

2015

Child's Play: The Case Against the Department of Labor for Its Failure to Protect Children Working on America's Tobacco Farms

Leigh E. Colihan

American University Washington College of Law

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/aulr>



Part of the [Law Commons](#)

Recommended Citation

Colihan, Leigh E. "Child's Play: The Case Against the Department of Labor for Its Failure to Protect Children Working on America's Tobacco Farms." *American University Law Review* 64, no.3 (2015): 645-686.

This Comment is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in American University Law Review by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

Child's Play: The Case Against the Department of Labor for Its Failure to
Protect Children Working on America's Tobacco Farms

CHILD'S PLAY: THE CASE AGAINST THE DEPARTMENT OF LABOR FOR ITS FAILURE TO PROTECT CHILDREN WORKING ON AMERICA'S TOBACCO FARMS

LEIGH E. COLIHAN*

Children are not allowed to purchase cigarettes, yet they may legally work on the fields that produce the tobacco for those cigarettes. This anomaly can be traced back to the passage of the Fair Labor Standards Act (FLSA) in 1938 when the original exemption for agricultural laborers was first carved out. The largely outmoded ideology that all farm work is wholesome fueled the legislature in 1938 to fight against a broad application of the minimum wage, overtime, and child labor provisions to the agricultural industry. This created a sharp disconnect between the protections provided to children working in non-agricultural employment and those working in agriculture. Today, the agricultural regulations remain unchanged.

In 2011, the Department of Labor (DOL) resolved to correct this discrepancy in the law and specifically sought to forbid the employment of child farm workers in tobacco production. However, the DOL abandoned its plans for revision, conceding to pressure from Congress and farm representatives who feared the revisions would alter farming norms and negatively impact family-owned farms. Because of the DOL's decision, children, some as young as twelve, continue to legally work on tobacco farms. This Comment argues that the DOL shirked its statutory responsibility under the FLSA and acted arbitrarily and capriciously in its decision not to revise the current agricultural provisions.

* Junior Staff Member, *American University Law Review*, Volume 64; J.D. Candidate, May 2016, *American University Washington College of Law*; B.A., History, May 2011, *College of the Holy Cross*. First, I would like to thank the entire *AULR* staff for dedicating their time and effort to editing and polishing this Comment. I also want to thank Dan Amodeo and Sydney P. Sgambato, who always went the extra mile in providing guidance and advice. Most importantly, I want to express my deep gratitude to my parents, siblings—Katherine, John, and Jimmy—and Pat for their unwavering support and encouragement.

TABLE OF CONTENTS

Introduction.....	646
I. Tobacco Farming and the Dangers to Children Working on Tobacco Farms	649
II. The DOL's Duty to Regulate Child Labor Under the FLSA.....	653
A. The Lack of Protections for Agricultural Workers	656
B. The Hazardous Occupations	658
C. The 2011 Notice of Proposed Rulemaking and the Resulting Backlash.....	661
III. Judicial Review of Agency Action	663
A. DOL's Rulemaking Authority	663
B. Courts Can Review the DOL's Inaction	666
IV. The DOL Abandoned Its Regulatory Function Under the FLSA when It Rescinded the 2011 NPRM.....	671
A. The DOL's Decision Not to Regulate Child Labor on Tobacco Farms Is Not Committed to Agency Discretion	674
B. The DOL Acted Arbitrarily and Capriciously in Its Decision to Withdraw the 2011 NPRM.....	681
Conclusion	685

“There can be no keener revelation of a society’s soul than the way in which it treats its children.”¹ “A democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens, with all that implies.”²

INTRODUCTION

If there is any truth to Nelson Mandela’s contention that humanity can judge a society by the way it treats its children, then every American should be concerned about the plight of children working on America’s tobacco farms today. The United States justifiably prides itself on the expansive legal protections it has developed to protect workers of all ages. However, some glaring exceptions persist even in the twenty-first century.³ In the agricultural field, young

1. Nelson Mandela, President of S. Afr., Speech by President Nelson Mandela at the Launch of the Nelson Mandela Children’s Fund (May 8, 1995), *available at* http://db.nelsonmandela.org/speeches/pub_view.asp?pg=item&ItemID=NMS250&xtstr=Dates:%201995%20-%201995.

2. *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944) (upholding a statute that prohibited children from passing out pamphlets on the street).

3. *See, e.g.*, 29 U.S.C. § 213(a)(6) (2012) (creating an exemption to the Fair Labor Standards Act’s (FLSA) minimum wage and hour requirements for employees employed in agriculture); *id.* § 213(c) (permitting a general exemption to the FLSA’s

children currently working on tobacco farms are subjected to working conditions that harken back to the nineteenth century⁴—a situation fully permitted under applicable laws.⁵ Similar to black lung disease that children developed from working in mines,⁶ child laborers on tobacco farms suffer from acute tobacco poisoning.⁷ Children on tobacco farms are exposed to harmful pesticides, face possible dismemberment from dangerous tools, and sustain serious injuries from lifting heavy loads and climbing barn rafters to hang the tobacco plants for drying.⁸ These conditions continue despite recent evidence showing that children who work on these farms are particularly vulnerable to tobacco-related diseases and other risks.⁹

The enactment of the Fair Labor Standards Act (FLSA) in 1938 established, for the first time, a federal law outlining a general ban on child labor.¹⁰ The FLSA forbids the use of “oppressive child labor”¹¹ in commerce or in the production of goods for commerce.¹² The term “oppressive child labor” is described as the employment of a child who does not meet the minimum age required by the FLSA.¹³ Yet, the FLSA defines “oppressive child labor” differently based upon whether the occupation is considered agricultural¹⁴ or non-agricultural work.¹⁵

child labor provisions in § 212 for any child “employed in agriculture outside of school hours for the school district where such employee is living while he is so employed”).

4. See HUGH D. HINDMAN, *CHILD LABOR: AN AMERICAN HISTORY* 25–43 (2002) (describing the rise of child labor in the United States beginning with the “Lowell girls,” teenage workers who boarded and worked in textile mills).

5. See *infra* Part II.

6. See HINDMAN, *supra* note 4, at 91 (describing the basic job children performed in coal mines). These children were penned “the breaker boys.” *Id.* The breaker boys manually removed slate and other impurities from the coal. *Id.* Throughout this process, the boys cut and bruised their fingers and inhaled coal dust. *Id.*

7. See *infra* Part I.

8. *Infra* Part I.

9. *Infra* Part I (detailing the different hazards associated with tobacco production).

10. See 29 U.S.C. § 212 (2012).

11. See *id.* § 203(*l*) (defining “oppressive child labor”).

12. *Id.* § 212(a).

13. See *id.* § 203(*l*) (requiring a minimum age of sixteen); 29 C.F.R. §§ 570.1(b)–(c), 570.2 (2013) (prohibiting work by children under sixteen unless an exception is met).

14. See *infra* note 66 (defining “agriculture”).

15. See 29 U.S.C. § 213(c)(1) (stating that the provisions outlined in section 212 of the FLSA—the Act’s provisions on child labor—“shall not apply to any employee employed in agriculture outside of school hours for the school district where such employee is living while he is so employed”). From the beginning, the FLSA drew a stark line between agricultural and non-agricultural work, creating the disparity in coverage between the two sectors that exists today.

Defining “oppressive child labor” differently for agricultural and non-agricultural occupations resulted in diminished protections for child agricultural workers. For all industries except agriculture, “oppressive child labor” means the employment of any child under the age of sixteen who engages in any activity or occupation, and any child between the ages of sixteen and eighteen who engages in work that the Secretary of Labor (“Secretary”) deems to be “particularly hazardous.”¹⁶ By contrast, Congress reduced the minimum working age to twelve for minors working in agricultural jobs¹⁷ and prohibited children under the age of sixteen from working in an occupation the Secretary deemed to be “particularly hazardous.”¹⁸ Consequently, child farm workers between sixteen and eighteen years of age are allowed to work in dangerous or hazardous jobs without any protections while their counterparts in non-agricultural occupations enjoy protections mandated by the Secretary.¹⁹

Despite the FLSA’s prohibition of “oppressive child labor,” tobacco products farmed by children, some younger than twelve years old on certain smaller farms, are still sold in stores across the United States.²⁰ In effect, child workers on tobacco farms face many of the same health risks as adult smokers because the Department of Labor (DOL) has not designated tobacco production as a hazardous occupation.²¹

16. *See id.* § 203(*l*) (stating that oppressive child labor exists when employing a child under the age of sixteen or when “any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find . . . to be particularly hazardous for . . . children between such ages or detrimental to their health or well-being”); 29 C.F.R. § 570.2(a)(1) (setting sixteen as the general minimum age for child employment for all “occupation[s] other than in agriculture”).

17. *See* 29 C.F.R. § 570.2(b) (establishing a minimum age of sixteen for children employed during school hours, a minimum age of fourteen for employment outside of school hours, and a minimum age of twelve for employment in non-hazardous jobs but only with parental consent or at a location where the parent is also employed).

18. 29 U.S.C. § 213(c)(2); 29 C.F.R. § 570.2(b).

19. *Compare* 29 C.F.R. § 570.71(a) (prohibiting children under sixteen from working for hazardous occupations in agriculture), *with* 29 C.F.R. § 570, subpt. E note (establishing an age range of sixteen to eighteen years of age as the minimum age for hazardous jobs in non-agriculture).

20. *See Made in the USA: Child Labor & Tobacco*, HUM. RTS. WATCH (May 13, 2014), <http://mm.hrw.org/content/made-usa-child-labor-tobacco> (stating that the tobacco grown in the United States is used to make popular cigarette brands like Marlboro, Newport, and Camel, and that many of the tobacco workers are children as young as twelve).

21. The Department of Labor (DOL) is delegated with the responsibility of enforcement under the FLSA. *See* 29 U.S.C. § 204(a) (creating the Wage and Hour Division within the DOL). As part of its delegated authority, the Secretary of Labor (“Secretary”) has the authority to designate jobs that are too hazardous for children

The focus on child tobacco workers serves as a case study for why the current regulations for child laborers working in agriculture are flawed. In 2011, the DOL had an opportunity to remedy the outmoded provisions but abandoned its plans following strong opposition from Congress and farm representatives. This Comment argues that the DOL acted arbitrarily and capriciously and abandoned its regulatory directive under the FLSA to protect child laborers when it decided not to revise the current agricultural provisions.

Part I describes the hazards associated with tobacco production, focusing on stories recounted by children working on tobacco farms. Part II provides a historical overview of the agricultural regulations under the FLSA and the factors that have stunted legislation aimed at protecting child agricultural workers. This Part also recounts the DOL's recent failed attempt to revise the regulations. Part III outlines the various prerequisites for judicial review of an agency's action and demonstrates how a court could review the DOL's failure to act on behalf of child tobacco workers. Part IV concludes that the DOL's decision to rescind its rule revising the agricultural regulations was not committed to agency discretion and should therefore face judicial scrutiny. If the DOL were commanded to justify its decision, a court would likely strike it down as arbitrary and capricious and in clear violation of the DOL's statutory command.

I. TOBACCO FARMING AND THE DANGERS TO CHILDREN WORKING ON TOBACCO FARMS

Children are involved in all stages of tobacco production. The cultivation of tobacco begins with planting seeds in greenhouses or plant beds.²² As the tobacco grows, workers are responsible for removing the large flowers that grow on the tops of the tobacco plants—a process called “topping”—and remove “suckers,” which are leaves that harm the quality and quantity of tobacco.²³ Both processes are done by hand.²⁴ Following the topping process, the

to perform—the so-called “hazardous occupations.” See 29 C.F.R. §§ 570.50–570.68 (recording the non-agricultural hazardous occupations); 29 C.F.R. § 570.71(a) (listing the agricultural occupations too hazardous for children).

22. HUMAN RIGHTS WATCH, TOBACCO'S HIDDEN CHILDREN: HAZARDOUS CHILD LABOR IN UNITED STATES TOBACCO FARMING 27 (2014), available at http://www.hrw.org/sites/default/files/reports/us0514_UploadNew.pdf [hereinafter HRW, TOBACCO'S HIDDEN CHILDREN].

23. *Id.* at 28.

24. *Id.*

plants are next harvested and dried in a procedure called “curing.”²⁵ The curing procedure varies depending on the type of tobacco: flue-cured tobacco and burley tobacco.²⁶ Harvesting the burley tobacco is more labor intensive because it is done primarily by hand while flue-cured tobacco is harvested by machine.²⁷ Direct contact with tobacco plants poses considerable risks to child laborers.

The hazards associated with tobacco production are prominent, well-documented, and known to regulators.²⁸ Recently, Human Rights Watch (HRW) published a report outlining a grim picture of child labor on tobacco farms in the United States.²⁹ The report documents conditions on farms in North Carolina, Tennessee, Kentucky, and Virginia.³⁰ Researchers interviewed 141 child tobacco workers between the ages of seven and seventeen as part of the study, and seventy-five percent of the respondents reported a wide range of symptoms, including vomiting, nausea, headache, dizziness, skin rashes, and burning eyes.³¹ The list of tobacco farming-related injuries is extensive and includes such serious health problems as heat stroke and dehydration,³² pesticide exposure,³³ dismemberment

25. *Id.*

26. *Id.* at 28–29.

27. *Id.*

28. *See generally id.* at 1–19; MARSHFIELD CLINIC, BLUEPRINT FOR PROTECTING CHILDREN IN AGRICULTURE: THE 2012 NATIONAL ACTION PLAN (2012), *available at* http://www.marshfieldclinic.org/proxy/MCRF-Centers-NFMC-NCCRAHS-2012_Blueprint_for_Child_Ag_Inj_Prev.1.pdf; NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, DEP’T OF HEALTH & HUMAN SERVS., NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH (NIOSH) RECOMMENDATIONS TO THE U.S. DEPARTMENT OF LABOR FOR CHANGES TO HAZARDOUS ORDERS 1, 143 (2002), *available at* <http://www.cdc.gov/niosh/docs/nioshrecsdolhaz/pdfs/dol-recomm.pdf> [hereinafter NIOSH, RECOMMENDATIONS FOR CHANGES TO HAZARDOUS ORDERS]; OXFAM AM., A STATE OF FEAR: HUMAN RIGHTS ABUSES IN NORTH CAROLINA’S TOBACCO INDUSTRY (2011), *available at* <http://www.oxfamamerica.org/static/media/files/a-state-of-fear.pdf>.

