# HARVARD JOURNAL
*on*
# LEGISLATION

VOLUME 35, NUMBER 1 WINTER 1998

## CONGRESS ISSUE



## POLICY ESSAYS



## ARTICLES

## STATUTES



## NOTE



---

# ARTICLE

# BEYOND CONTESTED ELECTIONS: THE PROCESSES OF BILL CREATION AND THE FULFILLMENT OF DEMOCRACY'S PROMISES TO THE THIRD WORLD

ANN SEIDMAN*
ROBERT B. SEIDMAN**

*In the Third World, development has not progressed as expected; legislatures in both formerly colonized nations and in states making the transition from command to market economies have enacted few transformative laws favoring the majority. Especially in view of the predominant executive domination of legislation in the law-making process, the authors contend that this failure demonstrates the falsity of a definition of democracy that hinges solely on the existence of competitive elections. In this Article, the authors examine the causes of the failure to enact transformative laws and propose potential solutions. They believe that problematic institutions have blocked development and that existing bill-creating institutions in the executive branch require significant restructuring. The authors adopt a problem-solving methodology to identify the causes of the problematic behaviors both of appointed and elected officials and of the actors whose behaviors government seeks to change via legislation. Insights from the authors' experience living, teaching, and training drafters and legislators in several African and other third-world countries inform the perspective set forth herein.*

> [T]here is hardly any kind of intellectual work which so much needs to be done, not only by experienced and exercised minds, but by minds trained to the task through long and laborious study, as the business of making laws.
>
> —John Stuart Mill[1]

In the Third World, promises made by nominally populist governments to promote development have gone unfulfilled. Whether previously colonized or continually under indigenous rule, in most of these nations development—defined as the use

---

* Adjunct Professor, School of Law, Boston University; Adjunct Professor, International Development, Clark University. B.A., Smith College, 1947; M.S., Columbia University, 1953; Sixth-year degree, University of Bridgeport, 1968; Ph.D., University of Wisconsin, 1968.

** Professor of Law and Political Science, Emeritus, School of Law, Boston University. B.A., Harvard University, 1941; LL.B., Columbia University Law School, 1948.
We are deeply indebted to our research assistants, Bradley Holt and Janice Payne, for their untiring efforts, far beyond the call of duty. For useful critique, we are indebted to Professor Maureen O'Rourke; mistakes are, of course, our own.

[1] Quoted in Ernst Freund, *The Problem of Intelligent Legislation*, 4 PROC. AM. POL. SCI. ASS'N 69, 70 (1907).

of state power to bring about social, political, and economic change in favor of the majority—has imploded.[2] Most countries' inhabitants have experienced a declining quality of life and plummeting income. Third-world babies, for instance, have life expectancies that range from ten to thirty years less than those of infants in richer, industrialized states.[3] By the late 1980s, in the two decades after colonized African countries typically achieved independence, the average African's real income had fallen twenty to twenty-five percent.[4] War, ethnic cleansing, and the disintegration into anarchy of whole societies have added their own horrors to this dismal picture.[5] These calamities have shown no discrimination, striking both highly authoritarian and democratic states.

A few countries' rates of growth have skyrocketed briefly and then fizzled: Argentina in the 1950s; Kenya and the Ivory Coast in the 1960s; Brazil and South Africa in the 1970s.[6] For the most part, however, development has remained an unrealized promise. Almost no countries have experienced the structural, populist

---

[2] *See* ANN SEIDMAN AND ROBERT B. SEIDMAN, STATE AND LAW IN THE DEVELOPMENT PROCESS: PROBLEM-SOLVING AND INSTITUTIONAL CHANGE IN THE THIRD WORLD 11–26 (1994) [hereinafter SEIDMAN & SEIDMAN].

[3] Life expectancy serves as a useful measure of quality of life because it reflects factors such as nutrition, health care, housing, and the duration and quality of labor. *See* EDWIN LIM & ADRIAN WOOD, CHINA: LONG-TERM DEVELOPMENT ISSUES AND OPTIONS—THE REPORT OF A MISSION SENT TO CHINA BY THE WORLD BANK (1985). Life expectancy in the member countries of the Organisation for Economic Co-operation and Development (OECD) in 1989 was about 76 years; in sub-Saharan Africa, it was about 52 years. *See* WORLD BANK, WORLD DEVELOPMENT REPORT 1991: THE CHALLENGE OF DEVELOPMENT 205 (1991).

[4] *See* SEIDMAN & SEIDMAN, *supra* note 2, at 11.

[5] *See, e.g.*, CONFLICT IN AFRICA (Oliver Furley ed., 1995) (reviewing the causes and effects of conflict); Stephen Buckley, *Army Seizes Power in Burundi*, WASH. POST, July 26, 1996, at A1; Stephen Buckley, *After 35 Years, Nigeria Still Stumbling on Road to Democracy*, WASH. POST, Sept. 30, 1995, at A1 (recalling Nigeria's civil war in the 1960s in which an estimated 1.5 million people died in combat and hundreds of thousands more died of starvation); *Burundi's Tutsi Army Battles to Expel Hutu Rebels from Capital*, CHI. TRIB., Dec. 7, 1995, at 26 (discussing the Tutsi-dominated army's operation to expel Hutu rebels from the city). *But cf.* Gwynne Dyer, *Peace, Democracy Prevail*, MONTREAL GAZETTE, Dec. 30, 1995, at B3 (maintaining that worldwide democratic transformation progresses despite chronic violence and ethnic cleansing). For a discussion of the roots of the ethnic divisions and the "culture of violence" in South Africa, see RICH MKHONDO, REPORTING SOUTH AFRICA 54–56 (1993). For an analysis of ethnicity in Zimbabwe, see COLIN STONEMAN & LIONEL CLIFFE, ZIMBABWE: POLITICS, ECONOMICS AND SOCIETY 88–89 (1989).

[6] *See* SEIDMAN & SEIDMAN, *supra* note 2, at 16. In addition, in the 1970s and 1980s, the GNPs of Asia's "little dragons" soared. These countries benefitted from exceptional circumstances unlikely to help most third-world countries. *See id.* at 46–50. Hong Kong, Taiwan, Singapore, and South Korea benefitted from massive foreign investment, regional economies that opened as unintended results of military conflict in Korea and Vietnam, and generous foreign aid. *See id.* at 47.

changes that their peoples expected would follow such monumental changes as decolonization.

Many commentators ascribe these dismal results to the venality or other personal defects of leaders.[7] Others maintain that problematic institutions have blocked development.[8] This Article adopts the institutional thesis and focuses specifically on institutions that create the laws.[9] Part I introduces the propositions

---

[7] *See, e.g.*, FRANTZ FANON, THE WRETCHED OF THE EARTH 134–37 (Constance Farrington trans., 1966). "Spoilt children . . . they organize the loot of whatever national resources exist. Without pity, they use today's national distress as a means of getting on through scheming and legal robbery . . . ." *Id.* at 39.

[8] *See generally* SEIDMAN & SEIDMAN, *supra* note 2, at 59–63; Robert Klitgaard, *Comment on "Incentives, Rules of the Game and Development" by Elinor Ostrom, in* ANNUAL WORLD BANK CONFERENCE ON DEVELOPMENT ECONOMICS 1995 235 (Michael Bruno & Boris Pleskovic eds., 1996) ("As we learn that economic policy reforms are not enough for economic success, that multiparty democracy is not enough for political success, that better laws are not enough for better justice, we focus on the institutions through which economic, political and legal activities are carried out and mediated.") Besides hypothesizing human venality and institutional warp, some scholars challenge the validity of the assumption that laws can inspire socially constructive behavior. Jurisprudential views which reject such an assumption include FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., London, Littlewood & Co., 1831) (historical jurisprudence); Eugen Ehrlich, *Sociology of Law*, 36 HARV. L. REV. 130 (1922) (sociological jurisprudence); Roscoe Pound, *Sociology of Law and Sociological Jurisprudence*, 5 U. TORONTO L.J. 1 (1943); KARL MARX, *A Contribution to the Critique of Hegel's Philosophy of Right, in* EARLY WRITINGS 424 (Quintin Hoard ed., Rodney Livingstone & Gregor Benton trans., 1975); BOB JESSOP, THE CAPITALIST STATE: MARXIST THEORIES AND METHODS (1982); HUGH COLLINS, MARXISM AND LAW 77 (1982); David V. Williams, *The Authoritarianism of African Legal Orders*, 5 CONTEMPORARY CRISES 247, 255–57 (1981) (reviewing ROBERT B. SEIDMAN, THE STATE, LAW AND DEVELOPMENT (1978)) (Marxist jurisprudence); Laura Nader, *Up the Anthropologist—Perspectives Gained from Studying Up, in* REINVENTING ANTHROPOLOGY 284 (Dell Hymes ed., 1974) (anthropological jurisprudence). In essence, each school teaches that law *reflects* society, and as such, cannot *affect* society. Academic pessimists notwithstanding, most countries in the Third World use state power in the development process, supplemented by assistance from the World Bank, USAID, UNDP, the Asian Development Bank, and many private agencies. This Article need not take a position on the issue, which is addressed in Robert B. Seidman, *Law and Poverty, in* ESSAYS ON THIRD WORLD PERSPECTIVES IN JURISPRUDENCE (M. L. Marasinghe & William Conklin eds., 1984) and SEIDMAN & SEIDMAN, *supra* note 2, at 119. This Article does argue, however, that (i) states have no means other than law to influence change; and (ii) so long as states continue to try to use law to bring about social, political, and economic change, the social practices concerned with law-making remain a valid arena for study.

[9] We leave unexamined possible remedies for the legislature's usual subservience to the executive and its general incapacity for legislative leadership—for example, its lack of drafting capacity, *see infra* text accompanying notes 74–76; the insufficiency of its committee structure; or the inability of many elected members to assess legislative materials. *See, e.g.*, WILLIAM TORDOFF, GOVERNMENT AND POLITICS IN AFRICA 67–68, 274 (1993); John R. Hibbing & Samuel C. Patterson, *The Emergence of Democratic Parliaments in Central and Eastern Europe, in* PARLIAMENTS IN THE MODERN WORLD: CHANGING INSTITUTIONS 129, 136–37 (Gary W. Copeland & Samuel C. Patterson eds., 1994) [hereinafter COPELAND & PATTERSON]; PETER H. KOEHN, PUBLIC POLICY AND ADMINISTRATION IN AFRICA: LESSONS FROM NIGERIA 248–50 (1990); ROBERT B. SEIDMAN, THE STATE, LAW AND DEVELOPMENT 391 (1978); *see also* GELASE MUTA-

that third-world development lags in large part because governments have mismanaged their principal tool for achieving social change: the legal order. As a result of this mismanagement, third-world countries have failed to institute effectively implementable laws with the potential to transform existing institutions in favor of the majority.

Adopting a problem-solving methodology,[10] Part II specifies whose and what behaviors constitute the social harm addressed in this Article: the failure of legislatures to enact laws that advance the interests of the majority that elected them. In most countries, the deficiencies in legislative output reflect weaknesses not only in the *legislative* but also in the *executive* branch, which typically dominates the law-making process.[11]

In the legislative processes of most polities, executive branch officials—some appointed, few elected—become the key actors, exercising a *de facto* monopoly power over legislation.[12] These officials include the ministerial civil servants who develop the legislative programs, the ministerial and central drafting office lawyers who actually formulate legislative programs in statutory language,[13] and the ministers who, at least in constitutional theory, supervise their work. The few development-related bills that these officials actually produce often fail to induce the behaviors they prescribe or, worse, the bills advance elite rather than popular interests.

The second step of problem solving requires diagnosing the causes of the behaviors that constitute the identified social harm.[14]

---

HABA, REFORMING PUBLIC ADMINISTRATION FOR DEVELOPMENT: EXPERIENCES FROM EASTERN AFRICA 127–28 (1989).

[10] On the problem-solving methodology as the preferred methodology for legislation, see Robert B. Seidman, *Justifying Legislation: A Pragmatic, Institutionalist Approach to the Memorandum of Law, Legislative Theory and Practical Reason*, 29 HARV. J. ON LEGIS. 1 (1992); SEIDMAN & SEIDMAN, *supra* note 2, at 69–85; Eric J. Gouvin, *Truth in Savings and the Failure of Legislative Methodology*, 62 U. CIN. L. REV. 1281 (1994). *But see* Edward Rubin, *Legislative Methodology: Some Lessons from the Truth-in-Lending Act*, 80 GEO. L.J. 233 (1991) (discussing how drafters should first determine the legislation's ends and make the bill its means); *infra* note 98 and accompanying text.

[11] This Article uses the term "bill-creating" to mean the processes by which an idea becomes a bill presented to the legislature; "law-enacting" refers to the legislative process proper; and "law-making" means both combined and, in some systems, includes approval by the executive. In the Anglo-American tradition, the term "bill-drafting" has come to signify only the processes by which drafters, almost exclusively lawyers, put other peoples' ideas into legal form; that is, only a small part of what this Article subsumes under "bill-creating." *See infra* text accompanying notes 91–95.

[12] *See* SEIDMAN & SEIDMAN, *supra* note 2, at 185–86; SEIDMAN, *supra* note 9, at 386; MUTAHABA, *supra* note 9, at 136–68 (describing the civil service domination of policy-making and implementation in Zambia, Kenya, and Tanzania).

[13] This Article denotes these two sets of officials collectively as "drafters."

[14] Legislation aims to solve an essential social problem; to solve such problems, laws

Part III offers two sets of explanations for the problematic behaviors of these officials. First, due to both institutional and personal limitations, drafters seldom perform the research required to assure that laws induce the behaviors they prescribe. Second, existing input and feedback processes predetermine elite-serving outcomes.

The third step of problem solving entails proposing solutions likely to alter or eliminate the causes identified at the explanations stage. Part IV explores possible means of restructuring existing bill-creating institutions to change the behaviors that have produced unimplementable bills, produced bills that work against majoritarian interests, or—most frequently—simply failed to produce any development-oriented bills.[15]

## I. LOCATING THE DIFFICULTY: THE FAILURE OF THIRD-WORLD GOVERNMENTS TO USE LAW IN AID OF DEVELOPMENT

As a foundation for the later discussion of bill-creating institutions, this Part discusses (1) the legal order's function in the development process; (2) law-makers' general failure to employ the legal order as an instrument of development; and (3) the limits of an election-centered definition of democracy, with its implicit focus on law enactment, not bill creation.

