Now, under the dissent's interpretation, a vertically-integrated poultry producer who is not performing work local in character could exempt a portion of its laborers as agricultural workers. Holly Farms who processes 96 million chickens per year and has an 18% market share<sup>281</sup> should not qualify for the exemption.

The majority's deference, on the other hand, allows the NLRB to keep up with the changes in the poultry industry. This furthers the intent of the drafters who, as clearly illustrated through legislative history, assigned the interpretation of the statute to the NLRB, thereby allowing the agricultural exemption to evolve with the ever-changing line between agriculture and industry.<sup>282</sup> The drafters did not express this delegation in the plain language of the agricultural exemption. However, they could not have predicted the creation of the *Chevron* test, which requires a look at the unambiguous language of the statute as the only indicator of Congressional intent. Therefore, the courts must look to legislative history, where available, for those statutes that were drafted pre-*Chevron*, or risk an interpretation that contradicts the clear intent of Congress. *Holly Farms* demonstrates that, in some cases, the legislative history provides clear guidance for interpreting a statute's plain meaning.

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279. See Noble, *supra* note 7 (noting that small farmers did not favor excluding the agricultural laborer from the wage and hour provisions because it would create unfair competition with large farmers who had a greater ability to hire cheap labor).

280. See *supra* text accompanying note 124-25.

281. See *supra* text accompanying notes 72, 87.

282. See *supra* Part III.A.