29. HRW, TOBACCO’S HIDDEN CHILDREN, *supra* note 22, at 3 (reporting that children are exposed to dangerous toxins and risk serious injury by lifting heavy loads and climbing into the rafters of barns).

30. *Id.* Roughly ninety percent of all tobacco grown in the United States comes from North Carolina, Kentucky, Tennessee, and Virginia. *Id.*

31. *Id.*

32. *See id.* at 52–53. One thirteen-year-old boy complained that the hot sun made his skin feel like it was burning. *Id.* Another eighteen-year-old remembered a particularly hot day when the temperature hovered around 102 or 103 degrees Fahrenheit; by three o’clock he started to see colors from the combination of the high temperatures and his dehydration. *Id.*

33. *See, e.g., id.* at 45 (finding that 63 out of 120 children interviewed have seen tractors spraying pesticides in the fields where they were working or in adjacent fields). Five children indicated that they applied pesticides to tobacco plants

from dangerous tools and heavy machinery,³⁴ and green tobacco sickness (“GTS”), a type of nicotine poisoning caused by absorption of nicotine through the skin after handling wet tobacco plants.³⁵

While the law prohibits children under eighteen from purchasing cigarettes,³⁶ children who work on tobacco farms are exposed to dangerous levels of nicotine simply from working in the fields.³⁷ One child laborer described working in a hot barn where “the smell [of tobacco] fill[ed] [his] nose and mouth.”³⁸ Legislators opted to prohibit the sale of cigarettes to children because of the increased chances of heart disease, tooth disease, decreased physical fitness, and impaired lung growth and function, and yet children are permitted to farm tobacco despite their exposure to the same danger.³⁹ According to a study on GTS, the average field worker

themselves using a handheld sprayer and backpack, or by operating a tractor designed to spray pesticides. *Id.* at 49. Using pesticides is a common practice on farms, yet tobacco workers are at a higher risk for pesticide exposure based on the way in which tobacco is farmed. *Id.* at 51. Typically tobacco workers are surrounded by tall plants and have close, direct contact with leaves treated with pesticides. *Id.*

34. *Id.* at 53 (highlighting the common use of axes and sharp spikes to cut and spear burley tobacco plants on tobacco farms). One seventeen-year-old worker severed two of his fingers while using a mower to trim tobacco seedlings before they were planted in the ground. *Id.* at 56. His employers offered him one hundred dollars to cover his medical bills and lost wages due to the accident, despite the boy's permanent dismemberment and continuous pain. *Id.* at 56–57.

35. See *NIOSH Issues Warning to Tobacco Harvesters*, CENTERS FOR DISEASE CONTROL & PREVENTION (July 8, 1993), www.cdc.gov/niosh/updates/93-115.html (emphasizing forty-seven people sought emergency room care for green tobacco sickness (“GTS”) over a two-month period in five counties of Kentucky alone).

36. See generally *State Tobacco Activities Tracking and Evaluation (STATE) System: Legislation—Youth Access*, CENTERS FOR DISEASE CONTROL & PREVENTION, <http://apps.nccd.cdc.gov/statesystem/DetailedReport/DetailedReports.aspx?TopicID=606&MeasureID=628> (last visited Mar. 30, 2015) (analyzing the various state regulations that ban the sale of tobacco products to minors).

37. See, e.g., HRW, *TOBACCO'S HIDDEN CHILDREN*, *supra* note 22, at 41 (according to Dr. Thomas Arcury, the director of the Center for Worker Health at Wake Forest School of Medicine, “[t]he tobacco plant . . . contains nicotine from the time it's a seedling to the end”); *US: Child Workers in Danger on Tobacco Farms*, HUM. RTS. WATCH (May 14, 2014), <http://www.hrw.org/news/2014/05/14/us-child-workers-danger-tobacco-farms> (“As the school year ends, children are heading into the tobacco fields, where they can't avoid being exposed to dangerous nicotine, without smoking a single cigarette.”).

38. HRW, *TOBACCO'S HIDDEN CHILDREN*, *supra* note 22, at 37–38 (first alteration in original).

39. See *cf. Effects of Tobacco on Children*, AM. ACAD. PEDIATRICS, <http://www.aap.org/richmondcenter/EffectsOfTobaccoOnChildren.html> (last visited Mar. 30, 2015) (explaining that children's immature lungs make them especially prone to the harmful effects of tobacco).

working on fields after a rainfall can be exposed to as much as 600 mL of dew, which contains the amount of nicotine found in approximately thirty-six average cigarettes.⁴⁰ The HRW report also contained numerous accounts of symptoms consistent with GTS, including vomiting, nausea, dizziness, and headaches.⁴¹ GTS is caused by the absorption of nicotine from the surface of wet tobacco through the skin.⁴² According to industrial hygienists with the National Institute for Occupational Safety and Health (NIOSH), it is common for tobacco workers' clothing to become saturated with nicotine within minutes of beginning field work.⁴³ One study has even linked occupational exposure to tobacco to a higher risk of suicide.⁴⁴

Many critics question whether young children possess the maturity and judgment to perform the hazardous tasks associated with tobacco farming.⁴⁵ Children are at risk of injury and death in the workplace due to their lack of work experience and other developmental factors.⁴⁶ Unlike adult workers, children need more, rather than less, regulatory protections to ensure their safety.⁴⁷ Yet, the existing

40. HUMAN RIGHTS WATCH, UNITED STATES FIELDS OF PERIL: CHILD LABOR IN US AGRICULTURE 58 (2010), available at http://www.hrw.org/sites/default/files/reports/crd0510webwcover_1.pdf.

41. HRW, TOBACCO'S HIDDEN CHILDREN, *supra* note 22, at 39.

42. *Id.*

43. NIOSH *Issues Warning to Tobacco Harvesters*, *supra* note 35.

44. Noa Krawczyk et al., *Suicide Mortality Among Agricultural Workers in a Region with Intensive Tobacco Farming and Use of Pesticides in Brazil*, 56 J. OCCUPATIONAL & ENVTL. MED. 993, 999 (2014) (concluding that the neurotoxic effects of prolonged exposure to tobacco or pesticides related to tobacco farming can increase the risk of suicide in farm workers).

45. See, e.g., Letter from David Strauss, Exec. Dir., Ass'n of Farmworker Opportunity Programs, to Adm'r, Wage & Hour Div. 3 (Nov. 22, 2011), available at <http://www.regulations.gov/contentStreamer?objectId=0900006480f74917&disposition=attachment&contentType=pdf> (opposing the student-learner exemption that permits children to operate tractors if they participate in a short-term training course because children's brains are still developing and lack the cognitive ability to recognize and correctly respond to hazardous situations).

46. See NIOSH, RECOMMENDATIONS FOR CHANGES TO HAZARDOUS ORDERS, *supra* note 28, at 6 (highlighting the increased risk for youth because of their lack of experience and resulting inability to easily recognize hazards); see also *Children Are at Greater Risks from Pesticide Exposure*, ENVTL. PROTECTION AGENCY (Jan. 2002), <http://www.epa.gov/opp00001/factsheets/kidpesticide.htm> (explaining that children are more susceptible to developmental problems from pesticide exposure because their bodies are still in the "critical periods" of human development).

47. See, e.g., Children's Bicycle Helmet Safety Act of 1994, 15 U.S.C. §§ 6001-6006 (2012) (creating safety standards to which all bike helmets must conform and allowing the National Highway Traffic Safety Administration to use grants to encourage states to require helmet use for children under sixteen); Children's

regulatory structure appears to take the exact opposite approach for children working on tobacco farms.⁴⁸ Even though the hazards associated with farm work are well-documented and known to the DOL, it has failed to appropriately protect child workers.

II. THE DOL'S DUTY TO REGULATE CHILD LABOR UNDER THE FLSA

The FLSA was enacted in 1938 after a bitter congressional battle. Between 1916 and 1935, Congress attempted unsuccessfully to regulate the problem of abusive child employment through its Commerce Clause power.⁴⁹ Different rationales have been offered to explain why the early attempts at federal regulation of child labor failed. One explanation centers on the myth that work—especially farm work—presented an invaluable opportunity for a child to learn the meaning of hard work in a wholesome environment.⁵⁰ In some areas of the United States, certain agricultural jobs are seen as part of a child's upbringing and are described as a rite of passage for many

Online Privacy Protection Act of 1988, 15 U.S.C. §§ 6501–6506 (imposing certain requirements on operators of websites or online services directed to children under thirteen years old and on operators of websites or online services that collect personal information online from a child under thirteen years old); Child Nutrition Act, 42 U.S.C. §§ 1771–1793 (recognizing the corollary between a nutritious diet and a child's capacity to develop and learn, Congress delegated authority to the Secretary of Agriculture to institute programs focused on providing healthful and nutritious foods to the "Nation's children").

48. The dangers facing children in agricultural work are not isolated to tobacco cultivation. In the summer of 2011, two fourteen-year-old girls working as part of a crew detasseling corn were electrocuted to death when they came into contact with "irrigation equipment or a nearby puddle conducting high voltage" after a weekend of heavy rains. Douglas Belkin & Scott Kilman, *Midwest Teenage Rite Ends in Tragedy*, WALL ST. J. (July 29, 2011), <http://online.wsj.com/news/articles/SB10001424053111904888304576474452455817760>.

49. See generally Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (1933), *invalidated by* United States v. Butler, 297 U.S. 1 (1936); National Industrial Recovery Act of 1933, Pub. L. No. 73-67, 48 Stat. 195, *invalidated by* A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Child Labor Tax Law of 1919, Pub. L. No. 65-254, §§ 1200–07, 40 Stat. 1057, 1138–40 (1919), *invalidated by* Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922); Keating-Owen Act, Pub. L. No. 64-249, 39 Stat. 675 (1916), *invalidated by* Hammer v. Dagenhart, 247 U.S. 251 (1918).

50. See, e.g., Davin C. Curtiss, Note, *The Fair Labor Standards Act and Child Labor in Agriculture*, 20 J. CORP. L. 303, 308 (1995) (highlighting the romantic ideals that many individuals associated with farm work); Sharon Selz, *The A-Maize-ing Race*, COUNTRY WOMAN MAG., June/July 2011, at 14, 16–17, *available at* <http://www.notafraidtosweat.com/pdf/nats-country-woman-article.pdf> (promoting detasseling as a means to teach teenagers the value of work and the ability to persevere under tough conditions).

teenagers.⁵¹ Yet, the fanciful benefits of some agricultural work color the reality that the agricultural industry poses real risks for children.⁵² Even today, many people associate labor-intensive work with “individual development, maturity, and [a] sense of responsibility.”⁵³ Often, the outdoor work associated with agricultural employment was juxtaposed against the “moral turpitude of city sweatshops” in order to portray farm labor as the “divine occupation” and mask the dangers associated with farm work.⁵⁴ Thus, a well-accepted notion developed, suggesting that little harm would come from exposing children to hard, menial labor at a young age, which limited the scope of legislative restraints placed on child laborers in agriculture.⁵⁵

Powerful rural representatives and lobbyists also presented a formidable obstacle to the legislation.⁵⁶ Farm representatives believed that if farmers were forced to pay minimum wages or adhere to working hour restrictions, then it would be “virtually impossible for

51. For example, corn detasseling is a common summer job for children in the Midwest, a major corn producing region. See, e.g., Luke Nichols, *Beatrice Teacher Makes Detasseling a Tradition*, BEATRICE DAILY SUN (July 27, 2011, 6:00 AM), http://beatricedailysun.com/news/local/beatrice-teacher-makes-detasseling-a-tradition/article_a6e0a69e-b7fd-11e0-a8de-001cc4c03286.html (describing a yearly tradition where a group of teachers take between 100 and 150 children to corn fields every summer for fifteen to twenty-five days to detassel).

52. See, e.g., *Agricultural Child Labor Act of 1971: Hearings on H.R. 10499 and H.R. 1597 Before the Subcomm. on Agric. Labor of the H. Comm. on Educ. & Labor*, 92d Cong. 4 (1971) (statement of Rep. James G. O’Hara, Chairman, Subcomm. on Agric. Labor) (arguing that the Subcommittee must align benefits associated with farm work with the reality of the working conditions as they actually exist today in agriculture—accounting for “the frequency and severity of accidents” and other hazards); *Safety and Health Topics: Agricultural Operations*, OCCUPATIONAL SAFETY & HEALTH ADMIN., <https://www.osha.gov/dsg/topics/agriculturaloperations> (last visited Mar. 30, 2015) (reporting that “[a]griculture ranks among the most dangerous industries” because “[f]armworkers are at high risk for fatal and nonfatal injuries” and “[b]etween 2003 and 2011, 5,816 agricultural workers died from work-related injuries in the US”); *supra* Part I (focusing on the dangers of tobacco farming).

53. Megan McGinnis, Note, *Child Farm Labor Under the Fair Labor Standards Act*, 20 KAN. J.L. & PUB. POL’Y 155, 167 (2010).

54. Curtiss, *supra* note 50, at 308.

55. *Id.* (stating that the characterization of agricultural work as “wholesome” and invaluable was an obstacle to the legislative protection of children on farms); see also Richard S. Kirkendall, *Up to Now: A History of American Agriculture from Jefferson to Revolution to Crisis*, AGRIC. & HUM. VALUES, Winter 1987, at 3, 3–4, reprinted in SUSAN A. SCHNEIDER, *FOOD, FARMING, AND SUSTAINABILITY: READINGS IN AGRICULTURAL LAW* 3, 3–4 (2011) (discussing the origin of the agrarian myth in the United States and the role Thomas Jefferson played in bolstering the value of the family farm).