### A. *Law in the Development Process*

Even if only to ensure appropriate conditions for optimal market functioning, development requires the use of state power.[16]

---

must address causes, not symptoms. The search for causes—explanations—constitutes a key step in problem solving. *See* SEIDMAN & SEIDMAN, *supra* note 2, at 76–79. What some authors denote as "problem solving" omits this key step. *See, e.g.*, ERNEST R. HOUSE, PROFESSIONAL EVALUATION: SOCIAL IMPACT AND POLITICAL CONSEQUENCES (1993); Robert Cox, *Social Forces, States and World Order Beyond International Relations Theory*, *in* NEOREALISM AND ITS CRITICS 204, 208 (Robert O. Keohane ed., 1986). As a result, those authors revert either to ends-means or incrementalist methodologies. *See infra* note 118 and text accompanying notes 120–125.

[15] Problem solving's fourth stage—monitoring the effectiveness of a law—lies beyond the scope of this Article. For further discussion, see SEIDMAN & SEIDMAN, *supra* note 2, at 81, 128–41.

[16] *See* Robert B. Seidman et al., *Big Bangs and Decision-Making: What Went Wrong?*, 13 B.U. INT'L L.J. 436, 446–48 (1995); Ibrahim F.I. Shihata, *The World Bank and "Governance" Issues in its Borrowing Members*, *in* THE WORLD BANK IN A CHANGING WORLD 53 (Franziska Tschofen & Antonio R. Parra eds., 1991); INTERNATIONAL BANK

Typically, whether following a colonial or a prior indigenous regime, government leaders announced policies aimed at eradicating the perceived social, political, or economic difficulties associated with underdevelopment. These difficulties invariably constituted social problems—i.e., problematic repetitive patterns of behaviors.[17] A repetitive pattern of behavior constitutes an institution.[18] Underdevelopment reflects the interactions of a com-

---

FOR RECONSTRUCTION AND DEVELOPMENT & WORLD BANK, WORLD DEVELOPMENT REPORT 58–77 (1987).

[17] *Cf.* HARRY M. JOHNSON, SOCIOLOGY: A SYSTEMATIC INTRODUCTION 639 (1960); Harry V. Ball et al., *Law and Social Change: Sumner Reconsidered*, 67 AM. J. SOC. 532 (1962).

[18] *See* GEORGE CASPER HOMANS, THE NATURE OF SOCIAL SCIENCE 50–51 (1967); *cf.* NORMAN UPHOFF, LOCAL INSTITUTIONAL DEVELOPMENT 9 (1986). This definition of "institution" is controversial. *Cf.* Sven-Erik Sjöstrand, *On Institutional Thought in the Social and Economic Sciences*, *in* INSTITUTIONAL CHANGE 9–12 (Sven-Erik Sjöstrand ed., 1993) (defining "institution" as "a human mental construct for a coherent system of shared (enforced) norms that regulate individual interactions in recurrent situations" and "institutionalization" as "the process by which individuals intersubjectively approve, internalize and externalize such a mental construct."); Douglass C. North, *Institutional Change: A Framework for Analysis*, *in* INSTITUTIONAL CHANGE, *supra*, at 36. According to North, an institution consists of "formal rules, informal constraints (norms of behavior, conventions and self-imposed codes of conduct) and the enforcement characteristics of both." *Id.* Organizations consist of "groups of individuals engaged in purposive activity. The constraints imposed by the institutional framework (together with the other constraints) define the opportunity set and therefore the kind of organizations that will come into existence." *Id.* "The agent of change is the entrepreneur, the decision-maker(s) in organizations." *Id.* at 37. *See also* JOHNSON, *supra* note 17, at 22 (defining the term "social institution" as a "complex normative pattern that is widely accepted as binding in a particular society or part of society").

For analyzing the law-making enterprise, the behavioral definition seems more useful: law always addresses behaviors; it transforms institutions by changing behaviors. The key question then becomes, *why* do those behavioral patterns exist? *See supra* note 8 and accompanying text. A drafter ought to count as important not merely the clarity and elegance of a bill's words, but also their likely effectiveness in bringing about the prescribed behaviors, and those behaviors' effectiveness in resolving the social problem at which the law aims. To serve a drafter's needs, the definition of institutions ought to reflect the requirement that a bill not merely change the *rules*, but change *behaviors*.

These utilitarian considerations suggest two reasons for the definition of institution used here. First, solutions build on causes (or explanations). To build into the definition of institution only one possible explanation for repetitive patterns of behavior (for example, that the normative pattern is "widely accepted as binding," JOHNSON, *supra* note 17, at 22) limits the investigation of explanations for those repetitive patterns. This narrows the range of possible legislative initiatives to change them. Second, confining the definition of institution to the *rules* that prescribe the behavior (as does North) can lead to a focus on rules, not on induced behavior. This neglects the American Legal Realists' observation that law-in-action systematically differs from law-in-the-books. *See* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); *see also* Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). This also ignores law's utility for changing institutions, thereby fostering development. *See infra* note 24 and text accompanying notes 21–24 (describing the legal order as a means of changing institutions).

plex institutional machinery that, together, manufacture poverty and repression.[19]

Policies alone, however, rarely change institutions; that task requires new laws.[20] At most, policies usually change only the climate of discourse. Until enacted into laws that change behaviors in ways likely to result in the implementation of the desired policies, policies amount to little more than declarations of intent.

Development-related policies usually proclaim desired changes in resource allocations. Since government cannot directly reallocate resources, it does so indirectly, by modifying behavior through legislation. To control inflation, in which too many dollars chase too few goods, for example, government can neither command the number of dollars to decrease nor command goods to multiply. It can only try to change the behaviors of those who print or spend dollars or produce goods.

The drafter of an anti-inflation bill must unpack the social problem into its constituent actors and their behaviors. On the money-supply side, the bill may aim to affect those in the Central Bank who issue money; those in commercial banks who make loans; employers who pay higher or lower wages; and all the other actors who, to one extent or another, influence the money supply. On the goods-supply side, the bill may seek to influence raw materials suppliers, transporters, manufacturers, energy suppliers, wholesalers, and retailers. Only if drafters identify the relevant actors and their behaviors can they devise a legislative program likely to change those behaviors.

---

[19] *See* SEIDMAN & SEIDMAN, *supra* note 2, at 145–76; *cf.* writings in the New Institutional Economics school, *e.g.*, Joel P. Trachtman, *The Applicability of Law and Economics to Law and Development: The Case of Financial Law*, *in* EMERGING FINANCIAL MARKETS AND THE ROLE OF INTERNATIONAL FINANCIAL ORGANIZATIONS 26 (Joseph J. Norton & Mads Andenas eds., 1996); Mustapha K. Nabli & Jeffrey B. Nugent, *The New Institutional Economics and its Applicability to Development*, 17 WORLD DEV. 1333, 1335 (1989); Oliver E. Williamson, *The Institutions and Governance of Economic Development and Reform*, *in* PROCEEDINGS OF THE WORLD BANK ANNUAL CONFERENCE ON DEVELOPMENT ECONOMICS 1994 171 (1995); North, *supra* note 18, at 44 ("Third world countries are poor because the institutional constraints define a set of payoffs to political/economic activity that do not encourage productive activity."); *see also* Antoni Z. Kaminski & Piotr Strzalkowski, *Strategies of Institutional Change in Central and Eastern European Economies*, *in* INSTITUTIONAL CHANGE, *supra* note 18, at 139; JAMES G. MARCH & JOHAN P. OLSEN, REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS 143–48 (1989).

[20] *Cf.* Karl Llewellyn, *The Normative, the Legal and the Law Jobs: The Problems of Juristic Method*, 49 YALE L.J. 1355, 1373 (1940).

Law constitutes government's principal tool for social control.[21] Despite the legal order's[22] limits, government's other instruments to execute policy have relatively little utility.[23] Unless crafted in legislation, development policy can deliberately and reliably alter neither institutions nor patterns of behavior.[24]

The Western concept of democracy implies that elected officials will use state power to enhance the majority's quality of life. Third-world governments' failure to use the legal order effectively to promote development constitutes a failure of democracy.

### B. *Government's Failures to Use Law for Development*

Most laws designed to foster development by changing institutions have not worked as intended.[25] Unimplemented, many

---

[21] *See* DONALD BLACK, THE BEHAVIOR OF LAW 2, 16–17 (1976).

[22] "Legal order" here includes not only the texts of laws, regulations, and other norms promulgated by the state, but also the law-making and law-implementing institutions—i.e., the entire normative system in which the state has a hand. *See* SEIDMAN & SEIDMAN, *supra* note 2, at 41.

[23] As one alternative, Chairman Mao argued that if the government embraced the correct ideology, government officials would *know* what to do. "The correctness or otherwise of the ideological and political line decides everything." Mao Tse-tung, Address on the Lin Piao Affair (1971), *in* MAO TSE-TUNG UNREHEARSED: TALKS AND LETTERS, 1956–1971 290 (Stuart Schram ed., John Chinnery & Tieyun trans., 1974). He directs that government should use ideology, not law, as an instrument of social change. Mao tried to implement ideological correctness in the Cultural Revolution, with results that hardly recommend it.

[24] *See* SEIDMAN & SEIDMAN, *supra* note 2, at 27, 38–39. Of course, non-governmental actors often do change institutions without formal authority to do so. These include "entrepreneurs," *see* North, *supra* note 18, at 37; DINESH N. AWASTHI & JOSE SEBASTIAN, EVALUATION OF ENTREPRENEURSHIP PROGRAMMES (1996) (evaluation research study of the entrepreneurship development movement in India); NGOs, *see* DEVELOPMENT ALTERNATIVES: THE CHALLENGE FOR NGOS (Ann Gordon Drabeck ed., 1987); army coups, *see* KOEHN, *supra* note 9, at 38; TORDOFF, *supra* note 9, at 149–220; peasant rebellions, *see* B.C. SMITH, UNDERSTANDING THIRD WORLD POLITICS: THEORIES OF POLITICAL CHANGE AND DEVELOPMENT 309–10 (1996); secessionist movements, *see id.* at 269–71; and corruption, *see* William N. Brownsberger, *Development and Governmental Corruption—Materialism and Political Fragmentation in Nigeria*, *in* GOVERNING IN BLACK AFRICA 136–48 (Marion E. Doro & Newell M. Stultz eds., 1986).

[25] *See* Neva Seidman Makgetla & Robert B. Seidman, *Legal Drafting and the Defeat of Development Policy: The Experience of Anglophonic Southern Africa*, 5 J.L. & RELIGION 421, 422 (1987). Consider land reform initiatives in Latin America: The land reform law adopted in Venezuela—a country that after 1958 had eight honest and highly competitive elections—benefitted only a few communities. Critics claimed its greatest achievement lay in giving enough peasants just enough land to forestall widespread support for the local guerrilla movement. *See* DANIEL C. HELLINGER, VENEZUELA: TARNISHED DEMOCRACY 104–07 (1991). In Chile in 1967, democratically elected President Frei promised that land reform would "change the lives of 1,000,000 peasants"; by the end of his term, however, only 20,000 peasants had received land.

laws[26] remain merely symbolic[27] or vacuously denounce unwanted behavior on pain of criminal penalties.[28] Academics respond with learned papers on overcriminalization[29] or on law's impotence to change society.[30] Worldwide, ordinary citizens voice their dis-

---

*Chile: Agrarian Reform at Last*, LATIN AM. NEWSLETTERS, July 28, 1967, at 108; *see also* LOIS HECHT OPPENHEIM, POLITICS IN CHILE 24 (1993) (outlining prior failed efforts at land reform in Chile). In Bangladesh, the Land Reform Ordinance of 1984 promised much but was "written in such a way as to make many of its principal provisions either unenforceable or meaningless." F. Tomasson Jannuzzi & James T. Peach, *Bangladesh: A Strategy for Agrarian Reform*, *in* AGRARIAN REFORM AND GRASSROOTS DEVELOPMENT: TEN CASE STUDIES 77, 90–91 (Roy Prosterman et al. eds., 1990) [hereinafter PROSTERMAN]. In Brazil, the National Agrarian Reform Plan of 1985 ("PNRA-NR") fell short of its targets from the very beginning and has been downgraded numerous times. *See* Anthony T. Hall, *Land Tenure and Land Reform in Brazil*, *in* PROSTERMAN, *supra*, at 205, 219–22. Based on land exportation and redistribution for 1986, "[o]ne observer calculated that . . . it would take over 1,000 years to cater to the 1.4 million families targeted in the initial phase." *Id.* at 222. By 1989, less than 10% (2.5 million hectares) of the reduced target of 27 million hectares for 1991 (the original target was 42 million) was available for reform projects. *Id.*

[26] In the former French colonies, following French tradition, the elected legislatures have typically enacted laws that, until implemented by an executive decree, remain purely symbolic. For example, the Lao P.D.R. enacted the Law on Foreign Investment in 1994 but as of the date of this writing has failed to enact an implementing decree. The law thus remains a dead letter. The same result obtained in Vietnam, where the legislature typically enacted such general laws as to be devoid of meaning. At this writing, of fifteen laws drafted in the course of ELIPS, an extensive USAID project, Indonesia enacted only two and failed to promulgate an implementing decree for either. For a discussion of implementation mechanisms, see Sherab Posel, *"Kamaiya": Bonded Labor in Western Nepal*, 27 COLUM. HUM. RTS. L. REV. 123, 164–68 (1995).

[27] *See, e.g.*, Mark Cammack et al., *Legislating Social Change in Islamic Society*, 44 AM. J. COMP. L. 45, 72 (1996). Non-third-world governments also enact laws that remain symbolic. *See, e.g.*, Gouvin, *supra* note 10; Rubin, *supra* note 10, at 240. *See generally* MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1964) (discussing unimplemented laws enacted by legislatures purely for symbolic value).

[28] *See infra* note 99 and accompanying text.

[29] *See, e.g.*, V.S. Khanna, *Corporate Criminal Liability: What Purpose Does it Serve?*, 109 HARV. L. REV. 1477 (1996) (arguing that corporate civil liability can capture the desirable features of corporate criminal liability); Richard J. Lazarus, *Meeting the Demands of Integration in the Evolution of Environmental Law*, 83 GEO. L. REV. 2407 (1995) (maintaining that the fundamental fairness of the criminal sanction of incarceration is undercut by incoherence in its imposition); John C. Coffee Jr., *Hush!: The Criminal Status of Confidential Information After* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 AM. CRIM. L. REV. 121 (1988); Ellen S. Podgor, *Corporate and White Collar Crime*, 31 AM. CRIM. L. REV. 391, 392 n.8 (1994).