56. See, e.g., 83 CONG. REC. 9257 (1938) (statement of Rep. Hartley) (suggesting that the farm bloc stronghold in the House of Representatives would have vetoed the FLSA if it had not included an outright exemption for agricultural work).

the farmer to secure hired help on wages within his reach.”⁵⁷ These groups argued that farming was different from other industries because farms relied on hiring seasonal workers at low costs.⁵⁸ Many southern representatives held so-called lynchpin votes, which they used to thwart what they perceived as a potential threat to the future success of the agriculture industry.⁵⁹ One theorist posited that the importance of maintaining a source of cheap minority labor, comprised largely of African Americans, for the large southern agricultural employers fueled the southern representatives to fight for the agricultural exemption under the FLSA.⁶⁰ Despite many obstacles, the FLSA finally passed both the House and Senate after two regular sessions and one special session of Congress.⁶¹ However, as a result of the numerous concessions made in the negotiations leading up to its passage, the FLSA's child labor provisions were significantly weakened.⁶²

57. 82 CONG. REC. 1477 (1937) (statement of Rep. Rutherford) (reciting the reasons the National Grange—a farm lobbyist group—opposed the FLSA as applied to farmers).

58. See *id.* at 1476 (statement of Rep. Culkin) (justifying an exemption for agriculture because “[t]he farmer is a seasonal worker . . . subject to the changes in season and to changes in the weather . . . [and he generally works] longer hours during some seasons than he does in others”). One representative pointed to the irregular hours at which a cow needs to be milked to highlight the foolishness of imposing regulated hours on a farm worker. *Id.* (arguing that the time at which a cow needs to be milked cannot be regulated and to “let the cow function as God intended”).

59. See Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1351 (1987) (explaining that President Roosevelt was left with no alternative but to cooperate with the southern congressmen because they occupied “over half the committee chairmanships and a majority of leadership positions in every New Deal Congress” (quoting HARVARD SITKOFF, *A NEW DEAL FOR BLACKS: THE DEPRESSION DECADE* 45 (1978))).

60. See Seymour Moskowitz, *Dickens Redux: How American Child Labor Law Became a Con Game*, 10 WHITTIER J. CHILD. & FAM. ADVOC. 89, 151 (2010) (suggesting that southern congressmen were intent on protecting the South's existing Jim Crow economy, which depended on the cheap supply of minority labor).

61. See Jonathon Grossman, *Fair Labor Standards Act of 1938: Maximum Struggle for a Minimum Wage*, U.S. DEP'T LAB., <http://www.dol.gov/dol/aboutdol/history/flsa1938.htm> (last visited Mar. 30, 2015) (recounting the FLSA's passage). The bill was introduced on May 24, 1937. *Id.* After the bill failed to pass during the first session of Congress, President Roosevelt called a special session to begin November 15, 1937. *Id.* The bill finally passed Congress after another session on June 13, 1938 and was signed into law on June 25, 1938. *Id.*

62. See, e.g., *id.* (noting that over the course of the battle for the FLSA's passage, members of Congress proposed seventy-two amendments seeking to weaken the bill with narrower coverage, lower standards, and exemptions); see also Moskowitz, *supra* note 60, at 141 (“The child labor provisions were a side show in the general struggle

A. *The Lack of Protections for Agricultural Workers*

Despite President Roosevelt's acknowledgement that agricultural workers were among the most "ill-nourished, ill-clad, and ill-housed" in the nation,⁶³ the legislative history of the FLSA shows that special treatment of agriculture was all but destined from the start. At the congressional hearings held on the FLSA, the question was not so much whether an agricultural exemption should be included, but rather how far the exemption should extend.⁶⁴ The bill proposed in 1937 ultimately excluded agriculture, and contained, according to one of the sponsors, "the most comprehensive definition of agriculture which ha[d] been included in any one legislative proposal."⁶⁵ Accordingly, Congress intended for the definition of agriculture to broadly cover every activity and task associated with farming operations,⁶⁶ allowing a farm owner ample means to circumvent many of the FLSA's core child labor, minimum wage, and overtime provisions.⁶⁷ The agricultural exemption was aimed largely at protecting family farms, where child labor was considered to be necessary, and clearly reflects the contemporary influence of the era's agricultural norms.⁶⁸ Unfortunately, the resulting relaxation of

for passage [of the FLSA], but decisions made during this battle have impacted the history of child labor in the United States to this day.").

63. S. REP. NO. 75-884, at 1 (1937).

64. See 81 CONG. REC. 7658 (1937) (statement of Sen. Black) (responding to an inquiry as to whether the exemption applied to an apple farmer who harvested, packed, and transported produce to market, Senator Black simply stated that "agriculture in all its phases should be exempted"); see also Patrick M. Anderson, *The Agricultural Employee Exemption from the Fair Labor Standards Act of 1938*, 12 HAMLINE L. REV. 649, 652 (1989) (stating that most of the criticism of the exemption was centered on fears that the exemption was not strong enough).

65. 81 CONG. REC. 7648 (statement of Sen. Black).

66. The FLSA defines agriculture as "farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities (including commodities defined as agricultural commodities in section 1141j(g) of title 12), the raising of livestock, bees, fur-bearing animals, or poultry, and any practices (including any forestry or lumbering operations) performed by a farmer or on a farm as 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." 29 U.S.C. § 203(f) (2012).

67. Interestingly, farm workers are similarly mistreated under the National Labor Relations Act, which specifically excludes agricultural workers from seeking improved terms and conditions of employment. *Id.* § 152(3) ("[E]mployee' . . . shall not include any individual employed as an agricultural laborer").

68. See *supra* notes 50–55 and accompanying text (describing the mythological characterization of all agricultural work as important to a child's upbringing).

protections for children employed in agriculture permitted unsafe and hazardous working conditions that endure to modern times.⁶⁹ While the FLSA has been amended numerous times, the sections outlining the particular rules for agricultural work have largely remained the same.⁷⁰

The contrast between the legal protections afforded to children who work in non-agricultural jobs and their counterparts in agricultural positions is both significant and revealing. Current federal law permits underage agricultural employees to work at younger ages than in any other occupation.⁷¹ Children of any age can work at any time in any job on a farm owned or operated by their parents.⁷² Children under twelve years old can work unlimited hours outside of school on farms owned or operated by their parents or by someone standing in place of their parents; such children can also be employed on a farm where all employees are exempt from minimum wage requirements if granted written consent by the parent or person.⁷³ While children between twelve and thirteen years old need written parental consent to work on a farm that also employs their parents,⁷⁴ the law does not similarly restrict children between fourteen and fifteen years old, thus enabling them to work freely outside of school hours.⁷⁵

Federal law also permits child agricultural workers, irrespective of their age, to work longer hours than children in any other

69. See *supra* Part I (illustrating the hazards children face while working in tobacco fields).

70. See Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,839, 54,849 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pts. 570, 579) (acknowledging that the Agricultural Hazardous Orders have remained unchanged for over forty years); see also Ellen C. Kearns, *Preface* to SECTION OF LABOR & EMP'T LAW, AM. BAR ASS'N, THE FAIR LABOR STANDARDS ACT, at xxv-vi (Ellen C. Kearns ed., 1999) (commenting that the coverage and exemption provisions have changed significantly since 1938, "but the basic framework of the *minimum wage*, *overtime*, and *child labor* provisions" have not). See generally 29 C.F.R. §§ 570, 579 (2013) (outlining various hazardous occupations).

71. See 29 C.F.R. § 570.2(a)(1) (setting the minimum age for child employment at sixteen for all occupations other than agriculture).

72. See *id.* § 570.2(b)(2) (permitting a minor younger than twelve years old to be employed by his parent or by a person standing in the place of his parent on a farm owned or operated by that parent or person).

73. *Id.*

74. *Id.* § 570.2(b)(1).

75. *Id.* § 570.2(b) (permitting children over fourteen years old to work regardless of parental consent); see also 29 U.S.C. § 213(c)(1)(C) (2012) (stating that the FLSA child labor restrictions do not apply to employees "fourteen years of age or older").

occupation.⁷⁶ In any other industry, children are prohibited from working until they reach fourteen years of age, at which time they may work for only three hours per day under certain limited conditions.⁷⁷ Because maximum hours restrictions do not apply to agricultural employees, the Secretary has authority to prohibit a fourteen year old from working in a mall for more than three hours while school is in session, but he cannot stop that same child from working on a tomato crop until 3:00 A.M and then attending a full day of school the next morning.⁷⁸ Given the perilous nature of the work normally performed on farms and tobacco farms in particular, discrepancy created under the FLSA between agricultural and non-agricultural work merits closer scrutiny.⁷⁹

B. *The Hazardous Occupations*

The Secretary of Labor has an important mechanism at his disposal that can act as a safeguard against the lenient rules governing children employed in agricultural work, namely the authority to define so-called “hazardous occupations.”⁸⁰ Congress amended the FLSA in 1966 to give the Secretary the authority to issue Agricultural Hazardous Orders.⁸¹ Congress specifically did not define what constitutes “hazardous employment” on the basis that it was “more practicable” to endow the Secretary with “flexibility” in this determination.⁸²

The Secretary also has jurisdiction to determine which occupations in the non-agricultural sector qualify as hazardous.⁸³ Currently, there

76. 29 U.S.C. § 213(b)(12) (precluding FLSA’s provisions on maximum hour standards from applying to agricultural employees).

77. See 29 C.F.R. § 570.35(a)(5) (limiting fourteen and fifteen year olds to three hours of work in non-agricultural jobs on any day when school is in session, including Fridays).

78. See *Mitchell v. Hornbuckle*, 155 F. Supp. 205, 212 (M.D. Ga. 1957) (acknowledging the negligible effects that working late hours has on children, yet the court had no jurisdiction to “prohibit or even regulate” the children from working until three in the morning since the FLSA regulates child agricultural workers only during school hours).

79. See *supra* Part I (focusing specifically on tobacco farming as dangerous); *infra* notes 94–97 (describing agricultural work as generally hazardous).

80. See 29 U.S.C. § 203(l).

81. Fair Labor Standards Amendments of 1966, Pub. L. No. 89–601, § 203(d), 80 Stat. 830, 834.

82. S. REP. NO. 88-200, at 6 (1963) (noting that the absence of definition was intentional because of the “almost daily” changes to “the harvest techniques of modern farming”).

83. See generally 29 C.F.R. §§ 570.50–570.68 (2013) (listing seventeen occupations deemed “particularly hazardous” for minors under the age of eighteen).

are seventeen Non-Agricultural Hazardous orders,⁸⁴ as opposed to only eleven Agricultural Hazardous Orders.⁸⁵ The Non-Agricultural Hazardous orders cover a broad array of industries, ranging from restaurants, bakeries, and grocery stores, to mining and woodworking.⁸⁶ For example, the Secretary prohibits any child under eighteen from working with power-driven bakery machines, meat-processing machines, and woodworking machines.⁸⁷ Under the Agricultural Hazardous Orders, children under sixteen cannot, among other tasks, operate a tractor with more than twenty PTO horsepower or a fork lift, work inside a fruit, forage or grain storage bin, or work from a ladder or scaffold over twenty feet.⁸⁸ The Secretary has not declared tobacco production to be a hazardous job. Therefore, a tobacco grower who hires a twelve-year-old to work an unlimited number of hours on his farm during the summer is not breaking the law, provided the child has parental consent.

The classification of hazardous occupations in the agricultural sector versus the non-agricultural sector further deepens the disparity of protections between the two types of occupations. While children under sixteen years of age are restricted from working in hazardous jobs in the agricultural field, the minimum age is set higher, at eighteen, for hazardous non-agricultural occupations.⁸⁹ Moreover, the prohibition against working in a hazardous occupation does not apply to a child employed “by his parent or by a person standing in the place of his parent on a farm owned or operated by such parent or person.”⁹⁰ The ban on employment in hazardous occupations for non-agricultural jobs cannot be similarly waived by the parental exception.⁹¹

In both industries, the use of automobiles and trucks is regulated, but comparing the two hazardous orders illustrates that the restrictions for agricultural child laborers is less strict. Section 213(c)(6) of the FLSA prohibits any youth under seventeen engaged

84. *See generally id.*

85. *Id.* § 570.71(a).

86. *Id.* §§ 570.50–570.68.

87. *See generally id.*

88. *Id.* § 570.71(a).

89. *Compare id.* § 570.71(a) (establishing sixteen as the minimum age for hazardous occupations in agriculture), *with id.* § 570, subpt. E note (setting the cutoff age at eighteen for hazardous jobs in non-agriculture).

90. *Id.* § 570.70(b).

91. *Id.* § 570.126 (noting that non-agricultural occupations found by the Secretary to be hazardous for children under the age of eighteen are “specifically excluded from the scope of the [parental] exemption”).

in non-agricultural work from driving automobiles or trucks on public roads, and includes narrow restrictions on the conditions and amount of time seventeen-year-olds may drive.⁹² The operation of automobiles, trucks, or buses in the agricultural industry, however, triggers the same restriction only if the minor is transporting another passenger or if the minor is riding on a tractor as a passenger or helper.⁹³

There is a common perception that farm work is “free from the moral turpitude of city sweatshops.”⁹⁴ Yet the number of deaths and injuries suffered by children from farm-related accidents each year belies this idealized view.⁹⁵ Accordingly, it is difficult to reconcile the minimal protections offered to children working in agricultural jobs when faced with numerous reports documenting, in painstaking detail, the dangers children face daily. The NIOSH report, commissioned by the DOL in 1998 as part of an effort to update the regulations pertaining to the hazardous orders, stated that the distinctions between hazardous orders for agricultural and non-agricultural occupations are “artificial” because “the same machinery, activities and exposures are often present in both settings.”⁹⁶ For instance, children in both occupations operate power tools and machines in their work. Studies and reports that describe the day-to-day activities on farms emphasize the illogical reasoning for giving farm child laborers fewer employment protections than children working in other industries.⁹⁷

92. For instance, seventeen year olds can drive during “daylight hours,” only if they have completed a state approved driving education course, and if the automobile or truck does not exceed 6,000 pounds. 29 U.S.C. §§ 213(c)(6) (2012). There are a total of seven restrictions—(A) to (G)—imposed upon seventeen-year-old workers who drive for their employment. *Id.*

93. 29 C.F.R. § 570.71(a)(7). A child laborer is permitted to operate an automobile, truck, or bus as long as he is the only one in the vehicle.

94. *See, e.g.,* Curtiss, *supra* note 50, at 308.