[30] *See* ROBERT L. KIDDER, CONNECTING LAW AND SOCIETY: AN INTRODUCTION TO RESEARCH AND THEORY (1983) (positing that it is all but impossible to know the impact of law on behavior); John Griffiths, *Is Law Important?*, 54 N.Y.U. L. REV. 339 (1976) (arguing that the political will underwriting a law is more important than the law itself); James M. Buchanan, *Politics, Property and Law: An Alternative Interpretation of* Miller v. Schoene, 15 J.L. & ECON. 439 (1972) (positing that if law remains stable then, following the Coase theorem, parties will bargain their way around the law to reach the same allocations of goods and services—whatever the law in force); Lawrence Friedman, *Legal Culture and Social Development*, 4 L. & SOC'Y REV. 29 (1969) (stating that "values and attitudes" determine which laws and institutions work and which do not); J. P. Roche & M. M. Gordon, *Can Morality be Legislated?*, N.Y. TIMES,

content in a familiar oxymoron: good laws exist, but they remain badly implemented.

Perhaps most commonly, legislatures have not even considered much development-oriented legislation.[31] Consider a recent case, that of post-apartheid South Africa. In 1994, more or less democratic elections[32] marked the end of the apartheid era. The liberation movement led by the African National Congress won the presidency and clear majorities in both houses of the National Assembly. Before that land-slide vote, the laws that structured apartheid institutions ensured that ethnicity determined both social and economic station. In 1996, two years later, most of these laws remain unchanged. A few ministries have proposed (and some have had enacted) a few transformative laws.[33] Others have issued policy statements geared toward transformation.[34] Some,

---

May 22, 1955, (Magazine) (using values and attitudes to explain failures to obey the law). *See generally* Brian Z. Tamanaha & Richard Bilder, *The Lessons of Law-and-Development Studies*, 89 AM. J. INT'L L. 470 (1995) (book review) (reviewing past accomplishments in the field of law and development and its future potential).

[31] *Cf.* Peter Bachrach & Morton S. Baratz, *Decisions and Non-Decisions: An Analytical Framework*, 57 AM. POL. SCI. REV. 632, 641 (1963). Non-decision-making is "the practice of limiting the scope of the actual decision-making to 'safe issues' by manipulating the dominant community values, myths, and political institutions and procedures." *Id.* at 632. "Many investigators have also mistakenly assumed that power and its correlatives are activated and can be observed only in decision-making situations. They have overlooked the equally, if not more important area of . . . non-decision-making . . . . To pass over this is to neglect the whole 'face' of power." *Id.*

[32] The Interim Constitution required that, whatever the vote, the Cabinet would include representatives of all parties that elected at least five percent of the members of the National Assembly. *See* MARTIN J. MURRAY, THE REVOLUTION DEFERRED: THE PAINFUL BIRTH OF POST-APARTHEID SOUTH AFRICA 192 (1994). For a discussion of the use of the proportional representation system in Germany, Israel, and the Netherlands, and its comparative advantages, see Bertus de Villiers, *An Electoral System for the New South Africa*, *in* CONSTITUTION MAKING IN THE NEW SOUTH AFRICA 28–53 (Alexander Johnson et al. eds., 1993).

[33] South Africa has enacted a few transformatory laws. For example, the Restitution of Land Rights Act aimed to restore land title to pre-apartheid holders; most of those pre-apartheid holders who had lost title, however, had not previously held it in a way recognized by the national legal system and hence could not claim under the new bill. The new labor law mandated major changes in industrial relations institutions. Labor Relations Act (1996) (new bills mandating minimum standards of employment and employment equity had reached the green paper stage). Regulations regarding housing also tended toward institutional change. A Police Act significantly changed decision-making about police policy. The Land Tenure Rights Act made it difficult to evict some sharecropping tenants but did not change the basically feudal relationships those tenures perpetuated. New transformatory educational legislation seemed imminent but, in the interim, most schools remained segregated and curricula unchanged.

[34] *See, e.g.*, REPUBLIC OF SOUTH AFRICA DEP'T OF LAND AFFAIRS, LAND POLICY: FRAMEWORK DEVELOPMENT DRAFT 1–11 (1995). The Land Ministry's initial policy paper stated in no uncertain terms the need for "fundamental change" to "improve the opportunities of all South Africans to access land for beneficial and productive use." *Id.* at 1. Community demands from the bottom, not government initiatives from the top, were supposed to drive that change, which was to rest on participation and

however, seemingly have blocked efforts to produce transformatory bills.[35] South Africa's experience mirrors that of most developing nations: democratic elections notwithstanding, legislatures have little opportunity to consider, much less enact, laws directed at institutional transformation.[36]

### C. *The Election-Centered Definition of Democracy and its Implied Focus on the Bill-Enacting Process*

Legislators' failure to pass transformative developmental laws contrasts ironically with a worldwide trend toward competitive elections and, therefore, according to the dominant definition of democracy,[37]

---

accountability. *See id.* The "priority . . . is to address the needs of the poor," especially women. *Id.* The policy paper recognized the connections between land policies and agriculture, nature conservation, water supply, forestry, and mining. *See id.* at 2. It proposed eight major goals: (1) the restitution of land to persons deprived of it by past racial policies; (2) the redistribution of land to benefit the poor; (3) tenure security for all South Africans; (4) the simplification and decentralization of the day-to-day land administration systems; (5) the development of a cadastral system for land registry; (6) the transformation of the system for managing state land; (7) facilitating an improved land development mechanism; and (8) improving the skills of participants in the land reform program. *See id.* at 3–11. As of this writing, however, only minor elements of the first and third of these goals had been translated into draft legislation. Restitution of Land Rights Act (1995); Land Tenure Rights Act (1995).

[35] In one provincial Arts and Cultural Ministry, for example, when asked to implement the government's Reconstruction and Development Program, the Ministry's civil servants claimed they had already done so through booklets (written under the old regime) and radio programs directed to women on subjects such as "How to Set the Table," "Formal and Informal Dining," "How to Make Ironing Enjoyable," and "Embroidery." Authors' interview with an Arts and Cultural Ministry consultant (Aug. 1995).

[36] Two years after Zimbabwe's independence in 1980, it had passed only a single transformatory act, creating a set of primary courts applying customary law. Subsequently repealed, the law transferred local power from chiefs appointed by the old regime to a new magistracy. For a discussion of the law and its application, see Robert B. Seidman, *The Individual Under African Law: Zimbabwe's New Primary Courts*, *in* THE INDIVIDUAL UNDER AFRICAN LAW: PROCEEDINGS OF THE FIRST ALL-AFRICA LAW CONFERENCE (P. Takirambuddwe ed., 1982) (paper presented by author at the Royal Swazi Spa, Swaziland; conference took place Oct. 11–16, 1981); Robert B. Seidman, *Rules of Recognition in the Primary Courts of Zimbabwe: On Lawyer's Reasoning and Customary Law*, 32 INT'L & COMP. L.Q. 871 (1983).

[37] In comparative studies, differing definitions of democracy abound. *See* Fred Schaffer, The Role of Culture, Language, and Translation in the Study of Democracy: The Case of Senegal (Oct. 16, 1995) (unpublished paper on file with the African Studies Center, Boston University) (noting a different cultural definition of democracy in Senegal); *see also* DENNIS C. MUELLER, CONSTITUTIONAL DEMOCRACY 216–17 (1996); Alan Ware, *Liberal Democracy: One Form or Many?*, 40 POL. STUD. 130, *reprinted in* TRANSITIONS TO DEMOCRACY: COMPARATIVE PERSPECTIVE FROM SOUTHERN EUROPE, LATIN AMERICA AND EASTERN EUROPE 17 (Geoffrey I. Pridham ed., 1995). Some formerly socialist states in Asia assert a definition of democracy that emphasizes not process but substantive outcome in favor of the majority. *See generally* Dennis Austin, *Introduction* to LIBERAL DEMOCRACY IN NON-WESTERN STATES x–xi

with the trend toward democracy itself.[38] Samuel Huntington, for example, characterizes a political system as democratic "to the extent that its most powerful collective decision makers are selected through fair, honest, and periodic elections in which candidates freely compete for votes and in which virtually all the adult population is eligible to vote."[39]

By this definition, in recent years much of the developing world has become democratic. In the (not so distant) past, in states such as Kenya, Zambia, South Africa, Nicaragua, Brazil, and Panama, governors' power sometimes derived from a mere "Ja" vote, sometimes from the vote of a minority electorate, and sometimes from the barrel of a gun. Today, elected governments and legislatures more often derive power through processes certified by international organizations as democratic.[40]

---

(Dennis Austin ed., 1995); Benjamin I. Schwartz, *The Possibility of Liberal Democracy in East-Asian Societies*, *in* AUSTIN, *supra*, at 205, 216–21; SAMUEL P. HUNTINGTON, AMERICAN POLITICS: THE PROMISE OF DISHARMONY 55–60, 228 (1981). *See also* Paul Markillie, *The Philippines: Back on the Road*, ECONOMIST, May 11, 1996, at S4 (quoting Singapore's former Prime Minister Lee Kuan Yew's statement that America's constitution is "one of the most difficult to operate in the world"); *Hashimoto's Japan*, ECONOMIST, Jan. 13, 1996, at 35. For a description of Korean democracy, see KIM ET AL., THE LEGISLATIVE CONNECTION: THE POLITICS OF REPRESENTATION IN KENYA, KOREA, AND TURKEY 34 (1984). A minority view in the United States emphasizes communitarian definitions. *See, e.g.*, AMITAI ETZIONI, THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES AND THE COMMUNITARIAN AGENDA (1993); WILLIAM A. GALSTON, JUSTICE AND THE HUMAN GOOD 276–77 (1980); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 109–20, 171–85 (1991); and GEORGE C. LODGE, THE NEW AMERICAN IDEOLOGY 39 (1974).

[38] *See* SAMUEL HUNTINGTON, THE THIRD WAVE: DEMOCRATIZATION IN THE LATE TWENTIETH CENTURY 7 (1991) (describing current democratic transitions as comprising a third wave of democratization in modernity) [hereinafter HUNTINGTON]. Thomas M. Franck describes the trend analogously:

> As of late 1991, there are more than 110 governments . . . that are legally committed to permitting open, multiparty, secret-ballot elections with a universal franchise . . . . While a few, arguably, are democracies more in form than in substance, most are, or are becoming, genuinely open to meaningful political choice. Many of these new regimes want, indeed need, to be validated by being seen to comply with global standards for free and open elections.

Thomas M. Franck, *The Emerging Right to Democratic Government*, 86 AM. J. INT'L L. 46, 47–48 (1992).

[39] HUNTINGTON, *supra* note 38, at 7.

[40] By the mid-1990s, the trend toward conducting contested elections in The Third World, which observers cited as evidence of meaningful democratization, had slowed considerably or even reversed. In Zimbabwe, in April 1996, President Mugabe was returned to office in a one-man race; Algeria's military cancelled elections in 1992 and excluded a Muslim fundamentalist party from future electoral participation when that party was projected as the election's winner; Nigeria's military voided the results of an election that went against its candidate and imprisoned the winner; in the Central African Republic, in May 1996, only the timely intervention of French troops prevented a military mutiny from becoming a coup; Kenya seems unlikely to stage more competitive, multiparty elections like those in 1992; and Zambia recently elected a

Democracy, however, means more than having the opportunity to cast ballots in a competitive election. Rather than describing democracy, Huntington has defined it by stipulation.[41] The function of Huntington's definition, however, reaches beyond mere clarification of meaning: it purports to separate the wheat of democratic politics from the chaff of the undemocratic. Huntington implies that merely conducting competitive elections entails a governmental process serving the majority will. A definition that certifies as "democratic" governments that do not act to benefit the majority that elected them, however, does not winnow out the wheat of people-centered politics.[42] The promise in these new democracies that popularly elected governors would better the lot of the majority has too often given way to enacting laws that favor the powerful and the privileged.

At least since Arthur Bentley's seminal 1908 study of the legislative process,[43] to explain legislative output, the dominant school of political science has fixated on the process by which legislatures enact bills.[44] Under this model of law-making, which meshes with the emphasis on democracy as election-centered, legislators bear responsibility for the legislative output; to explain legislation, studies of the law-making process focus on the legislature.[45] Very few scholars (and of the Third World, almost

---

president only after forbidding the nomination of its long-time former president, Kenneth Kaunda. *See* Charles J. Hanley, *Worldwide Surge Toward Democracy Hits Boulders*, COM. APPEAL, Dec. 10, 1995, at 8A ("Around the world, in country after country, the early returns show that government of the people, by the people, and for the people is under siege by 'democracy' for the few, in places where contrary voices are silenced, elections rigged, and 'elected' presidents enthroned.").

[41] Some definitions define words by describing the referent. Others, like this one, only stipulate what the word means. *See* C.K. OGDEN & I.A. RICHARDS, THE MEANING OF MEANING: A STUDY OF THE INFLUENCE OF LANGUAGE UPON THOUGHT AND OF THE SCIENCE OF SYMBOLISM 112, 113 (10th ed. 1969).

[42] The test of a descriptive definition lies in its accuracy. The test of a stipulative definition depends on its utility. *See id.* at 124–25.

[43] ARTHUR FISHER BENTLEY, THE PROCESS OF GOVERNMENT (Peter H. Odegard ed., 1967).

[44] *See, e.g.*, EDWARD V. SCHNEIER & BERTRAM GROSS, LEGISLATIVE STRATEGY: SHAPING PUBLIC POLICY (1993) (analyzing the legislative process from the perspective of legislators' strategic and tactical decision-making); WALTER J. OLESEZEK, CONGRESSIONAL PROCEDURES AND THE POLICY PROCESS (1978). *But see* HAYNES JOHNSON & DAVID S. BRODER, THE SYSTEM: THE AMERICAN WAY OF POLITICS AT THE BREAKING POINT 108–49 (1996) (discussing the drafting process which produced President Clinton's health care reform legislation); *see also* James A. Morone, *American Political Culture and the Search for Lessons from Abroad*, 15 J. HEALTH POL., POL'Y & L. 129, 134–35 (1990) (discussing the problems caused by political competition in health care legislation).

[45] *See, e.g.*, ERIC REDMAN, THE DANCE OF LEGISLATION (1973); WILLIAM J. KEEFE & MORRIS S. OGUL, THE AMERICAN LEGISLATIVE PROCESS: CONGRESS & THE STATES (8th ed. 1993); STEVEN S. SMITH, CALL TO ORDER: FLOOR POLITICS IN THE HOUSE

none) have studied the bill-creating process, a process that—far more than the law-enacting process—determines legislative output.

As a corollary to its principal claim of the centrality of the law-making process for development, this Article challenges the notion that a competitive election constitutes a sufficient condition of the democratic polity. In major part, the obstacle to the enactment of development-oriented, institutionally transformative law lies in the bill-creating segment of law-making, far removed from elected representatives' control.

Part II locates the most significant behaviors that thwart enactment of transformative, majority-oriented legislation, not in the moment when the legislature enacts a bill, but much earlier, in the bill's voyages to the legislature's shores. In these stormy, poorly charted seas, transformative laws founder on jagged rocks.

## II. THE DIFFICULTY: AN ANTI-DEMOCRATIC BILL-MAKING PROCESS

The subtext of an election-centered definition of democracy rests on the premise that a legislature serves as a democratic country's "most powerful collective decision maker."[46] According to most democratic constitutions, law-making power—the apex of state power—resides in the legislature. In principle, no member of the executive branch, whether elected or appointed, may lift an official finger without an enabling law duly enacted by the legislature.[47] Presumably, elected representatives control

---

AND SENATE (1989); JOSEPH COOPER, CONGRESS AND ITS COMMITTEES 181–83 (1988) (describing the role of the Congress of the United States in originating and enacting legislation).

[46] HUNTINGTON, *supra* note 38, at 7. Huntington's definition leaves unclear whether the phrase "the most powerful collective decision maker" refers to the decision-maker with the greatest power *de jure* or the greatest power *de facto*. After all, one might argue that democracy exists if the majority of the electorate chose the legislature in fair and open elections, and then the legislature chose a triumvirate to rule the country by decree for the term of office of the legislators. In that case, one might argue, the country might qualify as "democratic" under Huntington's definition: the triumvirate would be "the most powerful collective decision maker," selected "through" contested elections. No matter how fair the elections, however, it seems hard to characterize as "democratic" a polity in which the electorate has power merely to choose its dictator every four years. *Cf.* JOSEPH A. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 269, 288–92 (1943). According to Schumpeter, "the democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the people's vote." *Id.* at 269.

[47] *See, e.g.*, National Council on Compensation Insurance v. Todd, 905 P.2d 114, 119–20 (Kan. 1995) (invalidating a regulation prohibiting rating organizations from

presidents, ministers, cabinets, and even the legions of appointed bureaucrats.[48]

A reality check suggests a different picture. In very few polities does the legislature drive the law-making process. With few exceptions—notably, the United States[49]—the executive branch rather than the legislature exercises *de facto* legislative monopoly over the bill-creating—and hence law-making—process.

This section examines the reality of law-making in most countries: behind closed doors, anonymous executive-branch officials draft bills that the parliament almost invariably passes. This secretive bill-creating process provides a principal opportunity for the exercise of elite and ruling class influence. This section then proposes some hypotheses to explain the crystallization of legislative power in the executive branch. Finally, it specifies whose and what behaviors shape and produce bills that, though enacted by a democratically elected legislature, so often fail to

---

charging insureds for information regarding worker's compensation premiums promulgated by the Kansas Insurance Department as outside the scope of the authority granted the Department by statute); Lewis-Connelly v. Board of Education of Deerfield Public Schools, 660 N.E.2d 283, 286 (Ill. App. Ct. 1996) (holding that school board's action of allowing teacher to continue teaching after her certification had expired was *ultra vires*, and estoppel could not be invoked to prevent termination of the teacher); *see also* GLEN O. ROBINSON, AMERICAN BUREAUCRACY: PUBLIC CHOICE AND PUBLIC LAW 113–14 (1991). *Cf.* HANS KELSEN, GENERAL THEORY OF LAW AND STATE 115–36 (1949) (arguing that all laws fit into a hierarchy subsumed under the *Grundnorm*—roughly, the Constitution).

[48] *See* SEIDMAN & SEIDMAN, *supra* note 2, at chapter 9.

[49] The overwhelming majority of the world's political scientists come from the United States. There, the relative independence of members of Congress from executive control lends some credence to a model of democracy that elevates the legislature as the supreme power and thus comports with the election-centered definition of "democracy." It may well be that that definition in fact amounts to no more than an extrapolation from the circumstances of the United States. This demonstrates yet again the dangers of assuming that the developing world modeled itself on the United States. *Cf.* BRET L. BILLET, MODERNIZATION THEORY AND ECONOMIC DEVELOPMENT: DISCONTENT IN THE DEVELOPING WORLD (1993) (asserting that the modernization theory benefits only the "richer" LDCs); Ali A. Mazrui, *Conflict as a Retreat from Modernity: A Comparative Overview*, *in* CONFLICT IN AFRICA, *supra* note 5, at 19, 21–311; EZZEDDINE MOUDOUD, MODERNIZATION, THE STATE, AND REGIONAL DISPARITY IN DEVELOPING COUNTRIES: TUNISIA IN HISTORICAL PERSPECTIVE 1881–1982, at 16–48 (1989); William H. Freidland, *A Sociological Approach to Modernization*, *in* MODERNIZATION BY DESIGN: SOCIAL CHANGE IN THE TWENTIETH CENTURY 34, 36–42 (Chandler Morse et al. eds., 1969); Marc Galanter, *The Modernization of Law*, *in* MODERNIZATION: THE DYNAMICS OF GROWTH 153, 164 (Myron Weiner ed., 1966); *see also* ECONOMIC POLICY AND THE TRANSITION TO DEMOCRACY: THE LATIN AMERICAN EXPERIENCE (Juan Antonio Morales & Gary McMahon eds., 1996) (reviewing economic and political transformations in six countries); NORMAN JACOBS, MODERNIZATION WITHOUT DEVELOPMENT: THAILAND AS AN ASIAN CASE STUDY 3–25 (1971). *See generally* SMITH, *supra* note 24, at 276–77.

bring about development in favor of the majority that elected that legislature.

### A. *Executive Domination of the Legislative Process and its Consequences*[50]

Notwithstanding constitutional injunctions to the contrary, most third-world states that meet Huntington's definition of a democratic polity exhibit *de facto* executive hegemony over the legislative agenda and the exercise of legislative power. The tiny country of Belize, in Central America, exemplifies this process.[51] Formerly British Honduras, Belize received its independence from Great Britain in 1981. Its courts possess reasonable autonomy, it enjoys freedoms of speech and press, and it possesses none of the patent horrors of the non-democratic state (e.g., preventive detention by administrative fiat). Its constitution plainly lodges legislative power in the parliament. Three times since independence, in hotly contested elections, power has shifted peacefully between its two parties. By any measure, Belize meets Huntington's definition of a democratic polity.

Nevertheless, Belize's legislature has enacted no laws to meet the basic needs of the poor. Neither governmental nor civil societies' institutions have changed significantly. Belize City has become a city of tourist palaces and squalid huts. Elected governments have alternated between the nominal Left and Right (in what one Belize official dubbed "my turn democracy"),[52] but neither has significantly changed the institutions to favor the poor majority.

Belize's experience exemplifies the third-world norm. Most governments that Huntington would deem "democratic" deprive the legislatures of real power.[53] Parliament serves at best as a

---

[50] *See generally* DO INSTITUTIONS MATTER? GOVERNMENT CAPABILITIES IN THE UNITED STATES AND ABROAD (R. Kent Weaner & Bert A. Rockman eds., 1992). *See also* ROBINSON, *supra* note 47, at 69–105. For a discussion of executive domination of policy making in Kenya, *see* KIM ET AL., *supra* note 37, at 32–33.

[51] This section is based on information gathered in the course of a February 1995 consultation in Belize.

[52] Authors' interview with a Belize official (1995).

[53] *See, e.g.*, Newell M. Stultz, *Parliaments in Former British Black Africa*, 2 J. DEVELOPING AREAS 479, 489 (1968) (relating that in Ghana, Nigeria, Kenya, Uganda, Zambia, and Tanzania "parliaments . . . have been executive rubber stamps. No important piece of legislation . . . has been refused; indeed, much legislation has been enacted not infrequently with unseemly haste. Moreover, legislative initiative has rested almost entirely with the executive."); Douglas Webb, *Legal System Reform and Private*

forum for an opposition to voice objections to foregone legislative conclusions. Members of parliament (MPs) may harangue each other across the aisle, but in the end the cabinet gets what it wants.

In brief, practice illustrates the falsity of the power relationships Huntington's definition presumes. As one consequence, no matter how free and fair, parliamentary elections become largely symbolic.[54] If the parliament has no practical authority to initiate and shape legislation,[55] it serves as little more than a rubber-stamp for executive policies turned into bills by administrative bureaucracies.[56]

As a second anti-democratic consequence, the bill-creating process usually becomes an important site for the exercise of elite and ruling class influence. In most countries, civil servants consult "interested parties" before submitting a bill to the cabinet.[57] Almost everywhere, senior civil servants perceive themselves as part of the elite.[58] The parties they deem "interested" thus rarely include the poor and disinherited.

---

*Sector Development in Developing Countries*, *in* ECONOMIC DEVELOPMENT, FOREIGN INVESTMENT AND THE LAW 45, 49 (Robert Pritchard ed., 1996). In South Africa, executive supremacy in law-making became so entrenched that an old-line minister (included in the transitional Government of National Unity) complained that a parliamentary committee "should take care not to encroach on the authority of the executive when drafting laws." BUS. WK. [Johannesburg] 19 June 1996.

[54] In parliamentary systems, of course, parliament elects the government. In presidential systems, most parliaments do not enjoy even that much power. For example, in France, the president remains the preeminent and most powerful figure. *See* Louis Aucoin, Presentation at School of Law, Boston University (Nov. 14, 1996) (paper on file with author).

[55] South Africa's Senior State Counsel, a man with some forty years in government service, recollects only two Private Members' Bills enacted by the Parliament. Interview with R.P. Rossouw, Chief State Law Advisor, Ministry of Justice, in Cape Town, South Africa (Jan. 1994).

[56] *See* ANDREW ADONIS, PARLIAMENT TODAY 64 (1993). In England, "for all the sniping of Conservative MPs, notably dismissed ministers, and the remnants of the so-called 'wets' against Mrs. Thatcher's government, it was only once defeated in the Commons on an issue of significance in its eleven years in office . . . ." *Id.* This single defeat involved the 1986 Shops Act. *Id. See also* Richard Rose, *British MPs: More Bark Than Bite?*, *in* PARLIAMENTS AND PARLIAMENTARIANS IN DEMOCRATIC POLITICS 8, 28–30 (Ezra N. Suleiman ed., 1986) [hereinafter SULEIMAN].

[57] *See* Robert B. Seidman, *Law, Development and Legislative Drafting in English-Speaking Africa*, 19 J. MOD. AFR. STUD. 133, 160 (1981); Arnold Kean, *Drafting a Bill in Britain*, 5 HARV. J. ON LEGIS. 253, 254–57 (1968); *see also* Vernon Bogdanor, *Britain*, *in* PARLIAMENT AND PARTIES: THE EUROPEAN PARLIAMENT IN THE POLITICAL LIFE OF EUROPE 211, 214 (Roger Morgan & Clare Tame eds., 1996); Raymond F. Hopkins, *The Kenyan Legislature: Political Functions and Political Perceptions*, *in* LEGISLATIVE SYSTEMS IN DEVELOPING COUNTRIES 207, 208–10 (G.R. Boynton & Chong Lim Kim eds., 1975) [hereinafter BOYNTON & KIM].

[58] *See* BUREAUCRATS AND POLITICIANS IN WESTERN DEMOCRACIES 47–49 (Joel D. Aberbach et al. eds., 1981) [hereinafter ABERBACH]; THE NEW ELITES OF TROPICAL

A case in Zimbabwe illustrates the results. At Zimbabwe's independence in 1980, after many years of guerilla war, a populist government wrested power from a repressive white minority regime. A newly appointed deputy secretary in the Ministry of Labor asked one of the authors of this Article to draft a bill to replace the old regime's harsh, anti-labor Industrial Relations Act.[59] Following established procedures, the deputy secretary sent the draft to the permanent secretary, a holdover from the old government. Under cover of the Official Secrets Act, the permanent secretary sent it to "interested parties": the South African-based Anglo-American Corporation (then as now the most important private economic actor in Zimbabwe); the Chamber of Commerce; and the Chamber of Zimbabwe Industry. Notably, he did not send it to any trade union representatives. Anglo-American's lawyers drafted a substitute bill that was, if anything, even more restrictive and pro-employer than the old Act. The permanent secretary presented the minister only with Anglo-American's version of the bill. Extraordinarily, the minister—no lawyer—then brought the bill out from behind the veil of government secrecy, proudly announcing it in the press as the new populist government's contribution to democratic Zimbabwe.[60] At that late date, fierce opposition by trade unions and academics resulted in minor concessions. MPs, backbenchers included,[61] dutifully ratified the bill.

Third-world reality consists of a law-making process dominated by the executive that permits disproportionate elite influence in the bill-creating stage.

### B. *Why Executive Domination of Law-Making?*

Executive domination does not stem merely from ministerial power grabbing. It persists mainly for four *institutional* reasons:

---

AFRICA (P.C. Lloyd ed., 1966) [hereinafter LLOYD] (reviewing the rise of the elite class throughout Africa); J. Okumu, *The Socio-Political Setting, in* DEVELOPMENT ADMINISTRATION: THE KENYA EXPERIENCE 25 (G. Hyden et al. eds., 1970) [hereinafter HYDEN].

[59] From 1980 to the end of 1983, the authors taught and conducted research at the University of Zimbabwe.

[60] In Zimbabwe, as in other former British colonies, draft bills usually debut publicly only when submitted to parliament.

[61] At a 1982 workshop for Zimbabwean legislators, backbenchers frankly explained that they could not speak or vote against a cabinet bill without endangering their political careers.