95. *See* NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, DEP’T OF HEALTH & HUMAN SERVS., A SUMMARY OF NIOSH CHILDHOOD AGRICULTURAL INJURY PREVENTION EXTRAMURAL RESEARCH UNDER THE CHILDHOOD AGRICULTURAL INJURY PREVENTION INITIATIVE: A QUINDECENNIAL (1997–2011) OF PROGRESS 1 (2014), *available at* <http://www.cdc.gov/niosh/docs/2014-121/pdfs/2014-121.pdf> (calculating that about 115 youths under twenty die on farms each year and an estimated additional 15,876 are injured in farm-related incidents).

96. NIOSH, RECOMMENDATIONS FOR CHANGES TO HAZARDOUS ORDERS, *supra* note 28, at 143.

97. While this Comment focuses specifically on the perils of tobacco farming in an effort to elucidate the failings of the current agricultural regulations, other areas of farm work are equally as dangerous to children. *See, e.g.,* Anvi Patel, *Who’s Picking Your Berries? Feds Find Young Children on Strawberry Farms*, ABC NEWS (Aug. 11, 2011),

C. The 2011 Notice of Proposed Rulemaking and the Resulting Backlash

In an effort to revise child labor regulations under the FLSA, the DOL issued a Notice of Proposed Rulemaking in September 2011 (the “2011 NPRM”) detailing a number of proposed revisions to the Agricultural Hazardous Orders.⁹⁸ Among other things, the 2011 NPRM sought to increase parity between the agricultural and nonagricultural child labor provisions and reconsider the list of jobs identified as hazardous in both the agricultural and nonagricultural sectors.⁹⁹ The DOL recognized that while the regulations had not been updated in over four decades, the technology and methods used in the workforce had changed dramatically.¹⁰⁰ Thus, the DOL concluded that it was time to address and regulate the current hazards children face in the modern workforce.¹⁰¹

Importantly, the DOL’s proposed regulations would not have applied to children who work for their parents, a relative, or a friend standing in the place of a parent, regardless of the age or activity of the child.¹⁰² Therefore, the proposed rule would not have overturned the parental exemption. The proposal would have created two Non-Agricultural Hazardous orders,¹⁰³ revised the current Agricultural Hazardous Orders under 29 C.F.R. § 570.71, and added two new Agricultural Hazardous Orders, including a prohibition on employing child farm workers in tobacco production.¹⁰⁴

Following the notice and comment period, the DOL withdrew the 2011 NPRM citing the adverse effects the changes would have on small family-owned farms and farming traditions, including the loss of children’s opportunity to learn about farming through first-hand experience and a general deterrence to children entering the field of

<http://abcnews.go.com/Blotter/feds-find-young-children-working-strawberry-farms/story?id=14281166> (explaining that children picking 100 to 200 pounds of berries a day suffer from backaches).

98. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pts. 570, 579).

99. *Id.* at 54,836.

100. *Id.* at 54,849 (finding that the provisions involving the employment of children “have remained unchanged for over forty years”).

101. *Id.* (citing changes in the agricultural industry as one impetus for re-evaluating the agricultural exemptions under the FLSA).

102. *Id.* at 54,836.

103. The two Non-Agricultural Hazardous orders included a prohibition on the employment of youth in certain facilities within farm-product raw materials wholesale industries and a ban on the use of electronic devices while operating or assisting to operate certain power-driven equipment, including motor vehicles. *Id.* at 54,845.

104. *Id.* at 54,864–65.

farming.¹⁰⁵ Representatives from the agricultural industry and politicians waged a formidable campaign against the proposed rule changes, forcing the DOL to retreat.¹⁰⁶ For instance, in late January 2012, the House Small Business Committee's Subcommittee on Agriculture, Energy and Trade held a hearing to examine the 2011 NPRM.¹⁰⁷ The five witnesses invited to testify at the hearing included four farm representatives but only a single proponent of the 2011 NPRM.¹⁰⁸ Instead of providing a balanced view, most of the testimony offered a highly idealized version of farm jobs and a negative view of the proposed regulations. Moreover, the ten thousand or more commentators who submitted negative opinions about the regulations generally overlooked the fact that the 2011 NPRM expressly stated that the new regulations would *not* overturn the family exemption that had been in place since Congress first implemented the child labor regulations.¹⁰⁹ Opponents also

105. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 77 Fed. Reg. 31,549, 31,549–50 (May 29, 2012) (to be codified at 29 C.F.R. pts. 570, 579).

106. *See id.* at 31,549 (citing 153 Members of the House of Representatives and 42 U.S. Senators as among the over 10,000 commenters on the 2011 NPRM); *see also* Rachel Leven, *Child Labor Rules Rile Rural Lawmakers*, HILL (Dec. 2, 2011, 11:00 AM), <http://thehill.com/business-a-lobbying/196769-child-labor-rules-rile-lawmakers-from-farm-states> (highlighting statements made by “more than 70 lawmakers in the House,” led by Rep. Denny Rehberg—a fifth generation farmer from Montana—alleging that the DOL lacks “the conventional wisdom of what defines a family farm in the United States” and specifically attacking the representatives responsible for the 2011 NPRM as officials who do not understand rural life); Letter from Jerry Moran, U.S. Senator (Kan.), and Ben Nelson, U.S. Senator (Neb.), to Hilda L. Solis, Sec’y of Labor (Dec. 19, 2011), *available at* http://www.moran.senate.gov/public/index.cfm/files/serve?File_id=4a5d0a17-323b-4412-9a69-0f9d3175157e (calling the 2011 NPRM “misguided” and requesting the DOL to withdraw the proposed rule immediately until it can find a means to initiate changes to current Agriculture Hazardous Orders without adversely affecting rural employers).

107. *The Future of the Family Farm: The Effect of Proposed DOL Regulations on Small Business Producers: Hearing Before the H. Comm. on Small Bus.*, 112th Cong. 1 (2012) (statement of Rep. Tipton).

108. *Id.* at 3, 25, 27, 30, 31. The farm representatives included a fifth generation agricultural producer, the director of Future Farms of America—a group focused on youth agricultural education vocational training—a deputy commissioner of agriculture for West Virginia, and the Vice President of the Pennsylvania Farm Bureau. *Id.* at 25–31. The Deputy Administrator of the Wage and Hour Division was the only witness invited to support the 2011 NPRM. *Id.* at 3–4.

109. The NPRM repeatedly asserted that “[n]one of the revisions proposed . . . [would] in any way change or diminish the statutory child labor parental exemption in agricultural employment contained in FLSA section 13(c)(1)” and that the child labor provisions, similar to the FLSA’s minimum wage and overtime

mischaracterized the plain meaning of the 2011 NPRM.¹¹⁰ Not surprisingly, congressional representatives saw the negative reactions and quickly opposed the DOL's efforts.¹¹¹ Indeed, a bill was even introduced in the House of Representatives, entitled "Preserving America's Family Farms Act," that would have prohibited the Secretary from reissuing or issuing a rule "substantially similar" to the proposed rule issued by the DOL in 2011.¹¹² The bill noted the important role that family farms have played in providing youth with "valuable work experience."¹¹³ Proponents of preserving American farms and maintaining the existing conditions that allow for child farm laborers succeeded in forcing the DOL to acquiesce.

III. JUDICIAL REVIEW OF AGENCY ACTION

A. DOL's Rulemaking Authority

The FLSA established the Department of Labor's Wage and Hour Division, which is responsible for enforcing the federal minimum wage, overtime pay, and child labor regulations.¹¹⁴ Through the Wage and Hour Division, the DOL has the authority to promulgate

provisions, would only apply in an employer and child worker employment relationship. 76 Fed. Reg. at 54,841.

110. See Rena Steinzor, *The Age of Greed and the Sabotage of Regulation*, 47 WAKE FOREST L. REV. 503, 523–26 (2012) (comparing the opponents' "[w]illful[ly] [d]istort[ed]" analysis of passages from the NPRM to the actual wording of the proposed rule to highlight the hyperbolic insinuations alleged by the opponents).

111. For example, Idaho Congressman Mike Simpson characterized the NPRM as calamitous for the agricultural industry because it would hinder the ability for families "to pass on the generational knowledge and hands-on learning that is critical to the survival of the agricultural industry." Press Release, Mike Simpson, U.S. Cong., Preserving America's Family Farms Act Passes House (July 25, 2012), available at <http://simpson.house.gov/news/documentsingle.aspx?DocumentID=304630>.

112. Preserving America's Family Farms Act, H.R. 4157, 112th Cong. (2012). The act passed in the House on July 24, 2012, *id.*, but died in the Senate, see H.R. 4157 (112th): *Preserving America's Family Farms Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/112/hr4157> (last visited Mar. 30, 2015) (indicating that the bill died after only being passed by the House). The language of the act is a glaring example of the animosity towards any future regulations that could potentially curtail the liberty afforded to farm employers.

113. H.R. 4157 § 1(b)(1).

114. Wage & Hour Div., *Wage and Hour Division Mission Statement*, U.S. DEP'T LAB., <http://www.dol.gov/whd/about/mission/whdmis.htm> (last visited Mar. 30, 2015) (delineating responsibilities for enforcing minimum wage, overtime pay, recordkeeping, and child labor requirements of the Fair Labor Standards Act); see also 29 U.S.C. § 204 (2012) (creating the Wage and Hour Division in DOL and establishing the Administrator as the enforcer of the FLSA); *id.* § 206 (minimum wage); *id.* § 207 (overtime); *id.* § 212 (child labor).

final regulations, publish interpretative bulletins, and issue opinion letters in response to inquiries regarding compliance under the FLSA.¹¹⁵ On numerous occasions, the DOL has used its authority to issue rules in the Federal Register.¹¹⁶ Various regulations issued by the DOL have been challenged in court, with mixed results.¹¹⁷

Federal agencies have the power to adjudicate, legislate, and enforce laws within their specific areas of delegated power.¹¹⁸ The agencies derive power from enabling legislation.¹¹⁹ One commentator divides agencies' enabling statutes into three broad categories based upon the amount of deference Congress afforded to the agencies.¹²⁰ The broadest degree of judicial deference is given to agencies operating under "public interest statutes," where the administrative agency is instructed to regulate its subject area "in the public interest."¹²¹ At the opposite extreme, agencies

115. See SECTION OF LABOR & EMP'T LAW, *supra* note 70, at 61–65 (describing the different avenues available to the DOL to implement, interpret, or prescribe law or policy). Courts have also referred to the Wage-Hour Field Operations Handbook as a resource of authority. See *Belt v. EmCare, Inc.*, 444 F.3d 403, 415–17 (5th Cir. 2006) (deferring to a 1974 opinion letter and a 1994 Field Operations Handbook to interpret the ambiguous section 541.3(e) definition of the medical professional exemption when applied to physician assistants and nurse practitioners).

116. See *Semiannual Agenda of Regulations*, DEP'T LAB. (Nov. 21, 2014), <http://www.dol.gov/regulations/DOL-Fall-2014-Reg-Agenda.pdf> (containing a comprehensive list of all the regulations the DOL intends on promulgating, proposing, or reviewing in 2014 and 2015).

117. See *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (upholding the Secretary's interpretation of the disciplinary deduction element of the salary-basis test); *Herman v. Suwannee Swifty Stores, Inc.*, 19 F. Supp. 2d 1365, 1370–72 (M.D. Ga. 1998) (upholding the DOL's interpretation of a "bona fide commission rate" for a commissioned employee to fall under section 7(i)'s overtime exemption for commission salespersons). *But see Christensen v. Harris Cnty*, 529 U.S. 576, 588 (2000) (declining to award deference to the DOL's interpretation of the use of compensatory time because the regulation is not ambiguous and so the *Auer* deference is unwarranted); *Mortg. Bankers Ass'n v. Harris*, 720 F.3d 966, 968 (D.C. Cir. 2013) (vacating a 2010 administrative interpretation by the DOL's Wage and Hour Division that mortgage loan officers are not exempt from the FLSA's minimum wage and overtime pay requirements because the DOL switched its position from a 2006 opinion letter, which stated that loan officers were exempt, without allowing public comment through formal rulemaking), *rev'd*, 135 S. Ct. 1199 (2015).

118. See ANDREW F. POPPER ET AL., *ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH* 66, 531 (2d ed. 2010) (discussing the ability of administrative agencies to issue legislative, substantive rules and to use adjudication to enforce statutes and regulations).

119. See 29 U.S.C. § 551 (containing DOL's enabling statute).

120. See Gregory Bradshaw Foote, Note, *Judicial Review of Rescission of Rules: A "Passive Restraint" on Deregulation*, 53 GEO. WASH. L. REV. 252, 256–57 (1985).

121. *Id.* at 256 (internal quotation marks omitted). The middle category also comprises public interest statutes, yet these agencies have "somewhat less deference"

directed under “remedial legislation,” statutes focused on correcting social or economic problems, are given the least amount of rulemaking discretion.¹²² The author characterized the FLSA as an example of “remedial legislation.”¹²³

Agencies cannot take actions that go beyond their statutory authority as expressly assigned to them by Congress.¹²⁴ Thus, Congress has substantial oversight with respect to actions taken by agencies.¹²⁵ Further, according to the Administrative Procedure Act (APA), agencies must follow an open public process when issuing regulations.¹²⁶ There are two different categories of rulemaking¹²⁷: formal rulemaking¹²⁸ and informal rulemaking.¹²⁹ While informal rulemaking features fewer procedural requirements than formal rulemaking, the issuing agency nevertheless must follow a number of important formalities.

since the interest is typically defined in a more detail: “a *safe* workplace, *clean* air, *clean* water.” *Id.* Many health and safety regulations are housed within this category. *Id.*

122. *Id.* at 257.

123. *Id.*

124. See *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000) (ruling that the FDA lacked authority to regulate tobacco products because it would be “inconsistent with the intent that Congress has expressed in the FDCA’s overall regulatory scheme and in the tobacco-specific legislation”).

125. Typically, when Congress passes a law to create an agency, it grants that agency general authority to regulate certain activities within our society. See, e.g., *Massachusetts v. EPA*, 549 U.S. 497, 506 (2007) (stating that the EPA is responsible for regulating any air pollutant “from any class or classes of new motor vehicles or new motor vehicle engines” under the Clean Air Act (quoting Pub. L. 89-272, § 202(a), 79 Stat. 992, 992 (1965))); *UAW v. Brock*, 783 F.2d 237, 239, 241 (D.C. Cir. 1986) (explaining the Secretary of Labor has the sole power to enforce the Labor-Management Reporting Disclosure Act of 1959 to “protect[] . . . the rights . . . of [the] employees and the public . . . as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives” (quoting 29 U.S.C. § 401(b) (1982)) (internal quotation marks omitted)).