(1) party discipline; (2) the high proportion of ministers in parliament (this situation exists in some countries but not all); (3) the consequences of a negative vote on a government bill (a consideration in parliamentary, as opposed to presidential, systems); and (4) parliament's low level of expertise and lack of staff competent to deal with legislation.[62]

First, party discipline constrains legislative independence. Typically, party chiefs (who usually hold positions in the cabinet as well) punish members of their parliamentary caucus who vote in opposition to the cabinet's expressed will.[63] The extent to which party discipline affects particular legislators depends on the size and strength of their personal political bases. If, as sometimes happens in the United States, a legislator has a constituency independent of the party leadership, that legislator need not fear party reprisal.[64]

---

[62] At least two other factors also contribute. First, constitutional language frequently grants the legislature legislative power in the vaguest of terms. *See, e.g.*, ZAMBIA CONST. (1973) art. 63, *reprinted in* CONSTITUTIONS OF THE WORLD (Albert Blaustein & Gilbert Franz eds., 1985) [hereinafter CONSTITUTIONS] ("The legislative power of the Republic of Zambia shall vest in the Parliament which shall consist of the President and the National Assembly."); SWAZ. CONST. (1968) art. 52, *reprinted in* CONSTITUTIONS, *supra* ("Subject this order, the King and Parliament may make laws for the peace, good order, and government of Swaziland."); S. AFR. CONST. (1983) art. 30, *reprinted in* CONSTITUTIONS, *supra* ("The legislative power of the Republic is vested in the State President and Parliament of the Republic, which, as the sovereign legislative authority in and over the Republic, shall have full power to make laws for the peace, order, and good government of the Republic."). With such vague language, a cabinet can easily snatch legislative power from the parliament, leaving it merely formalistic functions. The Cuban Constitution (1976) uses language that at least reflects the realities of diminished legislative power:

> Article 73. The National Assembly of People's Power is vested with the following powers:
>
> . . . .
>
> b) approving, modifying and annulling laws after consulting with the people when it is considered necessary in view of the nature of the law in question;
>
> . . . .
>
> d) annulling in total or in part the decree-laws issued by the Council of State.

CUBA CONST. (1976) art. 73, *reprinted in* CONSTITUTIONS, *supra*. Second, many legislative sessions last only a brief period of time. In English-speaking Africa's first seven years of independence, no legislature sat for more than one hundred days in a year. *See* Newell M. Stultz, *Parliaments in Former British Black Africa*, 2 J. DEVELOPING AREAS 479, 489 (1968). In Tanzania, for example, MPs were "quite unable to keep current events under critical review." WILLIAM TORDOFF, GOVERNMENT AND POLITICS IN TANZANIA 6 (1967).

[63] *See infra* note 65 and accompanying text.

[64] The independent political power of many legislators in the United States (exemplified by its system of primary elections for party nomination) probably best explains American exceptionalism from executive domination of the law-making process. *See, e.g.*, MICHAEL FOLEY & JOHN E. OWENS, CONGRESS AND THE PRESIDENCY: INSTITUTIONAL POLITICS IN A SEPARATED SYSTEM 325 (1996). Even when the President's party has held the majority in Congress, "[m]embers of Congress reasoned they could nevertheless act independently from the President because they did not owe their

In most countries, however, party chieftains hold the reins of power.[65] Many follow the British system, in which the party central committee nominates the candidates.[66] This system gives party chieftains considerable leverage to chasten MPs who deviate from the party line. Even where constituencies nominate candidates, party chiefs still control patronage, budgetary favors, office assignments, committee posts, ministerial positions, and plain "pork."[67]

Second, in a surprising number of countries, the cabinet rules parliament because members of the government—ministers, vice-ministers, deputy ministers, ministers of state, etc.—comprise a large proportion of the parliamentary majority.[68] In 1995, eleven of the ruling party's fourteen-member majority in Belize's twenty-four member assembly held cabinet posts.[69] In 1966, in Kenya, fifty nine Ministers and Assistant Ministers comprised thirty-nine percent of the representatives in Kenya's lower house.[70] In 1964, thirty-seven out of ninety-eight members of Tanzania's

---

election to his coattails." *Id.* This is not to say that the President does not play an important role in the legislative process. Foley points out that Presidents' heavy promotion of their own legislative programs became accepted during Roosevelt's administration and has continued up to the present day. *See id.* at 299; *see also* ARTHUR M. SCHLESINGER, JR., THE IMPERIAL PRESIDENCY 1–34 (1973); *cf.* L.J. BOLLE, CONSTITUTIONAL REFORM AND THE APARTHEID STATE: LEGITIMACY, CONSOCIATIONALISM, AND CONTROL IN SOUTH AFRICA 15 (1984). Bolle recalls the days of Nixon's "imperial presidency," created by the inefficacy of checks and balances and exemplified by Congress's inability to scrutinize and control the executive. Bolle does maintain, however, that the "scope and extent of presidential influence have diminished appreciably since the Watergate era and have given way to a more stable balance of power." *Id.* at 15–16.

[65] *See* TORDOFF, *supra* note 62 at 13; STONEMAN & CLIFFE, *supra* note 5, at 80–97. In Zimbabwe, Edward Tekere was ultimately deprived of party membership in 1988 for his outspoken attacks on the one-party state and corruption in high places. *See id.* at 84. Herbert Ushewokunze, initially Minister of Health and later Minister of Transportation, was also excluded from the Political Bureau in the 1988 Congress. *See id.* at 83.

[66] In Zambia, this practice was followed until 1982. *See* William Tordoff, *Political Parties in Zambia*, *in* POLITICAL PARTIES IN THE THIRD WORLD 7, 14 (Vicky Randall ed. 1988) [hereinafter RANDALL]. In Ghana, the CPP recruited the national politicians that ruled Ghana for the first nine years after independence. *See* Robert Pinkney, *Ghana: An Alternating Military/Party System*, *in* RANDALL, *supra*, at 33, 38. For a discussion of the role of parties in nominating candidates in Britain, see MICHAEL RUSH, THE SELECTION OF PARLIAMENTARY CANDIDATES 275–78 (1969). For a description of the British parliamentary system, see LAURENCE BOLLE, CONSTITUTIONAL REFORM AND THE APARTHEID STATE 5–11 (1984).

[67] *See, e.g.*, JOHN P. MACKINTOSH, NIGERIAN GOVERNMENT AND POLITICS 430–32 (1966); *cf.* RANDALL, *supra* note 66, at 35–37, 46–48. For a comparative discussion of third-world political parties, see id. at 174–91.

[68] *See also* TORDOFF, *supra* note 62, at 17, 22.

[69] *See* BELIZE CONST., *reprinted in* CONSTITUTIONS, *supra* note 62.

[70] *See* Stultz, *supra* note 53, at 490.

National Assembly held ministerial posts, ten served as Regional Commissioners, three served as Area Commissioners, and one as Deputy Speaker.[71] In pre-coup Nigeria, government gave executive posts to some eighty MPs,[72] who on cabinet bills always dutifully voted "yes."

Third, in most parliamentary systems, a vote against a government bill amounts to a vote of no confidence, requiring the government to resign and to hold a new election.[73] By voting against a government bill, MPs put their own seats at risk. Only a rare legislator in the developing world finds a bill so distasteful as to warrant political self-immolation.

Finally, the executive always has at least some in-house expertise for preparing legislation (usually in the civil service).[74] In contrast, parliamentarians usually have little or none.[75] With-

---

[71] *See* TORDOFF, *supra* note 62.

[72] *See* BILLY J. DUDLEY, AN INTRODUCTION TO NIGERIAN GOVERNMENT AND POLITICS 72 (1982).

[73] "[A] hostile vote is normally given only in the secure knowledge that it will not put the government in a minority." ADONIS, *supra* note 56, at 64. "[P]arty loyalty is the norm, and absolutely so when their vote could affect their party's chances of remaining or becoming the government." *Id.* at 65. "Members are not only handcuffed by party obligations. They also are driven by the man whom they 'elect' . . . . Every horse is, of course, free to kick over the traces and it does not always run up to its bit. But revolt or passive resistance against the leader's lead only shows up the normal relation." SCHUMPETER, *supra* note 46, at 277; *see also* JOHN M. OSTHEIMER, NIGERIAN POLITICS 52 (1973). The frequency with which MPs follow the dominant government party is illustrated by the common assumption that South Africa's parliament would rubber stamp a proposal, strongly supported by the ANC, to legalize abortion. *See, e.g.*, Bob Drogin, *South Africa to Vastly Liberalize Law*, L.A. TIMES, Sept. 16, 1995, at A2.

[74] In South Africa, in 1995, the State Attorney's chambers in the Ministry of Justice housed some thirty lawyers. In Laos, the Ministry of Justice's central drafting division had six lawyers. In Zimbabwe, from 1980 to 1983, the Solicitor General's Chambers had some eight trained drafters. For 22% of the world's population, China's Bureau of Legislative Affairs had some 265 employees, more than half professional staff. Even these staffs tended to be inadequate, however. *See infra* note 75 and accompanying text.

[75] For example, in 1996, the National Assembly of South Africa had no technical drafting staff. It had one assigned lawyer, but he focused his attention on problems of internal parliamentary governance and had no capacity to draft bills for MPs. The legislature of the Lao P.D.R. also had one assigned lawyer; Mozambique's legislature had none. From 1980 to 1983, Zimbabwe's Office of Parliamentary Counsel had one lawyer and no support staff. By contrast, in China, the Standing Committee of the National People's Congress had a substantial legislative drafting office that produced about 20% of the bills presented to the National Assembly in a year. In the United States, legislative committees have ample staff, as do individual representatives and senators, and the Congressional Drafting Office has great competence. *See* SCHNEIER & GROSS, *supra* note 44, at 46, 47; SEIDMAN, *supra* note 9, at 440.

Moreover, in many countries, legislators have little or no expertise in assessing a bill. Mozambique, for example, held its first-ever elections for a legislature in 1994. Most of the new legislators had no education beyond secondary school, and many had even less. Nothing in their education or their experience prepared them to assess the legislation presented by the executive, nor did the executive do much to enlighten them.

out special training, legislators in the developing world—even the lawyers among them—have difficulty in assessing, much less initiating and drafting, legislation.[76]

No matter how democratically elected the legislators, these four institutional features have ensured government's automatic legislative majority and executive subversion of the legislature's law-making primacy. Once parliament elects a new government (or ratifies the earlier selection of government by the majority party or a party coalition), its members might as well pack their bags and head home to wait for the next election.[77]

### C. *Whose and What Behavior Constitutes the Difficulty?*

In order for a government to use state power to foster development, it must use the law to change the institutions that perpetuate underdevelopment.[78] Policies alone do not suffice; rather, they require translation into effective legislation.[79] In most countries, the critical moments in that process occur, not openly in parliament, but when secret, faceless bureaucrats prepare the legislative program and draft the bill for presentation to the cabinet and then to parliament. To understand why third-world legislation so seldom fosters institutional changes for development requires penetrating the mysteries of a bill's evolution before its arrival on the floor of the legislature.

Every bill-creating system involves many stages. In each stage, the behaviors of specific sets of actors determine the answers to six questions: (1) How does an idea or suggestion about new legislation enter the system, and from whom does it come? (2) Who first translates the idea into a draft legislative program, and how? (3) Who decides, and by what criteria and procedures, to spend scarce drafting resources on some bills and not others? (4) What procedures ensure that a bill meets formal standards and that its content does not contradict other laws? (5) Who does what kinds of research to determine a bill's details? (6) How do

---

In Mozambican practice, the memorandum that typically accompanies a bill does little more than summarize it.

[76] *See* Stultz, *supra* note 53, at 489.

[77] Schumpeter once made a similar argument about the United States. *See* SCHUMPETER, *supra* note 46, at 252.

[78] *See* SEIDMAN & SEIDMAN, *supra* note 2, at 39.

[79] *See* Robert B. Seidman, *Law and Development: The Interface Between Policy and Implementation*, 14 J. MOD. AFR. STUD. 641 (1975).

input and feedback institutions selectively deliver information (i.e., statistical data, theories, and the claims and demands of various groups) to those preparing a bill?[80] Drawing on examples from a variety of developing nations,[81] the rest of this section explores answers to the first five questions. Part III includes an analysis of the sixth.

### 1. Origins

Most bills originate in the civil service, and most make only incremental changes in existing law. Occasionally, ideas for bills come from other sources: political parties, non-government organizations, or individual constituents. Support of a proposed bill by the political leadership constitutes the critical first step.

In proposing a policy, politicians usually only identify a social problem or state broad objectives. Only occasionally do politicians outline even general means for accomplishing the stated goals.[82] Normally, a policy proposal ends up on the desk of a public servant for translation into a legislative program.

---

[80] The way the bill-creating system meets these challenges cannot be viewed in isolation from the treatment the legislature accords a bill after receiving it. If the legislature has a committee system which allows free access to persons interested in a bill, the fact that the pre-presentation institutions bar them access has a different thrust than where the legislature lacks a working committee system and an institutionalized method to enable interested parties to make formal and complete presentations of their information or claims. This Article primarily considers the problem as it appears in most countries, where in practice the cabinet has usurped the legislature's constitutional legislative power.

[81] These nations include three former British colonies, Zimbabwe, Zambia, and Belize; a former French colony, the Lao PDR; a former Dutch colony, Indonesia; a former Portuguese colony, Mozambique; South Africa; and China. To our knowledge, with the exception of Britain, little in the literature explores these countries' bill-drafting systems. The statements here rest on research conducted by the authors in these countries. *See* Robert B. Seidman, *Building Post-Apartheid Rural Institutions: Transforming Rural Reconstruction and Development Policies into Law*, *in* NO MORE TEARS: STRUGGLES FOR LAND IN MPUMLANGA (Daniel Wiener & Richard Levin eds., forthcoming 1997); Ann Seidman & Robert B. Seidman, *Drafting Legislation for Development: Lessons from a Chinese Project*, 44 AM. J. COMP. L. 1 (1995); Robert B. Seidman, *supra* note 57, at 133. For information regarding Indonesia, the authors are indebted to Professor Louis Aucoin, School of Law, Boston University; *see also* USAID, DRAFT DESIGN OF FIFTH COMPONENT FOR INDONESIA ECONOMIC LAW AND IMPROVED PROCUREMENT SYSTEM, ELIPS Project (Jakarta: xerox, (1990)).

[82] *Cf.* William H. Clune & R.E. Lindquist, *What "Implementation" Isn't: Toward a General Framework for Implementation Research*, 1981 WIS. L. REV. 1044, 1060 (1981).

### 2. The Concept Paper

Wherever the proposal originates, the second phase of the process culminates either in a memorandum from civil servants, describing the proposed program in some detail, or in a "layman's draft" bill.[83] In Belize, government officials call this a "concept paper." The concept paper constitutes the nodal point at which policy turns, however tentatively, into its operative legal form. It constitutes the first attempt at a legislative program.

In principle, the scope of a concept paper differs between countries with British rather than French legislative traditions. (In practice, little difference exists.) In the British tradition, all law has a binary thrust, with primary addressees, on the one hand, and agencies charged with implementation, on the other.[84] In this context, an adequate concept paper must not only formulate the substantive program, but also propose methods and bodies to execute it. Legislation becomes operative at the time specified in the bill or, if no time appears, at the time stipulated in the country's Interpretation Act.[85]

By contrast, legislatures in the French tradition enact laws consisting mostly of "principles." The legislators do not consider questions of implementation. Laws become operative only after the executive promulgates decrees that specify the means of implementation.[86] The existence of this separate step tends to exacerbate a problem in the British tradition that—despite the binary thrust of this tradition—remains all too common: having

---

[83] A layman's draft bill is any draft bill not prepared by the central drafting office. *See* Kean, *supra* note 57, at 257.

[84] For example, the same rule that commands the citizen not to commit murder also instructs the policeman to arrest the culprit and instructs a judge to convict and sentence. Hans Kelsen called the law addressed to the principal addressee the "secondary" form of the rule and that addressed to the implementing agency its "primary form." HANS KELSEN, GENERAL THEORY OF LAW AND STATE 61 (1949). Professor Hart essentially reversed those terms. *See* H.L.A. HART, THE CONCEPT OF LAW 35 (1961); *see infra* Figure 1.

[85] Usually, the Interpretation Act provides that a bill becomes operative on the day of assent by the executive, the day of publication (in the session law and regulation compilation, e.g., the *Canada Gazette*) or, as in Australia, a fixed time after assent. *See* G.C. THORNTON, LEGISLATIVE DRAFTING 155–58 (2d ed. 1979).

[86] In practice, the American legislative branch increasingly enacts statutes in general terms, letting the administration fill in the details. *See generally* Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65 (1983) (discussing how many federal laws have become increasingly "intransitive"). These general statutes contain statements of principle and empower administrative agencies to enact specific regulations. Such regulations include the terms of implementation. *See* Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 COLUM. L. REV. 369, 372–75 (1989).

ignored the question of implementation, the bill's author drafts an unimplementable bill.

### 3. Prioritization

Because drafting services remain in short supply,[87] revisions of relatively unimportant laws can easily swamp available drafting capacity. Prioritization by a government office makes the difference between proposals that reach the drafting stage and those that languish.[88]

In states that follow British tradition[89] (and, before reunification, in the German Democratic Republic),[90] a cabinet committee decides which bills to send to the central drafting office. Elsewhere, practice varies. In the early 1990s in the Lao PDR, the Minister of Finance made prioritization decisions. More recently, a committee under the Ministry of Justice, composed of the Minister and a small handful of experienced lawyers in government or in the National Assembly, undertook the task. Other governments regard prioritization as a mere gatekeeping function and assign it to appointed officials: in China, to the Bureau of Legislative Affairs (BLA) of the State Council (the equivalent of the American cabinet); in Indonesia, to SEKNEG, the equivalent of China's BLA.

### 4. Drafting the Bill

In every country, once the relevant officials give the green light after conducting some research, the bill goes to its actual drafters. In the British tradition, it goes to parliamentary counsel (in most of the former colonies, the Solicitor General, but in

---

[87] In Zambia during the 1970s, before drafting, a bill without any special priority often had to wait for as many as five years.

[88] In seeking to make the transition from command to market-driven economies, many countries have had to develop law on subjects as fundamental as education, the national budget, corporations, land law, the environment, health, social security, and industrial relations. (Many of these countries entered this transition period with practically nothing akin to a formal legal order.) Governments exercised their policy function not so much by deciding what laws they needed—they needed all of these—but by prioritizing their needs. Frequently, however, those priorities conformed to conditions imposed by the World Bank or bilateral aid agencies. For example, in the Lao P.D.R., the World Bank conditioned a $17,000,000 tranche on enactment of a cheque law. Sometimes the resulting priorities seemed curious.

[89] *See* Kean, *supra* note 57, at 254; ADONIS, *supra* note 56, at 93–95; *see also infra* note 136.

[90] *See infra* note 173 and accompanying text.

South Africa, to the Senior State Law Advisor). In China, it goes to the BLA; in Lao PDR, it goes to the same committee of officials that prioritizes bills.

In theory, drafters perform only technical work, ensuring that the bill's language contains no ambiguities; that neither word nor substance contradicts government policy, the existing corpus of law, or the constitution; and that the bill does not invade "vested rights."[91] In practice, bills frequently violate these technical ideals. For the most part, however, transformative legislation founders not on issues of form but of substance.[92]

In practice, the final drafters cannot avoid making substantive decisions.[93] Sometimes the originating ministry simply requests a law covering a particular area. In Belize, for example, one ministry requested a highway traffic act. The Solicitor General assumed the entire task of developing a legislative program and drafting the bill. Instead of tailoring the bill to his country's needs, however, he simply copied foreign legislation that he thought appropriate (which explains why, even though Belize has no weighing station, parliament enacted a law limiting the maximum weight of trucks on the highways).[94] In other cases, the

---

[91] *See, e.g.*, REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING (2d ed. 1986); ELMER A. DREIDGER, THE COMPOSITION OF LEGISLATION (2d ed. 1983); COURTENAY ILBERT, THE MECHANICS OF LAW MAKING (1914); SIR ALISON RUSSELL, LEGISLATIVE DRAFTING AND FORMS (4th ed. 1938); G.C. THORNTON, LEGISLATIVE DRAFTING (3d ed. 1987); LORD HENRY THRING, PRACTICAL LEGISLATION (1902). In 1869, in England, the myth of drafters' neutrality arose after the appointment of the first Chief Parliamentary Counsel, Henry Thring. Thring had to face accusations of power grabbing from ministries that earlier had sent their draft bills directly to cabinet but now had to send them first to parliamentary counsel. His defense originated the myth of neutrality. Drafters, he claimed, have nothing to do with policy, but only with form. *See generally* WILLIAM CHAMBLISS & ROBERT B. SEIDMAN, LAW, ORDER AND POWER 37–40 (1982). The drafter's role is "clerical" and "technical"—"[drafters] cannot furnish *ideas*." CHARLES MCCARTHY, THE WISCONSIN IDEA (1912), *quoted in* Roger Purdy, *Professional Responsibility for Legislative Drafters: Suggested Guidelines and Discussion of Ethics and Role Problems*, 11 SETON HALL LEGIS. J. 67, 95 (1987). Reflecting this traditional view, most legislative drafting manuals describe the drafter's work as formal only. *See, e.g.*, DREIDGER, *supra*, at 1–128 (1976).

[92] *See* Makgetla & Seidman, *supra* note 25, at 421 (1987).

[93] *See* Purdy, *supra* note 91, at 80:

> The typical view of the drafter as mere "translator," zealously serving the legislator-client's wishes . . . assumes the legislator has a clear conception of the law he or she wants drafted. Often, reality differs. The legislator may have no more than a vague idea of a problem, or a simplistic complaint from a constituent. In such cases, the drafter often may end up defining, formulating, or even instilling such ideas in the legislator, then drafting them.

*Id.*; *see also* JACK DAVIES, LEGISLATIVE LAW AND PROCESS IN A NUTSHELL (2d ed. 1986). *See supra* note 96.

[94] Precisely the same phenomenon occurred in Lesotho. *See* SEIDMAN, *supra* note 9, at 297–98.

concept papers received by drafting offices from originating ministries contain only the most general proposals. Then the drafters must supply details[95] that may or may not have been contemplated in the original proposals. Despite such substantive interventions, administrations tend to claim that drafting offices merely tidy up final drafts of bills.

### 5. Research

Research can take place at two points in this process: before submission of the bill to the central drafting office or afterwards. Civil servants in the originating ministry typically conduct whatever empirical research supports the bill before submitting it to the central drafting office.[96] The lawyers in that office rarely—if ever—investigate anything but sources readily available in a law library, such as domestic and foreign legislation.[97]

In most countries, once the drafters finish their work, no further research—aimed at ascertaining the soundness and efficacy of the bill, for instance—occurs. The proposed bill does not go to the public or to legislators for comment. Instead, after approval by the minister, the bill goes to the cabinet either directly or via the Cabinet Committee on Legislation. The final requirement of legislative enactment serves mainly symbolic functions.

In sum, the bill-creating process involves the coordinated activities of civil servants in originating ministries, a prioritizing authority (comprised frequently but not always of ministers), and a central drafting office. In the Third World, this process seldom produces development-oriented bills that favor the majority of the citizens. The next section explores the causes of officials' perverse behaviors.

---

[95] The Senior State Law Advisor in South Africa, based on his forty years' experience, stated that, while drafting, the State Attorneys had to make many substantive decisions. Interview with R.P. Rossouw, *supra* note 55.

[96] Empirical research might include analysis of available documents, articles, and books relating to the problem, as well as input and feedback from various social groups; see *infra* Part II.

[97] Every third-world drafting office the authors have visited possesses statutory codes of other countries, yet no volumes on how these laws work in practice.

## III. EXPLANATIONS

All of the actors work within a cage of laws and regulations that purport to prescribe their behaviors. This framework includes constitutions, statutes, cabinet memoranda, and civil service regulations. This section offers a behavioral model that suggests hypotheses to explain why, in this context, drafters typically fail to produce bills that improve the lot of the electoral majority.

### A. *Why Actors Behave as They Do in the Face of a Rule of Law*

Legislation to transform institutions too often does no more than normatively describe the desired new behaviors.[98] Threats of criminal punishment for non-compliance with these laws remain largely ineffective.[99] Inducing behavioral change among administrators involved in bill creation requires new rules that change or eliminate the causes of their dysfunctional behaviors. Instituting effective new rules requires an understanding of how and why people behave as they do in the face of a rule of law.

Confronted by a rule of transformative law calling for radically new behavior, actors make *deliberate* choices about how to behave.[100] In making those choices, they likely consider not only

---

[98] Franz von Benda-Beckmann, *Scape-goat and Magic Charm: Law in Development Theory and Practice*, 28 J. LEGAL PLURALISM & UNOFFICIAL L. 129 (1989):

> The idea of legal engineering, of achieving social and economic change through government law, still ranks foremost in the arsenal of development techniques. Law, as "desired situation projected into the future" . . . is used as a magic charm. The law maker seeks to capture desired economic or social conditions, and the practice supposed to lead towards them, in normative terms, and leaves the rest to law enforcement, or expressed more generally, to the implementation of policy.

*Id.* To the extent that drafters subscribe to any legislative theory, the methodology of that theory tends to remain ends-means. *See* Rubin, *supra* note 10, at 234, 282–84. Because that methodology skips the crucial explanatory stages, see *supra* note 14, it lures drafters into writing bills that merely denounce social problems.

[99] *See* KALMAN KULCSAR, MODERNIZATION AND LAW 255 (Vera Gathy trans., 1992). As an extreme example, an ordinance to induce Tanzanian peasants to move from subsistence to market agriculture required every farmer to grow at least two acres of cash crops, under pain of a 500 shilling fine or six months in prison. *See* SEIDMAN, *supra* note 9, at 147. On the effects of punishment and rewards, see generally James T. Tedeschi et al., *Power, Influence, and Behavioral Compliance*, *in* COMPLIANCE AND THE LAW: A MULTI-DISCIPLINARY APPROACH 206–09 (Samuel Kristov et al. eds., 1972).

[100] This does not constitute a "rational choice" claim. *Cf.* Michael C. Jensen & William H. Meckling, *The Nature of Man*, 7 J. APPLIED CORP. FIN. 4 (1994) (viewing man as a resourceful actor prioritizes values).

the law's promises and threats, but also the constraints and resources that inhere in their particular circumstances.[101] Only if a bill's drafters take into account all of the factors, non-legal as well as legal, internal as well as external, will legislation likely induce the behaviors it prescribes. Figure 1 provides a model that purports to facilitate the analysis of factors that influence behavioral choices in the face of a rule of law.[102]

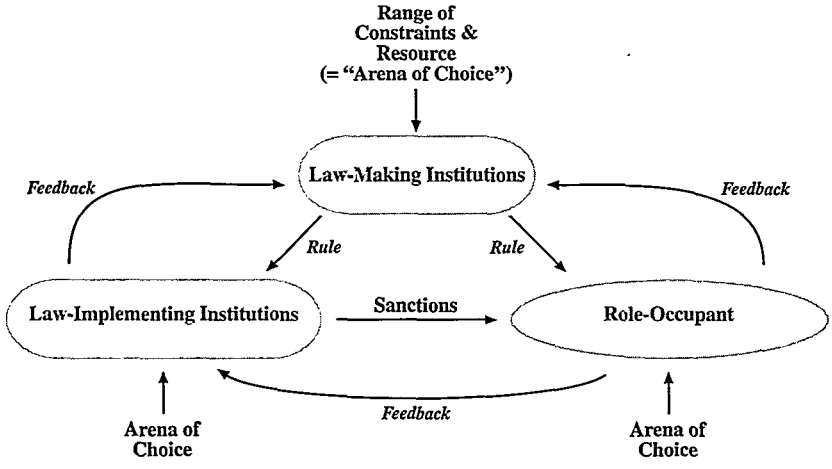


Figure 1
A Model of the Legal System

Figure 1 illustrates the following proposition: in the face of a rule of law, relevant social actors—"role occupants"[103]—choose how to behave by taking account not only of the written rule but

[101] *Cf.* FREDERIK BARTH, MODELS OF SOCIAL ORGANIZATION (1966). For example, a law that requires a notary public to validate a contractual obligation will go unenforced if the country has no notaries. Manufacturers, faced by a law that forbids discharging toxic wastes into the groundwater, will disregard it unless they have access to alternative disposal techniques.