126. See generally 5 U.S.C. § 552 (2012) (outlining the information that agencies must make available to the public).

127. Under 5 U.S.C. § 551(5), rulemaking is defined as the process for “formulating, amending, or repealing a rule.”

128. See *id.* § 553(b)–(d) (requiring formal rules to be made “on the record after opportunity for [a] . . . hearing” and distinguishing substantive rules from other rules of interpretation, general statements of policy, and procedure, as the notice requirements apply only to substantive rules); see also *id.* §§ 556–557 (specifying judicial-like procedures agencies must follow when implementing formal rules, including oral presentation of evidence and cross-examination of opposing witnesses).

129. See *id.* § 553(b)(3)(A)–(B) (describing the procedural requirements for informal rulemaking).

The APA's notice and comment requirements apply only to substantive rules.¹³⁰ The NPRM is the official document that announces and explains the agency's proposal for addressing a particular problem or accomplishing a specified goal.¹³¹ The process begins with the agency publishing a notice of its intent to promulgate a particular rule in the Federal Register.¹³² The notice must provide a summary of the issues and actions being proposed, together with the underlying legal authority for the rule.¹³³ The agency then must provide a timeframe for public comment on the proposed rulemaking through written submissions.¹³⁴

Following the close of the comment period, the agency considers all the comments submitted and decides whether to withdraw the proposed rule or to issue a final rule taking into account the comments received. If the agency decides to issue a final rule, that rule must be a "logical outgrowth" of the proposed rule¹³⁵ and contain a "concise general statement of [the rule's] basis and purpose."¹³⁶ The final rule must be issued at least thirty days before it becomes effective.¹³⁷

B. Courts Can Review the DOL's Inaction

Agencies often successfully argue that agency inaction is not subject to judicial review.¹³⁸ It is difficult for courts to review an

130. Specifically excluded from APA rulemaking procedures are the following categories: interpretative rules, statements of policy, and procedural and internal agency management rules. *Id.* § 553(b)(3)(A).

131. *Id.* § 553(b) (outlining the general requirements that need to be included in the notice).

132. *Id.*

133. *See id.* §§ 553(b)(2)–(3).

134. *Id.* § 553(c).

135. *Chocolate Mfrs. Ass'n of the United States v. Block*, 755 F.2d 1098, 1105, 1107 (4th Cir. 1985) (finding that the prohibition on the inclusion of chocolate flavored milk in the federally funded Special Supplemental Food Program for Women, Infants, and Children in the final rule was not a "logical outgrowth" from the proposed rule in the Federal Register).

136. 5 U.S.C. § 553(c).

137. *Id.* § 553(d).

138. *See generally* *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63–64 (2004) (permitting judicial review of agency inaction but only for acts the agency is legally required to take); *Heckler v. Chaney*, 470 U.S. 821, 832 (1985) (ruling that agencies' decisions to withhold enforcement are generally not reviewable); *S. Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 456–61 (1979) (determining that the Interstate Commerce Commission's decisions not to suspend proposed rates filed by railroads were unreviewable); *Collins Music Co. v. United States*, 21 F.3d 1330, 1331, 1336 (4th Cir. 1994) (rejecting a challenge to the Internal Revenue Service's failure

agency's refusal to act because inaction is seen as an amorphous and imprecise decision and not as a discrete, final action.¹³⁹ This reasoning, however, largely ignores the courts' specific APA authority to determine whether the agency has overstepped its "statutory jurisdiction [or] authority,"¹⁴⁰ or unlawfully withheld or unreasonably delayed action.¹⁴¹ Nevertheless, an aggrieved party must overcome several hurdles before a court will review an agency's inaction. Specifically, the aggrieved party—usually the party alleging harm from the agency's failure to implement the regulation—has to establish standing,¹⁴² show that the decision was a final agency action,¹⁴³ and establish that the action is not subject to "agency discretion."¹⁴⁴

However, these justiciability requirements are not barriers to judicial review of DOL's decision to rescind its 2011 NPRM. Often, the easiest way to establish standing in a non-implementation¹⁴⁵ case

to create a tax deduction category for entertainment machines on the grounds that "inaction of an agency under such circumstances is analogous to the decision of an agency not to undertake enforcement steps"); *Kixmiller v. SEC*, 492 F.2d 641, 645 (D.C. Cir. 1974) (per curiam) (establishing that discretionary enforcement decisions are generally unreviewable); *UAW v. Donovan*, 577 F. Supp. 398, 401 (D.D.C. 1983) (declining to review a refusal by the Secretary of Labor to take enforcement action).

139. See 5 U.S.C. § 704 (providing that a court may review a "final agency action").

140. *Id.* § 706(2)(C).

141. *Id.* § 706(1) (permitting a court to "compel agency action unlawfully withheld or unreasonably delayed"). "Agency action" is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13) (emphasis added).

142. See *id.* § 702 (limiting standing to "person[s] suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute"). The purpose behind standing is to ensure that the correct plaintiff brings the case and that the injury can be redressed by a favorable court decision. Under the doctrine of standing, the plaintiff must allege an "injury in fact," the injury has to be "fairly . . . trace[able] to the challenged [agency] action" (or inaction), and the court must be capable of redressing the aggrieved harm. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (quoting *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976)) (first two alterations in original).

143. 5 U.S.C. § 704 (requiring a "final agency action for which there is no other adequate remedy in a court").

144. See *id.* § 701(a) (precluding judicial review for agency action "committed to agency discretion by law" and actions statutorily prohibited from review).

145. For the purpose of this Comment, inaction and non-implementation are synonymous. In his Note, Peter H.A. Lehner defines non-implementation as the agency's failure to enforce a regulation, failure to promulgate regulations, or failure "to take any of the steps necessary for either of the above actions." Peter H.A. Lehner, Note, *Judicial Review of Administrative Inaction*, 83 COLUM. L. REV. 627, 627 n.3 (1983).

is by filing a rulemaking petition that specifically asks the agency to adopt a rule.¹⁴⁶ Yet, even absent a rulemaking petition, a petitioner can satisfy standing in instances where Congress has authorized an agency to act but the agency has refused to do so.¹⁴⁷ While the congressional mandate to define hazardous occupations might be broad, the Secretary still has to act within the parameters of the FLSA, a statute founded to regulate, *inter alia*, child labor.¹⁴⁸ In this instance, Congress required the Secretary to impose restrictions on occupations that are found to be harmful to children's health and safety. Because the FLSA authorizes the Secretary to designate certain occupations as hazardous, the definition of "hazardous occupation" must inevitably address the regulation of occupations that could detrimentally harm children—one of the key purposes of the FLSA.¹⁴⁹

Courts apply a two-part test to determine whether an agency action is final within the meaning of the APA. First, the decision must be the "consummation" of the agency's decision making process, and second, the decision must have "legal consequences."¹⁵⁰ The purpose of the finality requirement is to avoid "premature judicial intervention in the administrative process."¹⁵¹ Simply put, courts will not review an action before the agency has considered that action fully.¹⁵² However, an agency need not take an affirmative act in order to meet the finality requirement; rather, a court is also permitted to review agency inaction under the APA.¹⁵³ Nevertheless, a court can only review and compel an agency to act if the "agency failed to take a

146. See 5 U.S.C. § 553(e) ("Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule."). Under 5 U.S.C. § 555(e), the agency is required to at least respond to the petition in a timely fashion. See *Auer v. Robbins*, 519 U.S. 452, 459 (1997) (interpreting this section of the APA as a mandate for the agency to provide a justified reason for denying the petitioner's rulemaking petition). The agency's response can be appealed to the courts. *Id.*

147. See *Lehner*, *supra* note 145, at 649 (arguing that non-implementation is an injury-in-fact that can successfully pass the threshold question of standing).

148. See 29 U.S.C. § 212(a) (creating a general ban on the shipment or production of goods that were "produced in an establishment . . . [where] oppressive child labor has been employed").

149. *Id.* § 212(c) (prohibiting the employment of "oppressive child labor").

150. See, e.g., *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997) (outlining the two conditions that must be met for agency action to be "final").

151. *Env'tl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970).

152. *Id.* (holding that an express denial of a request for suspension or cancellation of the use of a harmful pesticide is "clearly ripe for review").

153. See *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 60–65 (2004) (permitting review of the Bureau of Land Management's failure to act to protect public lands in Utah from damage caused by off-road vehicle use, but not compelling the Bureau to act).

discrete agency action that it is *required to take*.¹⁵⁴ The burden is on the aggrieved party to prove the existence of some kind of harm before the court will permit review.¹⁵⁵ The DOL is required to regulate child labor¹⁵⁶ and the child farm laborers should be able to present sufficient evidence to prove that they have suffered irrefutable harm.¹⁵⁷ Thus, the DOL's decision to retract its 2011 NPRM should be considered a final agency action.

Another factor in determining finality is the extent to which the agency's rulemaking record details the amount of resources it invested in considering the particular issue.¹⁵⁸ Generally, the more extensive the record, the more likely a reviewing court will find the action taken to be final.¹⁵⁹ If a regulation is rescinded after "extensive rulemaking proceedings narrowly focused on the particular rules at issue," then a judge will likely find the agency's decision "amenable to . . . judicial scrutiny."¹⁶⁰ Accordingly, to the extent that child farm laborers suffer harm from their jobs, they have standing to challenge the DOL in court.

However, even if a plaintiff can pass the justiciability requirements as outlined above, the Supreme Court's decision in *Heckler v. Chaney*¹⁶¹ provides a further hurdle that must be satisfied before a court will review an agency's regulatory inaction. The *Chaney* Court established a presumption of non-reviewability when an agency decides not to undertake an enforcement action.¹⁶² In that case, prison inmates alleged that the FDA failed to comply with the Federal Food, Drug, and Cosmetic Act (FDCA) by outlawing drugs that were

154. *Id.* at 64.

155. *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 891 (1990) (concluding that the agency's land withdrawal review program was not an agency action or final agency action within the meaning of the APA and instead the plaintiffs simply sought a "wholesale improvement of [the] program").

156. *See* 29 U.S.C. § 212(b) (2012) (discussing the regulations on the employment of "oppressive child labor").

157. *See supra* Part I (describing how working on a tobacco farm is harmful and hazardous to child laborers).

158. *See, e.g.,* WWHT, Inc. v. FCC, 656 F.2d 807, 816–17 (D.C. Cir. 1981) ("[T]he greater the agency's investment of resources . . . the more complete the record . . . the more likely . . . [that the] action will be a proper subject of judicial review." (quoting *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1047 n.19 (D.C. Cir. 1979) (internal quotation marks omitted))).

159. *Id.*

160. *Natural Res. Def. Council*, 606 F.2d at 1047.

161. 470 U.S. 821 (1985).

162. *Id.* at 831.

used for lethal injections in carrying out their death sentence.¹⁶³ The Court held that the FDA's denial of the prisoners' petition was not reviewable under 5 U.S.C. § 701(a)(2), which excludes judicial review when that "agency action is committed to agency discretion by law."¹⁶⁴ The *Chaney* Court interpreted this section to mean that if the "court would have no meaningful standard against which to judge the agency's exercise of discretion," then the court would have no jurisdiction over the agency's decision.¹⁶⁵ If Congress did not provide the court with a "law to apply," then the court has no jurisdiction for review and the agency has full discretion.¹⁶⁶ The FDA had no prosecutorial discretion in determining drugs used for killing and therefore no judicial review was permitted.¹⁶⁷

The ruling in *Chaney* does not preclude review of the Secretary's decision not to regulate child labor on tobacco farms because Congress specifically delegated authority to the Secretary to determine the occupations that are too hazardous for children.¹⁶⁸ As such, there is a meaningful standard that can be used to judge the agency's exercise of discretion. Consequently, while the FDCA lacked any express delegation of control over drugs used in state-mandated

163. *Id.* at 823.

164. 5 U.S.C. § 701(a)(2) (2012). There are two statutory exceptions to judicial review under the APA: (1) if a statute expressly precludes review or provides another form of review under the APA, that statute governs; or (2) the "agency action is committed to agency discretion by law." *Id.* § 701(a).

165. *Chaney*, 470 U.S. at 830.

166. *Id.* at 834–35 ("If [Congress] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion, there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law' within the meaning of that section.").

167. *Id.* at 835–38 (examining the enforcement mechanisms under the FDCA before concluding that the FLSA grants the agency "complete discretion" in "decid[ing] how and when" the enforcement provisions should be exercised). The Court focused on the permissive language of the FDCA—21 U.S.C. § 372 provides only that "[t]he Secretary is *authorized* to conduct examinations and investigations"—and thus the FDA is not mandated to always act. *Id.* at 835 (alteration in original).

168. *Supra* Part II.B. Further, the U.S. Court of Appeals for the D.C. Circuit distinguished the ruling in *Chaney* from instances where the agency outright refused to institute rulemaking proceedings. *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987). Rulemaking proceedings, according to the court, were less frequent, more often involved legal as opposed to factual analysis, and subject to special formalities, including a public explanation. *Id.* Ultimately, the court decided that *Chaney* did not prohibit a court's review of an agency's refusal to institute rulemaking. *Id.*

executions, the FLSA does assign the Secretary the duty to identify occupations that are hazardous for children. As such, since there is a law that the Secretary is charged with applying, courts can compel the agency to follow that law.¹⁶⁹ Additionally, Justice Marshall's concurring opinion in *Chaney* provided clear guidance for determining the correct judicial approach to "one of the pressing problems of the modern administrative state": the problem of agency refusal to act.¹⁷⁰ According to Justice Marshall, the court can review agency inaction to "assure that it is not 'arbitrary, capricious, or an abuse of discretion,'" unless Congress established an express intent to preclude review.¹⁷¹ While Justice Marshall agreed with the majority opinion that the agency decisions should be afforded a substantial degree of deference, he nevertheless carved out an exception for circumstances warranting closer scrutiny where administrative inaction exposed citizens to harm that Congress, by passing the underlying statute, sought to prevent.¹⁷²

IV. THE DOL ABANDONED ITS REGULATORY FUNCTION UNDER THE FLSA WHEN IT RESCINDED THE 2011 NPRM

The DOL's initiation of the 2011 NPRM to revise the child labor regulations and Agricultural Hazardous Orders was part of a broader department initiative that stemmed from a 2002 NIOSH report that was funded by the DOL.¹⁷³ Following the issuance of the report, the DOL adopted two final rules, one in 2004¹⁷⁴ and the other in 2010,¹⁷⁵

169. Specifically, the *Chaney* Court's interpretation of § 701(a)(2) works in favor of judicial review and against agency discretion since there is "law to apply" and thus a "meaningful standard against which to judge the agency's exercise of discretion." *Chaney*, 470 U.S. at 830, 834–35 (interpreting § 701(a)(2)'s preclusion to judicial review to hinge upon whether or not Congress provided the reviewing court with any "law to apply").