[102] This model derives from American Legal Realism, which distinguishes between the law-in-the-books and the law-in-action, between rules and behaviors. *See* Llewellyn, *supra* note 20, at 1381, 1383. The sociological school reached much the same conclusion. *See* Ehrlich, *supra* note 8, at 136–42.

[103] The sociological term "role occupant" denotes the person whom a rule addresses. Role occupants may be every member of society ("Thou shalt not commit murder"), a defined class of non-officials ("No director of a corporation may use insider knowledge for private benefit"), or government officials ("The Public Utilities Commission shall prescribe fair and reasonable rules for the generation and distribution of electricity").

also two additional sets of factors: (1) their unique social, political, economic, and physical environment (combined, these comprise their "arena of choice"); and (2) the probable sanctioning behavior of the implementing agency (itself a function of the rule addressed to the agency and the agency's arena of choice). This proposition implies that simply conducting library research on the state of the law will not suffice to explain role occupants' behaviors. Rather, drafters must empirically investigate causal factors in two arenas of choice: (1) those likely to affect the primary role occupant's behaviors; and (2) those likely to affect the implementing agency's behaviors.[104] A bill's efficacy depends on the successful conduct of these investigations.[105]

Figure 1's "arena of choice," however, remains too amorphous to guide empirical research by drafters. They need the more precise guidance that legislative theory may provide by unpacking the arena of choice into seven narrow categories: *R*ules of law; the actors' *O*pportunities and *C*apacities to behave as they do; the *C*ommunication of the rules to actors; the actors' own *I*nterest;[106] the *P*rocess by which they decide how to behave; and

---

[104] As its principal category for investigation, the New Institutional Economics focuses on transaction costs. *See, e.g.*, Trachtman, *supra* note 19. It adopts as the model of human behavior the rational value-maximizer. *See* Jensen & Meckling, *supra* note 100; North, *supra* note 18. Like the meaning of "value" in the rational choice model, the definition of "transaction costs" seems either too narrow or too broad. If it means what Ronald Coase originally suggested, *see* Ronald Coase, *The Problem of Social Cost*, 3 J.L. ECON. 1 (1960), i.e., the actual costs of making a deal, then it seems too narrow to comprehend all the difficulties of development. If it means what the New Institutional Economics school implies—i.e., anything that stands in the way of useful social cooperation, *see* PHILLIP A. KLEIN, BEYOND DISSENT: ESSAYS IN INSTITUTIONAL ECONOMICS 186–90 (1994); Marc R. Tool, *The Theory of Instrumental Value: Extensions, Clarifications*, *in* INSTITUTIONAL ECONOMICS: THEORY, METHOD, AND POLICY 119, 120, 124–30 (Marc R. Tool ed. 1993), then it too becomes so broad as to be rendered useless as a guide to empirical research. *See* John Toye, *The New Institutional Economics and Its Implications for Development Theory*, *in* THE NEW INSTITUTIONAL ECONOMICS AND THIRD WORLD DEVELOPMENT 49, 64–67 (John Harriss et al. eds., 1995). *But see* KLEIN, *supra*, at 52–53.

[105] On the importance of a research report describing these investigations, see *infra* text accompanying note 163. A research report describing the investigation of causal factors could serve as crucial quality control; however, almost nowhere do drafters either by regulation or custom provide more than the flimsiest of memoranda, which usually contain no more than a description of the bill in lay language.

[106] If limited to choice among *material* incentives, the rational choice model confuses human nature in general with the motivations of a small shopkeeper, *cf.* KARL MARX, 1 CAPITAL 761–64 (Friedrich Engels ed., Samuel Moore & Edward Aveling trans., 1867), and lacks empirical warrant: people seek goals besides material gain. If individual priorities, however, include non-material incentives, then the model becomes non-falsifiable and trivial. *See* John Adams, *The Emptiness of Peasant "Rationality": "Demirationality" as an Alternative*, 16 J. ECON. ISSUES 663, 663–67 (1982); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Programs: A Critique*, 33 STAN. L. REV. 387, 398–400 (1981); Richard B. Stewart, *The Development of Administrative and*

their domain assumptions[107] or *I*deologies.[108] Each of these categories inspires hypotheses to help explain the causes of the relevant actors' problematic behaviors.[109]

The next two sections use these seven categories of causal factors to generate hypotheses to explain two sets of behaviors that too often prevent bill-creating processes from producing effective transformative legislation: (1) when officials (here collected under the term "drafters") actually do formulate bills for massive development, the resulting laws rarely induce the prescribed behaviors; and (2) most officials seldom, if ever, even try to draft the kinds of transformative bills required for socially beneficial development.

### B. *Why the Failure to Produce Workable Bills?*[110]

Figure 1 suggests that laws induce desired behaviors only if they alter the factors that cause the initial problematic behaviors. That so many laws have not induced desired behaviors implies that the drafters failed to conduct the research necessary to identify accurately all causal factors. Most polities simply lack effective procedures to require drafters to accompany their bills

---

*Quasi-Constitutional Law in Judicial Review of Environmental Decision-Making: Lessons from the Clean Air Act*, 62 IOWA L. REV. 713, 747 (1977).

[107] *See* ALVIN GOULDNER, THE COMING CRISIS OF WESTERN SOCIOLOGY (1970) (discussing the bundle of valuations and propositions which comprise personalities).

[108] This category includes the actor's subjective values and attitudes. Thus, it seeks to capture what some have called the "embeddedness" of economic decision-making. *Cf.* Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, 91 AM. J. SOC. 481 (1985).

[109] The first letters of these categories form the mnemonic "ROCCIPI." The categories stimulate the researcher to generate hypotheses as to the factors likely to cause each set of role occupants' behaviors; these hypotheses guide the research that drafters conduct in trying to demonstrate the falsity of the hypotheses. *See* KARL POPPER, THE LOGIC OF SCIENTIFIC DISCOVERY 40–41 (rev. ed. 1968). In any particular case, of course, one or more of these categories may prove empty. For example, government officials usually know the law addressed to their positions. As a source of hypotheses to explain the behaviors of high government officials, therefore, the category "Communication" (of the law) usually is not helpful. *But see* John A. Robertson and Phyllis Teitlebaum, *Optimizing Legal Impact: A Case Study in Search of a Theory*, 1973 WIS. L. REV. 665, 695–99 (even some judges remained ignorant of a new Massachusetts law giving judges the power to sentence to a drug rehabilitation center in lieu of jail).

[110] The explanatory hypotheses here derive from the research described *supra* in notes 59 and 81. They are corroborated by third-world country evidence. To use the hypotheses as a basis for formulating drafting regulations for a particular country, however, would require testing them against available evidence regarding that country's specific circumstances, as well as using that evidence to develop more time- and place-specific hypotheses.

with adequate research reports or even to perform any research at all.

### 1. Rules

Like all other role occupants, drafters in developing nations operate within the context of rules.[111] The substance of those rules, their relative precision, and the scope that they leave for discretion all impinge on the behavior of role occupants. Regulations that define the bill-making process have particular implications for the research that drafters do—or do not—undertake.

In most governments, unpublished regulations (such as a cabinet memorandum, typical in former British colonies) prescribe the official process by which an idea becomes a bill.[112] These regulations merely prescribe the route a bill travels before the cabinet presents it to the parliament.[113] Seldom, if ever, do the regulations prescribe the type or extent of desirable research, nor do they normally detail the format of reports to accompany bills. As a result, the regulations leave research to the drafters' discretion. The quality of research and attendant memoranda varies with the drafters' individual notions.[114] Aside from trying to choose able drafters, most authorities have no system for exerting rigorous quality control over the content of the bills they produce.

Given the absence of research and the wide discretion to accompany bills with sketchy reports, the results of the bill-creation process depend greatly on non-legal factors that shape the drafters' decisions regarding their bills. When officials enjoy such unrestrained discretion, the ROCCIPI agenda suggests that they may exercise it in accordance with their own opportunities

---

[111] In addition to the rules specifically aimed at the behaviors in question, this category includes all related state-promulgated rules. For example, to understand a farmer's behavior with respect to irrigation law, one must look not only at the law labeled "irrigation law," but also at the laws labeled "water law"; "property law"; "contract law"; and laws regarding farmers' "unincorporated associations" or "cooperative societies." To understand drafters' behaviors, one should examine not only the drafting regulations, but also the civil service regulations and laws, including those concerning the cabinet and the legislature.

[112] *See, e.g.*, Zambia Cabinet Office Circular 72, §§ 4, 5 (1969), *cited in* SEIDMAN, *supra* note 9, at 393; *see also* TORDOFF, *supra* note 62, at 82.

[113] *See Legislative Drafting to Support Economic Reform: Project Document of the Government of the People's Republic of China*, U.N. Development Programme, U.N. Doc. CPR/91/524/A/01/99 (1991).

[114] That is the case with the United States Congress. Since there is scant prescription for content of a committee report on a bill, the quality and scope of the report depends on the competence of the staff author. *See* Robert B. Seidman, *supra* note 10, at 2–4.

and capacities, their personal interests, their domain assumptions, and their bureaucratic routines.

### 2. Opportunity and Capacity

In the Third World, ministries often have the capacity to investigate resource allocation issues. Their personnel include engineers and sometimes economists.[115] Few civil servants, however, possess the social science training and theoretical background necessary to research and explain the behaviors of role occupants that give rise to resource allocation problems. Most third-world civil servants have only a baccalaureate, often in a humanities discipline like history or literature, and third-world undergraduates rarely learn research skills.[116] Furthermore, only infrequently do lawyers or other civil servants within the ministries have an opportunity on the job to learn skills to investigate causes of problem behaviors. Consequently, they often fail even to recognize the need for research. Third-world civil servants and legislative drafters rarely even have a theory of legislation,[117]

---

[115]The foreign consultant for the underground water law under study by the UNDP-China project told the authors that the ministry's engineers could produce a report specifying the location and chemical content of every cubic meter of underground water in China. (He probably exaggerated only slightly.) The ministry possessed no facts, however, regarding the causes of the behaviors of those who polluted this water.

[116]For 11 years, we taught in universities in former British African colonies. The colonial tradition deters undergraduates from performing local studies. Their social science research skills, consequently, remain minimal. In particular, lawyers never acquire such skills, and thus their drafting facility suffers. In our work on legislative projects in various states, only rarely have we met civil servants with social science research skills. With respect to China, see Ann Seidman & Robert B. Seidman, *supra* note 81, at 14–15; with respect to Africa, see Robert B. Seidman, *supra* note 57, at 155–58.

[117]*See* Philip von Mehren & Tim Sawers, *Revitalizing the Law and Development Movement: A Case Study of Title in Thailand*, 33 HARV. INT'L L.J. 67, 68 (1992). A major problem with the law and development literature:

> has been its failure to state explicitly the causal interaction between law and development . . . . Yet, if the law and development movement is to influence the literature on social change, law needs to be cast as at least an important reinforcing variable in the process of social change. If law is merely a product of social change, then analysis of legal development loses all normative implications for policy-making. Legal analysis becomes a descriptive exercise.

*Id.*

While serving as Chief Technical Advisors recruiting consultants for a major UNDP-sponsored project in China and a smaller one in the Lao P.D.R., we spoke with more than one hundred non-Chinese experts in various fields, mainly lawyers, many with vast legislative consulting experience. Not one claimed to have a theory to guide the bill-making process.

Most theories that deal with the legislative process focus on factors that influence legislators' decisions, not on factors likely to cause the problematic behaviors that laws

let alone one that requires them to examine the factors likely to influence social actors' behaviors.[118]

In our experience, some of the civil servants who prepare the concept papers, and practically all of the drafters who cast bills in their final form, have had a legal education, mostly at the undergraduate level. At least in the English-speaking world, law studies do not include social science theory, much less social science research methodologies.[119] This education, however, does little to ameliorate attitudes toward or knowledge of research techniques and legislative theory. As a result, almost all drafters' research takes place not in the real world but in law libraries, which contain little that explains role occupants' behaviors.

---

address. *See* Ann Seidman & Robert B. Seidman, *The Present State of Legislative Theory and a Proposal for Remedying Its Sad Condition*, 1995 J. LEGIS. RES. 219, 228–34.

[118] If third-world civil servants had searched the literature to find relevant legislative theories, they would have discovered remarkably little. What theories exist fall into one of two camps. One, based on interest group theory, teaches that drafters should seek out the claims and demands of different interest groups, *see, e.g.*, SUSAN L. BRODY ET AL., LEGAL DRAFTING 324–33 (1994) [hereinafter LEGAL DRAFTING], and urged that procedures produce a "level playing field." *Cf.* Edward Rubin, *Administrative Law and the Complexity of Culture, in* LEGISLATIVE DRAFTING FOR MARKET REFORM: SOME LESSONS FROM CHINA (Ann Seidman et al. eds., forthcoming 1997). The other follows the dictates of classical republicanism. In republican theory, "[l]egislators are motivated to solve those [social] problems [as identified by the citizenry] out of a sense of civic duty. They do not make special deals for themselves or act solely to ensure their reelection." Gouvin, *supra* note 10, at 1281, 1344. Most neo-republican writers, however, formulate no explicit theory for developing legislation, expecting legislators instead to rely on "practical reason"—common sense mixed with zeal for the public good. *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31–48 (1985) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1548–51 (1988) [hereinafter Sunstein, *Revival*]. A few authors working in the spirit of American Legal Realism have acknowledged the importance of examining the non-legal constraints and resources within which law operates. Before World War I, Ernst Freund sought to devise means to assure a higher level of competence in drafting statutes. Freund "argued for the use of social science as a predicate to enactment, insisting that regulatory legislation should come at the end of an analytical process." Paul D. Carrington, *The Missionary Diocese of Chicago*, 44 J. LEGAL EDUC. 467, 495 (1994). He "emphasized the need to erect legislation on the rock of empirical reality." *Id.* at 515. Roscoe Pound spoke of the use of law as a tool for social engineering. *See* ROSCOE POUND, SOCIAL CONTROL THROUGH LAW 23–34 (1942). That vision basically disappeared sometime between the two world wars. Recently, a few writers have trolled the waters of law and economics for a theory; the most promising follows the emerging tradition of the New Institutional Economics. *See, e.g.*, Trachtman, *supra* note 19.