170. *Id.* at 854 (Marshall, J., concurring).

171. *Id.*

172. *Id.*

173. See Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,836–37 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pts. 570 and 579). The Department funded the NIOSH in 1998 to conduct a review of the workplace hazards and the adequacy of the hazardous orders in addressing them. *Id.* at 54,837. The final report issued in 2002 made recommendations for the existing Non-agricultural and Agricultural Hazardous Orders and recommended the creation of seventeen new hazardous orders. *Id.*

174. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 69 Fed. Reg. 75,382 (Dec. 16, 2004) (to be codified at 29 C.F.R. pts. 570, 579, 580).

that addressed all of the NIOSH recommendations for the Non-Agricultural Hazardous orders. The 2011 NPRM that was eventually withdrawn by the DOL was intended to be the first regulation addressing the Agricultural Hazardous Orders.¹⁷⁶ Additionally, the DOL held a public hearing on the 2011 NPRM, received over 10,000 written comments on the proposed rule, and issued a notice explaining its reasoning for withdrawing the 2011 NPRM.¹⁷⁷ Given the extent of the DOL's record to revise the agricultural exemptions, coupled with the broader plan to overhaul all the child labor regulations under the FLSA, its decision to withdraw the 2011 NPRM should be treated as a final decision by the DOL.¹⁷⁸

The FLSA explicitly confers power on the Secretary to determine whether an occupation is too hazardous for a child to perform.¹⁷⁹ Thus, the DOL had the necessary authority to act once it concluded that tobacco production was hazardous to child laborers. Not only is it a requirement under the FLSA, but the Secretary has already identified occupations that are hazardous¹⁸⁰ and has participated in rulemaking procedures focused on revising the Non-Agricultural Hazardous orders.¹⁸¹ Further, even though the statute is written in

175. Child Labor Regulations, Orders and Statements of Interpretation, 75 Fed. Reg. 28,404 (May 20, 2010) (to be codified at 29 C.F.R. pts. 570, 579).

176. The Agricultural Hazardous Orders remained unchanged since its first implementation in January 1970. 76 Fed. Reg. at 54,849. The 2011 NPRM addressed NIOSH's recommendations concerning the Agricultural Hazardous Orders for the first time. *Id.* at 54,844.

177. See Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 77 Fed. Reg. 31,549, 31,550 (May 29, 2012) (to be codified at 29 C.F.R. pts. 570 and 579).

178. Furthermore, the DOL's news release notifying the public of the withdrawal made it explicitly clear that the Obama administration would not pursue "this regulation" for the duration of his presidency. News Release, Wage & Hour Div., Labor Department Statement on Withdrawal of Proposed Rule Dealing with Children Who Work in Agricultural Vocations (Apr. 26, 2012), *available at* <http://www.dol.gov/opa/media/press/whd/WHD20120826.htm>. That statement alone establishes the finality of the DOL's decision.

179. 29 U.S.C. § 213(c)(2) (2012).

180. Currently, there are seventeen Non-Agricultural Hazardous orders and eleven Agricultural Hazardous Orders. See 29 C.F.R. §§ 570.50–570.68 (2013) (outlining the Non-Agricultural Hazardous orders); *id.* § 570.71(a) (listing the eleven Agricultural Hazardous Orders).

181. See, e.g., Child Labor Regulations, Orders and Statements of Interpretation, 72 Fed. Reg. 19,337, 19,338 (proposed Apr. 17, 2007) (to be codified at 29 C.F.R. pt. 570) (proposing to revise, among other things, the nonagricultural hazardous occupations in the areas of "logging and sawmilling; meat processing; and the operation of power-driven hoisting equipment, bakery equipment, compacting and baling equipment, and certain cutting, shearing, and guillotining equipment");

permissive rather than mandatory terms, the DOL's decision not to regulate tobacco farming is not placed "beyond judicial scrutiny."¹⁸² The freedom conferred to agencies under permissively worded statutes is broad but not limitless, especially when the agency adopts a policy that amounts to "an abdication of its statutory responsibilities."¹⁸³ When an agency has taken action in direct contradiction of its legislative bylaws, a permissively worded statute cannot save that agency from judicial review.¹⁸⁴ The DOL, in this instance, failed to characterize tobacco farming as being hazardous to children—a responsibility dictated by Congress¹⁸⁵—despite substantial evidence pointing to the dangerous nature of the work.¹⁸⁶

The FLSA was enacted to provide protections to children in the workplace,¹⁸⁷ and the Secretary's failure to designate tobacco farming as a hazardous occupation arguably endangers the health and welfare of children who farm tobacco.¹⁸⁸ Courts have a role to play in instances where Congress specifically intended for an agency to act

Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 69 Fed. Reg. 75,382, 75,382 (Dec. 16, 2004) (to be codified at 29 C.F.R. pts. 570, 579, 580) (finalizing a NPRM to incorporate two amendments of the FLSA: the Compactors and Balers Safety Standards Modernization Act and the Drive for Teen Employment Act).

182. See *Env'tl. Def. Fund, Inc. v. Hardin*, 428 F.2d 1093, 1098 (D.C. Cir. 1970) (permitting judicial review of the Secretary of Agriculture's decision to dismiss defendants' petition seeking restricted use of DDT in the environment).

183. See *Heckler v. Chaney*, 470 U.S. 821, 832–33 & n.4 (1985) (stating that the general presumption that an agency's decision not to take enforcement action is unreviewable can be rebutted when that decision amounts to a blatant disregard for its legislative obligations).

184. See, e.g., *N. Ind. Pub. Serv. Co. v. FERC*, 782 F.2d 730, 745 (7th Cir. 1986) (refuting the presumption against reviewability because the agency's decision not to investigate could be interpreted as "essentially abandon[ing] its regulatory function . . . under the guise of unreviewable agency inaction"); *Iowa ex rel. Miller v. Block*, 771 F.2d 347, 348–51 (8th Cir. 1985) (admitting that while the decision to initiate (or not initiate) disaster relief programs and payments following a natural disaster is at the discretion of the Secretary of Agriculture, the court had jurisdiction to review the agency's decision in this instance to not effectuate assistance to the State of Iowa and several individual farmers following a devastating drought because the Secretary abandoned its responsibility by failing to implement programs as dictated by the legislative intent).

185. 29 U.S.C. § 213(c)(2) (2012).

186. *Supra* Part I.

187. See 29 U.S.C. § 212(a)–(b) (establishing a general ban on the production or shipment of goods that were produced by companies employing minors and permitting the Secretary of Labor to investigate and punish those companies appropriately).

188. See *supra* Part I (highlighting the numerous hazards children face on tobacco farms).

and it fails to do so. The DOL's withdrawal of the 2011 NPRM represents such an inaction that warrants judicial review.

A. *The DOL's Decision Not to Regulate Child Labor on Tobacco Farms Is Not Committed to Agency Discretion*

Congress did not grant the DOL agency discretion, and consequently, the DOL should face a greater degree of scrutiny in connection with its decision not to regulate child labor on tobacco farms. Normally, when an agency decides not to regulate or promulgate a rule, that agency receives deference.¹⁸⁹ Many reviewing courts avoid judicial review of agency action on the basis that an agency is in a better position to handle its specific area of regulation. Thus, a judge who is far removed from the agency's work is not in a strong position to review an agency's decision to refrain from acting.¹⁹⁰ Further, a decision not to regulate could be based on reasoning that is ill-suited for judicial scrutiny or resolution,¹⁹¹ or a reviewing court may not want to subject an agency to the cost and time of litigation.¹⁹² Courts rightly state that Congress enacts statutes

189. See *Massachusetts v. EPA*, 549 U.S. 497, 527–28 (2007) (asserting that review of agency refusals to issue a rule is “extremely limited” and “highly deferential” (quoting *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989))); *Heckler v. Chaney*, 470 U.S. 821, 831–32 (1985) (outlining the Court's general view that an agency is afforded deference when deciding whether or not to act since that decision naturally includes “a complicated balancing of a number of [internal agency] factors . . . within [the agency's] expertise”).

190. See, e.g., *FEC v. Rose*, 806 F.2d 1081, 1091 (D.C. Cir. 1986) (“It is not for the judiciary to . . . sit as a board of superintend[er]nce directing where limited agency resources will be devoted. We are not here to run the agencies.”); *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1047–48 (D.C. Cir. 1979) (discussing the balancing act courts have to play when choosing to review agency actions and acknowledging that “agencies [are] more competent than the courts in many specialized areas of fact determination”).

191. See *Natural Res. Def. Council*, 606 F.2d at 1046 (citing internal management decisions of budget and personnel issues as reasons not to regulate). *But see* *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410, 413 (1971) (establishing that if there is “law to apply” then the exemption for action “committed to agency discretion” does not apply); *Transp. Intelligence, Inc. v. FCC*, 336 F.3d 1058, 1063 (D.C. Cir. 2003) (deciding that the agency's denial of a petition to revoke a license was reviewable because the agency's grant of the license in the first place “provides a focus for judicial review”); *Nat'l Treasury Emps. Union v. Horner*, 854 F.2d 490, 496 (D.C. Cir. 1988) (permitting judicial review of an Office of Personnel Management policy decision because its rulemaking must follow a notice and comment period, a procedure that “provides a focal point for judicial review”).

192. See, e.g., *Natural Res. Def. Council*, 606 F.2d at 1045 (interfering with “an agency's effective performance of its statutory mission” is cited as a possible reason not to subject agency decisions to judicial review); *Lehner*, *supra* note 145, at 627

that confer a great deal of discretion to administrative agencies, permitting them to issue rules according to their own expertise free from congressional attempts to pigeonhole their actions.¹⁹³

Yet, the significant deference afforded to agencies does not give an agency *carte blanche* authority to act in contradiction of specific statutory mandates.¹⁹⁴ In fact, “[a] court does not depart from its proper function when it” decides to review an agency’s “evidence on technical and specialized matters” to ensure that the agency “exercised a reasoned discretion.”¹⁹⁵ Courts are permitted to play a more active role rather than merely stand by and rubber-stamp an agency’s action. Courts have authority to make necessary determinations on whether the agency engaged in reasoned decision making.

There are numerous instances where courts have limited agency discretion in favor of a stricter level of judicial scrutiny.¹⁹⁶ If the agency inaction potentially harms the health of the public, close scrutiny of administrative action is appropriate.¹⁹⁷ Sudden departures

(citing four reasons for why courts decline to review inaction decisions: “[1] the lack of a particular person harmed by a particular agency action, [2] the lack of clear congressional intent regarding proper agency conduct, [3] the inability of courts to analyze the problem, and [4] the presumed availability of political controls over general nonimplementation”).

193. See *Natural Res. Def. Council*, 606 F.2d at 1045 (noting that Congress gave the SEC “broad discretionary powers to promulgate (or not to promulgate) rules requiring disclosure of information beyond that specifically required by the statute”); see also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843–44 (1984) (“If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation.”).

194. See, e.g., *Chaney*, 470 U.S. at 854 (Marshall, J., concurring) (permitting judicial enforcement when “inaction allegedly deprives citizens of statutory benefits or exposes them to harms against which Congress has sought to provide protection”).

195. *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 850 (D.C. Cir. 1970). Judge Levanthal articulated a new area of judicial review of agencies actions in *Greater Boston Television Corp.* Judge Levanthal acknowledged that usually courts absentmindedly followed the “sensible judgments” of the agency, concluding that the agency “express[ed] an intuition of experience which outruns analysis.” *Id.* at 852. Yet, this absolute deference to the agency has evolved over the years, forcing the court to become more assertive in its review. *Id.*

196. See Raymond Murphy, Note, *The Scope of Review of Agencies’ Refusals to Enforce or Promulgate Rules*, 53 GEO. WASH. L. REV. 86, 113 (1984) (articulating three reasons why courts would decide to interfere in an agency’s refusal to promulgate rules: “[1] the agency’s discretion, [2] the extent of the record, and [3] the type of issues involved”).

197. See, e.g., *Pub. Citizen Health Research Grp. v. Aucther*, 702 F.2d 1150, 1156 (D.C. Cir. 1983) (acknowledging that while OSHA might be best suited for making determinations based on the complex scientific and factual data on EtO exposure levels, when “the interests at stake are not merely economic interests . . . but personal

from an agency's past position, such as an abrupt change of its interpretation of a statute, can also necessitate strict scrutiny because, in that instance, the agency might be acting contrary to congressional authority.¹⁹⁸ One example of a "sudden and profound alteration" includes an action that reverses an agency's prior policy.¹⁹⁹

Further, when an agency adopts a new interpretation of a statute, the question of whether judicial review is permissible does not arise because "courts are emphatically qualified to decide whether an agency has acted outside the bounds of reason."²⁰⁰ By not promulgating a final rule to amend the rules governing child labor on farms, the DOL's decision has arguably caused harm by exposing children to additional safety and health hazards.²⁰¹ In other words, children's safety and future opportunities have been jeopardized because of a failure to act on the part of the DOL.²⁰²

interests in life and health," the level of deference afforded lessens (quoting *Wellford v. Ruckelshaus*, 439 F.2d 598, 601 (D.C. Cir. 1971)); see also *Murphy*, *supra* note 196, at 115 (claiming that the appellate court in *Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), *rev'd*, 470 U.S. 821 (1985), may have been persuaded to hold the FDA accountable for its refusal to investigate or promulgate rules because of the type of interest involved in the matter, namely the execution of human beings).

198. See generally *Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury*, 573 F. Supp. 1168, 1173 (D.D.C. 1983) ("[S]udden and profound alterations in an agency's policy constitute 'danger signals' that the will of Congress is being ignored." (quoting *State Farm Mut. Auto. Ins. Co. v. Dep't of Transp.*, 680 F.2d 206, 221 (D.C. Cir. 1982), *vacated*, 463 U.S. 29 (1983))). Prompted by Executive Order 12,291, the Department of the Treasury rescinded a final rule that was issued a little over a year before. *Id.* For the reviewing court, this fact alone justified a "careful examination" of the agency's decision. *Id.*

199. See, e.g., *Ctr. for Sci.*, 573 F. Supp. at 1173 (rescinding a final rule that was issued a little over a year before justified a court to take a "careful examination" of the agency's decision).

200. See *UAW v. Brock*, 783 F.2d 237, 245 (D.C. Cir. 1986) (alleging that an agency acts "outside the bounds of reason" when it issues a new statutory interpretation for an already established statute).

201. See generally Steven Greenhouse, *Just 13, and Working Risky 12-Hour Shifts in the Tobacco Fields*, N.Y. TIMES (Sept. 6, 2014), <http://www.nytimes.com/2014/09/07/business/just-13-and-working-risky-12-hour-shifts-in-the-tobacco-fields.html> (describing the daily routine that a thirteen-year-old girl in North Carolina follows when she starts her twelve hour shift at six A.M., which includes pulling a plastic garbage bag over her body to protect herself from GTS); *supra* Part I (providing an overview on the different hazards associated with agricultural work, including exposure to pesticides and potential dismemberment from power tools).

202. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-98-193, CHILD LABOR IN AGRICULTURE: CHANGES NEEDED TO BETTER PROTECT HEALTH AND EDUCATIONAL OPPORTUNITIES 36 (1998) (stating that children "working more than 20 hours a week adversely affects their educational achievement").

Additionally, the decision to pull the regulation following widespread backlash—mostly from farm lobbyists and members of Congress from farm-belt states—represented a change to the DOL's original plan to implement the changes recommended by NIOSH in 2002.²⁰³ In fact, the DOL declared the 2011 NPRM to be part of the "Department's tradition of . . . fostering permissible and appropriate job opportunities for working youth that are healthy, safe, and not detrimental to their education."²⁰⁴ Following the 2002 report, the DOL adopted a clear pattern of making the necessary revisions to the child labor regulations under the FLSA in order to "help[] youth enjoy positive and challenging work experiences."²⁰⁵ Children working in non-agricultural jobs have benefitted from the NPRMs that eventually passed as final regulations,²⁰⁶ while children working on farms remain unprotected.²⁰⁷ Given the clear policy direction that had been adopted by the DOL, its abrupt decision to change direction and rescind the 2011 NPRM can be seen as a reversal of its prior policy of revamping the child labor provisions to add more protections.

Additionally, less judicial deference is given to administrative agencies when their interpretation of a statute "unduly compromises the Act's purposes."²⁰⁸ Enabling statutes frequently contain

203. See, e.g., Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,837 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pts. 570, 579) (acknowledging that the 2011 NPRM was an extension of the Department's response to the NIOSH 2002 report and specifically that this NPRM was going to address the recommendations made to the Agricultural Hazardous Orders and the addition of two new Non-Agricultural Hazardous orders); see also NIOSH, RECOMMENDATIONS FOR CHANGES TO HAZARDOUS ORDERS, *supra* note 28, at 16 (suggesting that "[i]ndustries, occupations, or specific work activities that have a high risk for death or severe injury should clearly be prohibited for young workers").

204. 76 Fed. Reg. at 54,836.

205. *Id.*; see *supra* note 181 and accompanying text (chronicling the efforts the DOL has made towards regulating child labor in the non-agricultural sector).

206. See *supra* note 181 (explaining the different proposed rules and final regulations that have been passed since the 2002 NIOSH report that revised the non-agricultural hazardous provisions under the FLSA).

207. The regulations pertaining to agricultural work in the FLSA "have remained unchanged for over forty years." 76 Fed. Reg. at 54,849.

208. *Orloski v. FEC*, 795 F.2d 156, 164 (D.C. Cir. 1986). The court applied the "Chevron two-step" analysis to determine whether the Federal Election Commission (FEC) acted appropriately when it permitted corporate funding of a non-political event sponsored by an incumbent congressman. *Id.* at 157, 161–62. While the court noted that the FEC leaves a gap "between impermissible corporate financing of federal election campaigns and permissible corporate financing of legislative

ambiguities, and agencies are entrusted with interstitial regulatory powers to clarify them.²⁰⁹ However, while such a statutory gap will justify a wide range of administrative interpretations, an agency's final interpretation will not be afforded deference unless it represents a "reasonable accommodation" under the applicable act.²¹⁰ Therefore, even under the substantial deference permitted under *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*,²¹¹ if an agency acts in a way that "Congress would not have sanctioned," then that agency loses its general autonomy to interpret the ambiguity in the statute.²¹²

To resolve discrepancies in language, the Secretary is afforded the ability to distinguish an occupation that is hazardous from one that is safe so long as that determination is not inconsistent with the primary purpose of the FLSA, which includes protecting child laborers.²¹³ In this regard, the DOL shirked its responsibility when it withdrew the 2011 NPRM that sought to address the current anomalies in the protections afforded to child farm workers. Congress made the DOL responsible for enforcing the FLSA²¹⁴—a responsibility it arguably neglected when it withdrew the 2011 NPRM—which allowed child workers to continue to be exposed to health and safety risks on

activities" under the Federal Election Campaign Act, the final interpretation cannot "undercut[] the statutory purpose[]." *Id.* at 164.

209. *Id.* at 164.

210. *Chevron, U.S.A. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 859, 865 (1984) (finding that the EPA is entitled to deference regarding its interpretation of the statutory term "stationary source" since the "interpretation represents a reasonable accommodation of manifestly competing interests").

211. 467 U.S. 837 (1984).

212. *Id.* at 845, 865 (holding that the question on review for the Court should be whether the EPA's application of the bubble concept to the permit program was "a reasonable one" and not whether it was "inappropriate" because Congress did not have an intention regarding the applicability of the bubble concept to the program (quoting *United States v. Shimer*, 367 U.S. 374, 383 (1961))).

213. See 29 U.S.C. § 202(a) (2012) (outlining the general purpose of the FLSA as an act focused on the protection of employees, including children in the workplace); see, e.g., Hilda L. Solis, *Foreword to MARSHFIELD CLINIC*, *supra* note 28 ("The longstanding mission of the Department's Wage and Hour Division (WHD) is to achieve compliance with labor standards to protect and enhance the welfare of the nation's workforce. *An important WHD priority is to reduce the number of youth injuries and fatalities in agriculture.*" (emphasis added)); Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,836 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pts 570, 579) (articulating the Department's commitment to "helping youth enjoy positive and challenging work experiences," while also ensuring that the work is "safe, age appropriate, and does not jeopardize their schooling").

214. See 29 U.S.C. § 204(a) (creating the Wage and Hour Division, a group within the DOL, as administrator of the FLSA).

tobacco farms.²¹⁵ The DOL should not be entitled to deference under *Chevron* because its action was contrary to the purpose of the FLSA.

Furthermore, changed circumstances can provide a basis to allow judicial review of the DOL's decision to rescind the 2011 NPRM. A court can compel an agency to institute rulemaking proceedings if "a significant factual predicate" for deciding whether to promulgate or not promulgate a specific regulation no longer exists.²¹⁶ Additionally, if regulations prove inadequate, a reviewing court has the authority to direct an agency to revise them in a new rulemaking procedure.²¹⁷

Moreover, President Obama issued Executive Order 13,563 in 2011 requiring agencies to conduct a "retrospective analysis" on rules that are "outmoded, ineffective, insufficient, or excessively burdensome."²¹⁸ Under this "periodic review," if an agency finds an outdated regulation, it should then modify the regulation in order to promote an "effective [and] less burdensome" regulatory program.²¹⁹ The DOL's failure to revise its agricultural exemptions under the FLSA has arguably allowed outdated regulations to remain operative despite the obvious risks to children's lives. The DOL has failed to revise the FLSA to address the new types of jobs children perform in the field today, as well as the new technologies and equipment developed since the FLSA's first implementation.²²⁰ Also, the

215. See *supra* Part I (describing the hazards associated with work on tobacco farms).

216. See *WWHT, Inc. v. FCC*, 656 F.2d 807, 819 (D.C. Cir. 1981) (summarizing the ruling in *Geller v. Federal Communications Commission*, 610 F.2d 973 (D.C. Cir. 1979)). The court in *Geller* ordered the FCC to conduct an analysis to determine whether regulations promulgated to facilitate the enactment of new copyright legislation still served the public interest four years later when the copyright legislation actually passed. *Geller*, 610 F.2d at 974, 979–80.

217. See *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 1, 7–8 (D.C. Cir. 1987) (agreeing with plaintiffs—an animal advocacy group—that developments since the enactment of the Horse Protection Act required the Secretary of Agriculture to determine whether the changed circumstances and additional information from a study demanded an amendment to the soring regulation). The Horse Protection Act contained a general prohibition against the use of devices likely to cause soreness in horses, a practice that involves "deliberately injuring show horses to improve their performance in the ring." *Id.* at 1–2. A study conducted by the Auburn University School of Veterinary Medicine concluded that the use of eight and ten ounce chains and fourteen ounce rollers scarred horses and caused raw lesions. *Id.* at 2. The results from this study helped the court conclude that the Secretary needed to review the practices outlawed in the Act. *Id.* at 7–8.

218. Exec. Order No. 13,563, 3 C.F.R. 215, 217 (2012), *reprinted in* 5 U.S.C. § 601 app. at 816–17.

219. *Id.*

220. See, e.g., SCHNEIDER, *supra* note 55, at 18–19 (describing the advances in farming technology, which include advanced machinery and synthetic chemicals and fertilizers).

discrepancy between agricultural and non-agricultural child employment protections is largely outmoded²²¹ because large-scale farming operations or corporate farming conglomerates have replaced the small independent family farm ownership that originally dominated the agricultural sector.²²²

The 2002 NIOSH report highlighted many of the glaring holes in the current Agricultural Hazardous Orders.²²³ For instance, two of the Agricultural Hazardous Orders delineate a list of specific machines that children under sixteen are prohibited from operating.²²⁴ Since the list is defined by particular machine names (e.g., corn picker, fork lift, potato digger) rather than general functional categories (e.g., harvesting and threshing machinery, planting and fertilizing machinery), new types of machinery in agricultural production are not covered under the exemption.²²⁵ Consequently, children can legally operate newly manufactured machines, even if the equipment might not be safe for them to use.²²⁶ The NIOSH report, together with the Human Rights Watch Report,²²⁷ highlight numerous hazards associated with farm jobs, yet the DOL failed to revise the FLSA to address the concerns raised in these studies. The DOL's decision to not institute rulemaking

221. See *supra* Part II.A (arguing that the agricultural exemptions—and corresponding lack of protections for agricultural workers—under the FLSA largely exist for the protection of the family farms and to preserve the rural tradition of children working on farms).

222. See CAROLYN DIMITRI ET AL., THE 20TH CENTURY TRANSFORMATION OF U.S. AGRICULTURE AND FARM POLICY 2 (2005), available at http://www.ers.usda.gov/media/259572/eib3_1_.pdf (“The agricultural sector of the 21st century . . . is concentrated on a small number of large, specialized farms.”); Melaine J. Wender, Comment, *Goodbye Family Farms and Hello Agribusiness: The Story of How Agricultural Policy Is Destroying the Family Farm and the Environment*, 22 VILL. ENVTL. L.J. 141, 141–42 (2011) (“United States farm production has shifted to larger operations, usually referred to as agribusiness . . . [which produces] approximately ninety-eight percent of America’s food supply.”).

223. See generally NIOSH, RECOMMENDATIONS FOR CHANGES TO HAZARDOUS ORDERS, *supra* note 28, at 67–98.

224. 29 C.F.R. § 570.71(a)(2)–(3).

225. NIOSH, RECOMMENDATIONS FOR CHANGES TO HAZARDOUS ORDERS, *supra* note 28, at 72.

226. As an example, the NIOSH report states that even though plowing and cultivating machinery, as well as spreaders, contributed to a substantial number of deaths on farms, these machines are not included under the existing Agricultural Hazardous Orders. *Id.* at 73.

227. See HRW, TOBACCO’S HIDDEN CHILDREN, *supra* note 22, at 3 (outlining the various serious symptoms associated with tobacco production, including “headaches, dizziness, skin rashes, difficulty breathing,” and nausea).

procedures should be afforded little deference under these circumstances because it failed to address the discrepancies that exist between the outdated protections for child farm laborers and the studies demonstrating the need for more protection.²²⁸

B. The DOL Acted Arbitrarily and Capriciously in Its Decision to Withdraw the 2011 NPRM

The DOL did not provide a permissible explanation for refusing to regulate child laborers working on tobacco farms. Instead, its decision stems from the strong desire of some interest groups to maintain the rural tradition of children working on farms.²²⁹ A court should review whether, in reaching its decision, the DOL relied upon statements from farm lobbyists and other groups rather than on evidence from credible sources documenting the risks and harm to children working on tobacco farms.²³⁰

While courts must maintain a careful equilibrium when engaging in judicial review of administrative action or inaction,²³¹ they nevertheless play a crucial role in ensuring the integrity of the administrative process. This can be especially true in cases where an agency has been incapable of proposing or enacting a regulation due to unfavorable backlash from Congress.²³²

228. See *Geller v. FCC*, 610 F.2d 973, 979–80 (D.C. Cir. 1979) (compelling the FCC to reexamine the cable television regulations to ensure that they still serve the public interest).

229. See News Release, Wage & Hour Div., *supra* note 178 (citing the concerns over the potential impediment to children working on family farms as the only stated reason for the 2011 NPRM withdrawal).

230. See *supra* Part II.C (describing the various ways that members of Congress and farm advocacy groups influenced the DOL's decision, including a blatant mischaracterization of the 2011 NPRM as it related to children working on family owned farms).

231. See, e.g., *Stark v. Wickard*, 321 U.S. 288, 309–10 (1944) (“[C]ourts are [not] charged more than administrators or legislators with the protection of the rights of the people.”); *Natural Res. Def. Council, Inc. v. SEC*, 606 F.2d 1031, 1047–48 (D.C. Cir. 1979) (remarking on the “uneasy” position courts are put in when reviewing legislative actions and the difficulty in “perform[ing] their congressionally-mandated task of judicial review without encroaching on territory which as judges they are ill-suited to enter”).

232. See Andrew P. Morriss et al., *Choosing How to Regulate*, 29 HARV. ENVTL. L. REV. 179, 189 & nn.48–49 (2005) (citing reasons for an agency not to regulate). An agency might choose not to regulate when the projected returns from the action are negative or economically ill advised; the reasons include “fear [of] retribution from interest groups or political figures” not in favor of the action, a desire to “cultivate allies” for future support for other initiatives, the agency’s “higher priorities” for

The appropriate level of judicial review for agency inaction is different from that for final rule promulgation.²³³ Courts only review inaction decisions under narrow parameters, namely if the agency has a clear or nondiscretionary duty to act. Conversely, review of final rule promulgation is more relaxed and permits a reviewing court to take a hard look to ensure that the decision is not “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”²³⁴ Courts generally apply a narrower scope of review when analyzing an agency’s decision not to promulgate rules, since they are reluctant to interfere in an agency’s realm of authority.²³⁵ Despite this narrower scope of review, informal agency action²³⁶ is subject to an “arbitrary [and] capricious” standard of review.²³⁷

If an agency wants to avoid having a court find its decision to be arbitrary and capricious, the agency must provide a coherent explanation for its action, including a “rational connection between the facts found and the choice[s] made.”²³⁸ The agency must demonstrate that its final decision was based upon “reasoned

other actions that take precedent, or the benefits of proposing or adopting a regulation do not justify the costs (e.g., societal or monetary). *Id.* at 190.

233. See Eric Biber, *The Importance of Resource Allocation in Administrative Law*, 60 ADMIN. L. REV. 1, 7–9 (2008) (quoting 5 U.S.C. § 706(2)(A) (2012)) (arguing that it is more difficult for a plaintiff to obtain judicial review of agency inaction under 5 U.S.C. § 706(1)—permitting courts to “compel agency action unlawfully withheld [or] unreasonably delayed”—than judicial review of agency action under 5 U.S.C. § 706(2)—allowing courts to “set aside agency action”).

234. *Id.*

235. See, e.g., *WWHT, Inc. v. FCC*, 656 F.2d 807, 809, 816, 818–19 (D.C. Cir. 1981) (deciding that the agency’s denial of a petition for rulemaking was subject to judicial review, but emphasized that “the *scope* of review must of necessity be very narrow”); *Natural Res. Def. Council*, 606 F.2d at 1052–53 (determining that the SEC’s decision to terminate a rulemaking proceeding without issuing a rule is also subject to a narrower scope).

236. “Informal agency action” refers to action not taken “on the record” and without the procedural requirements of 5 U.S.C. §§ 556–557. These are decisions made without trial-type hearings. See *supra* notes 128–29 and accompanying text.

237. See 5 U.S.C. § 706(2)(A) (allowing a court to set aside any agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law”). Arguably, the “substantial evidence” review under 5 U.S.C. § 706(2)(E) could also be used to analyze the DOL’s inaction but courts generally construe the “arbitrary and capricious” standard and the “substantial evidence” as equivalent. See *Bangor Hyrdo-Elec. Co. v. FERC*, 78 F.3d 659, 663 n.3 (D.C. Cir. 1996) (calling the two standards “the same substantive standard of review”). Furthermore, the substantial evidence standard is simply “a specific application of [the more general arbitrary and capricious review].” *Id.* (alteration in original) (citing *Ass’n of Data Processing Serv. Orgs., Inc. v. Bd. of Governors*, 745 F.2d 677, 683 (D.C. Cir. 1984)).

238. *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962).

decision-making.”²³⁹ As evidence of reasoned agency action, the agency must be able to show that it relied on factors proposed by Congress and examined all evidence the agency had at its disposal.²⁴⁰ If an agency decides to rescind a rule, it must provide permissible reasons for the change.²⁴¹ A court will even rule that an agency acted arbitrarily and capriciously if the statement explaining its action is too tenuous and irrational.²⁴²

It is questionable whether the DOL's decision to pull the 2011 NPRM would pass judicial scrutiny as being a “reasoned decision.” The DOL issued a notice to explain the Secretary's decision not to promulgate the rule.²⁴³ Yet, the DOL failed to articulate a reasonable basis for not regulating the hazards associated with tobacco production.²⁴⁴ Instead, the agency arguably succumbed to pressures

239. *Prof'l Drivers Council v. Bureau of Motor Carrier Safety*, 706 F.2d 1216, 1220 (D.C. Cir. 1983) (“The court's task is to discern whether the relevant factors were considered and whether the ultimate decision reflects reasoned decision-making.”); *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 851 (D.C. Cir. 1970) (describing the court's role as “supervisory” in order to ensure the agency is “genuinely engaged in reasoned decision-making”).

240. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (outlining the factors a court considers when deciding whether an agency has acted arbitrarily or capriciously, which includes reliance on “factors which Congress has not intended it to consider, entirely fail[ing] to consider an important aspect of the problem, offer[ing] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise”).

241. *See Ctr. for Sci. in the Pub. Interest v. Dep't of the Treasury*, 573 F. Supp. 1168, 1169, 1173 (D.D.C. 1983) (stating that the court will review the Department of the Treasury's decision to rescind alcoholic beverage ingredient disclosure regulations to determine “whether the change was supported by explicit, permissible reasons and whether it was in accordance with the law”).

242. *See, e.g., Massachusetts v. EPA*, 549 U.S. 497, 534–35 (2007) (requiring the EPA to explain its refusal to decide whether greenhouse gases cause or contribute to climate change when it failed to act); *see also Natural Res. Def. Council, Inc. v. Herrington*, 768 F.2d 1355, 1363, 1431–33 (D.C. Cir. 1985) (holding that the Department of Energy's decision not to adopt efficiency standards for seven household appliances because a mandatory standard would not result in significant conservation of energy was not arbitrary or capricious, but that its conclusion that there would be no significant effect on the environment as a result of its decision was not sufficiently explained and therefore was arbitrary and capricious).

243. *Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties*, 77 Fed. Reg. 31,549, 31,550–51 (proposed May 29, 2012) (to be codified at 29 C.F.R. pts. 570, 579).

244. *See, e.g., Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 6 (D.C. Cir. 1987) (finding that the agency's explanation for its decision to not revise its regulations on soring did not include any factual or policy basis and thus was not a product of reasoned decision making).

from farming interests seeking to maintain the status quo.²⁴⁵ While the Secretary undoubtedly has discretionary authority to designate certain occupations as being “particularly hazardous” for children under the age of sixteen,²⁴⁶ the Secretary cannot abuse this discretion by failing to act on credible reports documenting the numerous hazards associated with farm work, particularly tobacco farming.²⁴⁷ If the Secretary makes a determination that a particular occupation is too hazardous for minors to perform, it is the Secretary’s responsibility to issue an order outlawing minors from performing that job.²⁴⁸

Unfortunately, the DOL appears not to have satisfied its legislative responsibility under the FLSA in this instance,²⁴⁹ and it has abandoned its stated purpose and the intent of the revisions.²⁵⁰ If the DOL was forced to justify its rationale for not implementing the 2011 NPRM, a court should invalidate its inaction as a violation of its “clear statutory command.”²⁵¹

245. The DOL only provided one statement describing its decision to pull the 2011 NPRM. See News Release, Wage & Hour Div., *supra* note 178 (stating that the rule was withdrawn “in response to thousands of comments expressing concerns about the effect of the proposed rules on small family-owned farms”). Other news commentators suggested political reasons for DOL’s decision. See, e.g., Associated Press, *Obama Criticized in Reversal on Child Farm Labor Regulations*, WASH. POST (Apr. 29, 2012), http://www.washingtonpost.com/politics/obama-criticized-in-reversal-on-child-farm-labor-regulations/2012/04/29/gIQAZvEDqT_story.html (citing the 2012 presidential election as a reason that President Obama gave up the regulatory fight to prevent children from working in dangerous farm jobs); Editorial Bd., *Obama Administration Must Do More to Protect Children Harvesting Tobacco*, WASH. POST (May 18, 2014), http://www.washingtonpost.com/opinions/obama-administration-must-do-more-to-protect-children-harvesting-tobacco/2014/05/18/23b8a7c4-dd36-11e3-b745-87d39690c5c0_story.html (suggesting that the Obama administration can now freely reverse its previous decision to pull the 2011 NPRM since President Obama has been re-elected and thus is no longer engaged in a political campaign).

246. 29 U.S.C. § 213(c)(2) (2012).

247. See *supra* note 28 and accompanying text.

248. See 29 U.S.C. § 213(c)(2) (placing the sole responsibility on the Secretary to regulate the jobs that are too hazardous for the employment of children).

249. *Id.*

250. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,836 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pts 570, 579) (revising the child labor regulations to implement NIOSH’s recommendations and to increase parity between the agricultural and non-agricultural child labor provisions).

251. Cf. *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (concluding that the EPA’s refusal to regulate greenhouse gas emissions from motor vehicles is a violation of its statutory command under the Clean Air Act). The EPA ignored its congressional duty under the Clean Air Act to regulate emissions of damaging pollutants from new motor vehicles. *Id.* Similar to the Secretary’s duty under the FLSA in defining hazardous occupations, the Clean Air Act requires the EPA to

CONCLUSION

Children working on tobacco farms today are particularly vulnerable to potential disastrous harm, and unfortunately, instead of protecting the child farm workers, the FLSA regulations provide numerous exceptions to allow them to work unimpeded. The disparity that exists between the protections afforded to children working in non-agricultural work from those working in agricultural work is arbitrary and capricious—the DOL has failed to articulate any rationale for treating the two sectors differently. Instead, it appears that the distinction reflects a largely historical anomaly that arose from historical views of the mythical benefits associated with farm work, namely that it provides children with invaluable lessons in hard work and responsibility. Considering that workplace standards for acceptable working conditions for children have evolved over the years, romanticized notions tied to our nation's agrarian roots must give way to the harsh realities of the modern workplace.

When provided with the opportunity to rectify this discrepancy, the DOL acquiesced to political pressures and failed to follow the statutory authority conferred upon the agency under the FLSA. Once the Secretary determined that children's health and safety are at risk on tobacco farms, the agency had a fundamental duty to protect those children from continued harm. While agencies are normally provided with great latitude in reaching their own decisions, the DOL should not be afforded deference in this instance and, instead, should face a greater degree of scrutiny in defense of its decision not to regulate child labor on tobacco farms. However, the DOL is unlikely to provide a reasonable justification since its inaction was a clear violation of its statutory command under the FLSA.

The DOL should re-instate the 2011 NPRM and provide stricter laws to protect child farm laborers. In fact, congressional representatives—having presumably seen the errors of their ways from their earlier rejection of DOL's efforts—have recently taken a more proactive stance to eradicate child workers on tobacco farms in response to the Human Rights Watch's May 2014 report. Representative Cicilline from Rhode Island introduced a bill in the House of Representatives in July 2014 requesting to amend the FLSA to declare tobacco production particularly hazardous and oppressive

determine which pollutants "cause, or contribute to, air pollution" that could "endanger public health or welfare." 42 U.S.C. § 7521(a)(1). In *Massachusetts v. EPA*, the Court struck down the EPA's failure to regulate greenhouse gas emissions, 549 U.S. at 528, and the DOL would face a similar fate in a court proceeding.

child labor.²⁵² Interestingly, this bill went further than the 2011 NPRM with regards to child employment on tobacco farms. The 2011 NPRM suggested creating a new Agricultural Hazardous Order to prohibit children under the age of sixteen from working in tobacco production.²⁵³ Representative Cicilline's proposed bill would prohibit the employment of any child under the age of eighteen.²⁵⁴

On September 20, 2014, thirty-five House Democrats sent a letter to the DOL asking it to commence with a new rulemaking to prohibit children from working on tobacco farms.²⁵⁵ Even some tobacco companies have taken initiatives towards protecting child laborers. Two major tobacco manufacturing companies—R.J. Reynolds Tobacco Co. and Altria Group Inc.—have recently banned its growers from employing workers under sixteen.²⁵⁶ While these efforts are promising, federal law continues to permit employment of children under oppressive conditions. The child labor regulations under the FLSA need to be realigned to conform to the realities of current workplace conditions.

252. H.R. 5327, 113th Cong. § 1 (2014) (“Any employment in which children under the age of 18 come into direct contact with tobacco plants or dried tobacco leaves shall be considered particularly hazardous oppressive child labor within the meaning of this subsection.”). This bill has been referred to the House Subcommittee on Workforce Protections on Nov. 17, 2014. See *H.R. 5327—To Amend the Fair Labor Standards Act of 1938 to Prohibit Work by Children in Tobacco-Related Agriculture as Particularly Hazardous Oppressive Child Labor*, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/5327/all-actions> (last visited Mar. 30, 2015). This bill will have to be re-introduced in the 114th United States Congress.

253. See 29 C.F.R. § 570.71(a) (2013) (establishing sixteen as the minimum age for occupations in agriculture).

254. H.R. 5327 § 1.

255. Letter from Matt Cartwright et al., Members of Cong., to Thomas Perez, Sec’y of Labor (Sept. 20, 2014), available at [http://op.bna.com/env.nsf/id/rdae-9p9na7/\\$File/2014%2009%2020%20DOL%20Letter%20on%20Child%20Tobacco%20Labor.pdf](http://op.bna.com/env.nsf/id/rdae-9p9na7/$File/2014%2009%2020%20DOL%20Letter%20on%20Child%20Tobacco%20Labor.pdf).

256. Richard Craver, *Reynolds, Altria Will Prohibit Under-16 Workers in Tobacco Fields*, WINSTON-SALEM J. (Dec. 13, 2014, 7:00 AM), http://www.journalnow.com/business/business_news/local/reynolds-altria-will-prohibit-under-workers-in-tobacco-fields/article_52a60a66-8279-11e4-bff6-7bb5a34e5069.html.