[119] With respect to Chinese law schools, see William P. Alford & Fang Liufang, Legal Training and Education in the 1990's: An Overview and Assessment of China's Needs (1994) (unpublished World Bank manuscript, on file with William P. Alford).

### 3. Interest and Ideology

Without a theory that calls for empirical research, much less one that guides it, few civil servants or drafters perceive a need to spend time and ministry resources on investigations of role-occupant circumstances. If these officials do adopt a legislative theory, they typically regard bill creation as the result of negotiation among interest groups.[120] As a pragmatic sort of theory, whether formulated in terms of pluralism,[121] public choice,[122] or Marxism,[123] interest-group theory holds that only power counts.[124] Drafters need only identify the relevant power vectors, then craft a legislative compromise that reflects them.[125]

### 4. Summary

The failure of bill makers to conduct empirical research lies primarily in the inadequacy of their (usually unstated) legislative

---

[120] *See* GEOFFREY BRENNAN & LOREN LOMASKY, DEMOCRACY AND DECISION: THE PURE THEORY OF ELECTORAL PREFERENCE AND THE DEMOCRATIC PROCESS 86–87, 114–15 (1993).

[121] *See* Mark Kesselman, *The State and Class Struggle: Trends in Marxist Political Science*, *in* BERTELL OLLMAN & E. VERNOFF, THE LEFT ACADEMY 82 (1982), *reprinted in* COMPARATIVE POLITICS IN THE POST-BEHAVIORAL ERA 112, 114 (Louis J. Cantori & Andrew H. Ziegler, Jr. eds., 1988) ("[Pluralism] minimized the importance of class, racial and sexual divisions. Furthermore, the losers in the pluralist game had no one but themselves to blame."). Dahl observed, "[b]y their propensity for political passivity the poor and uneducated disenfranchise themselves." ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 8 (1956).

[122] *See* JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

[123] *See* SEIDMAN & SEIDMAN, *supra* note 2, at chapter 5.

[124] No rules required those engaged in bill creation to undertake research. *See* SEIDMAN, *supra* note 9, at 436–37, 440. Rules do require them to consult "interested parties," *see supra* note 57 and accompanying text, plainly a reflection of at least an inchoate interest-group theory.

[125] Interest-group theory resonates with philosophical positivism which insists that values and facts occupy discontinuous arenas; one cannot prove the Ought from the Is. Values are incommensurable; one cannot be sure that a rich man who wants scarce milk for his poodle will not suffer more by its denial than will a mother who wants scarce milk for her rickets-afflicted child—or even more than the child. *See* PAUL SAMUELSON, ECONOMICS: AN INTRODUCTORY ANALYSIS 43 (14th ed. 1992). The law always involves an "ought" proposition; it therefore always involves values. Since reason informed by experience cannot help a lawmaker measure which group's values should outweigh another's, a drafter cannot resolve a dispute about a bill's content by reason and facts. Power controls. Research is then necessary only in order to discover interest groups' claims and demands, and those groups' relative power. *See* BOYNTON & KIM, *supra* note 57, at 215–17; *cf.* Philip Norton, *Representation of Interests: The Case of the British House of Commons*, *in* COPELAND & PATTERSON, *supra* note 9, at 13 (analyzing recent developments in interest-group representation in the House of Commons). *See generally* ABERBACH, *supra* note 58, at 10–13.

theory. In designing new legislation, many adopt some version of interest-group theory, which holds that a bill's content should respond not to factual context but to the claims and demands of power.

Only if legislation addresses the causes of behaviors will it likely change those behaviors. Understanding behavior requires sophisticated analysis informed by an adequate legislative theory and social science research methodologies. Absent an education enabling drafters to undertake such research, and absent a rule requiring research reports along these lines, drafters will do little (if any) empirical research.

While these hypotheses explain the lack of research in the bill-creation process, they do not account for the failure of democratically elected governments even to attempt to draft and enact transformative legislation in the interests of the majority of citizens.

### C. *The Failure to Write Bills in the Majority's Interest*

Democratically elected third-world governments seldom propose bills conducive to institutional transformation in the majority's interest. To explain that phenomenon, this section first proposes a model of decision-making processes characteristic of complex organizations like government agencies. Then, based on that model, it offers some explanatory hypotheses.

#### 1. A Model of Decision-Making in a Complex Organization

Too frequently, people speak of a complex institution as though it consisted of a single rational actor.[126] As demonstrated above,[127] government decisions on bills come at the end of complicated decision-making processes in which sundry actors (not all perfectly rational) participate. Subsumed under the "Process" category in the ROCCIPI research agenda, an input-output process model captures the main features of this complex decision-making system (Figure 2).[128]

---

[126] *See* GRAHAM ALLISON, ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS 32–35 (1971).

[127] *See supra* text accompanying notes 82–96.

[128] *See* SEIDMAN & SEIDMAN, *supra* note 2, at chapter 7. The model evolved from Robert Dahl's observation that an existing decision finds its proper explanation in the inputs and feedbacks that lead to that decision. *See* ROBERT DAHL, WHO DECIDES?:

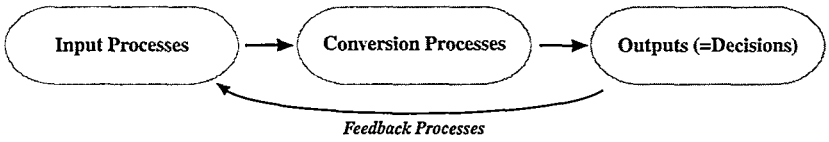


Figure 2
A Model For Understanding Complex Organizations

The process model in Figure 2 demonstrates that the *range* of decisions produced by a complex organization depends upon three factors: (1) the input processes that determine what facts and arguments decision-makers consider; (2) the feedback processes that determine what decision-makers learn about their decision's (output's) impact;[129] and (3) the conversion processes, that is, the way decision-makers combine input and feedback to produce their decisions.[130]

These features determine both *whose* and *what* complaints and difficulties law-makers hear about and whose and what facts, explanations, and solutions they consider. To explain whose and what interests the existing system's decisional outputs favor requires investigating *who* has access to the input and feedback channels and for *what sorts* of inputs. Combined with the ROCCIPI agenda, the model generates hypotheses as to why the

---

DEMOCRACY AND POWER IN AN AMERICAN CITY (1961). Bachrach and Baratz criticized that model's failure to explain "non-decisions," i.e., why some and not other issues enter the system and come to decision. Bachrach & Baratz, *supra* note 31. The conundrum of non-decisions constitutes a principal problem that this section seeks to explain: why have so few bills come before legislatures that even purport to address development issues? By emphasizing *process* rather than particular decisions, the revised model here shows why a complex organization may produce non-decisions: in this case, the exclusion of development-oriented bills from drafters' consideration. *Cf.* ALLISON, *supra* note 126 (suggesting two alternative models of "bureaucratic politics" and "process"; of these, his "process" model approximates that urged here); Bachrach & Baratz, *supra* note 31, at 655 (explaining that non-decisions occur "when the dominant values, the accepted rules of the game, the existing power relations among groups and the instruments of force, singly or in cooperation, effectively prevent certain grievances from developing into full-fledged issues which call for decisions.").

[129] On different sorts of feedback, see Karl W. Deutsch, *Social Mobilization and Political Development*, 55 AM. POL. SCI. REV. 493 (1961).

[130] *See* SEIDMAN & SEIDMAN, *supra* note 2, at 128–45.

outputs of the bill-creation system (i.e., bills) typically favor not the majority—as democracy's election-centered definition predicts—but power and privilege.

2. Explanations for the Decisional Output: Senior Civil Servants

Senior civil servants control the input and feedback channels of bill creation. Ostensibly, rules exist to govern the system. The ROCCIPI agenda helps to identify hypotheses to explain why, despite these rules, senior civil servants favor the rich and might and usually fail to produce transformative legislation.

a. *The rules.* Two sets of rules determine who has access to input and feedback channels, and thus who provides the facts and theories civil servants consider: (1) rules concerning official secrecy; and (2) rules concerning whom drafters should consult. In most countries, both sets of rules endow drafters with broad discretion to grant—or deny—access to the system's input and feedback channels.

(i) *Official secrecy acts.* In most third-world nations, official secrecy acts exclude from the bill-making process all but those whom the drafters choose to admit. Few governments require public notice inviting all interested parties to comment on proposed bills.[131] Moreover, public hearings on proposed legislation or regulations remain very uncommon.[132] Instead, on pain of draconian penalties, official secrecy acts criminalize communications by civil servants to lay persons about the particulars or even the very existence of a bill under consideration.[133] At the same time, these acts grant civil ser-

---

[131] The United States is exceptional in that the rules governing the introduction of administrative regulations require this. 5 U.S.C. § 553 (1994) (requiring "notice" and "comment" prior to promulgation of administrative rules); *see also* CORNELIUS M. KERWIN, RULEMAKING: HOW GOVERNMENT AGENCIES WRITE LAW AND MAKE POLICY 52–87 (1994) (positing that core elements of APA rulemaking are "information, participation, and accountability"). Swedish laws go even further in opening up all government actions to public scrutiny. *See infra* note 162.

[132] The drafting regulations in the German Democratic Republic provided that the originating ministry suggest a schedule of input procedures to the Cabinet Committee on Legislation, which had the final decision. *See infra* text accompanying note 173.

[133] *See* SEIDMAN, *supra* note 9, at 430–32. In Zimbabwe, the Official Secrets Act on its face carried a maximum penalty of twenty-five years in prison for revealing to an unauthorized person a fact that the defendant had learned in the course of official employment. Literally read, this law subjected a sweeper to twenty-five years in prison for telling a stranger to the ministry how to find the toilet. A Zimbabwean official in one ministry once took one of the authors to task for revealing in all innocence to

vants broad discretion to admit to the input process whomever they choose.[134]

(ii) *Drafting regulations.* In most countries, the rules that govern the drafting process[135] also grant civil servants the power to decide which interested parties obtain access to input and feedback channels.[136] Inevitably, civil servants exercise that discretion on the basis of their own opportunities and capacities, ideologies and interests.

Consider the case of Zimbabwe: there, as elsewhere in Anglophonic Africa, and in South Africa fourteen years later, blacks achieved the right to contest elected offices by conceding that current public servants (almost all white) could stay in office.[137]

---

another minister that he was working on a particular bill. Both the minister of the ministry for which he was drafting the bill and the minister with whom he discussed the bill belonged to the same political party, sat on the same Party executive committee, and served in the same Cabinet. In Zambia, on grounds of official secrecy, a Treasury official refused to disclose to an MP, the chair of a parliamentary committee on price control, the basis for some controlled prices.

[134] *See, e.g.*, SEIDMAN, *supra* note 9, at 430. On one occasion in Zimbabwe, shortly after its independence, the Minister of Urban Development and Housing asked one of the authors to help draft some bills which he urgently wished to present to Cabinet. It took less than half an hour to drive from the University to the Minister's office. On arrival, the Minister apologized: in the interim, he had consulted with his Permanent Secretary (a holdover from the old regime), who advised him that under the Official Secrets Act, unless a consultant had taken the civil service oath, the consultant could not see official documents. That, of course, made the drafting exercise impossible. (In fact, the Permanent Secretary plainly misinterpreted the Official Secrets Act, which gives discretion to a "person in authority" to reveal otherwise protected information. The Minister, in his post only a few short and incredibly frantic months, apparently felt compelled to accept the Permanent Secretary's interpretation of the Act.) The proposed bill never did get drafted. The same civil servants, however, could and frequently did discuss the bill with non-official "interested parties."

[135] *See supra* text accompanying note 111.

[136] *See* Kean, *supra* note 57; *see also* A.V. DICEY, INTRODUCTION TO THE STUDY OF LAW AND THE CONSTITUTION at xliv, xlv (10th ed. 1959). In China, bills usually originate in a ministry. After preliminary drafting of the Chinese equivalent of the concept paper, the bill goes to the State Council, which sends it to BLA as a matter of course. After redrafting the bill and consulting with the originating ministry, BLA exercises discretion in deciding who should receive a copy of the proposed bill for comment: mostly government units, but not infrequently the trade union organization, the women's organization, and the like; occasionally, BLA publishes the bill and invites public comments. BLA officials then redraft the bill in light of these comments. The authors learned through their personal research that after obtaining the originating ministry's approval, BLA sends the bill together with such of the comments from the public *as BLA decides to include* to the State Council for action. For the German Democratic Republic, see *infra* text accompanying note 173; Suzanne S. Schüttemeyer, *Hierarchy & Efficiency in the Bundestag: The German Answer for Institutionalizing Parliament*, *in* COPELAND & PATTERSON, *supra* note 9, at 29, 34–42; T. ALEXANDER SMITH, THE COMPARATIVE POLICY PROCESS 18–20 (1975).

[137] The Anglophonic, independence constitutions accomplished this mainly through the device of the independent civil service commission. At least in constitutional principle, in the English Parliament, the "mother of parliaments," a senior civil servant held office at the pleasure of the Minister, ensuring that the official followed govern-

As a result, the black electoral victory hardly changed the bill-making system; the same civil servants who crafted Rhodesia's version of apartheid also drafted most of the new government's bills.[138] Since old official secrecy statutes and drafting regulations remained in place, these officials also retained their old discretionary gate-keeping powers over input and feedback channels.[139]

b. *Opportunity and capacity.* Senior civil servants move in the social circles of the powerful and privileged:[140] they attended the same preparatory schools and universities, frequent the same Embassy parties, and drink sundowners at the same (usually formerly colonial)

---

ment policy. *See* J.F. GARNER, ADMINISTRATIVE LAW 34 (1970). The African independence constitutions, in contrast, gave independent civil service commissions, rather than an individual minister, the power to discipline senior civil servants. *See, e.g.*, ZIMB. CONST. (1979) art. 74. Most independence constitutions required that a former senior civil servant chair the commission. *See id.*, art. 74, § 2 (mandating that the Chair of the Independent Civil Service Commission have five years experience as a senior civil servant). The Colonial Service was nearly exclusively white, and the independence constitutions safeguarded the tenures of these officials. *See* Robert B. Seidman, *supra* note 10. Precisely the same sorts of provisions existed in South Africa's 1994–1996 Interim Constitution. *See* S. AFR. CONST. (1994–1996 Interim Const.) arts. 210–11, 238.

[138] Rhodesia's core drafters remained in office for years after Zimbabwe's independence. Many had great technical proficiency, and some earnestly endeavored to serve the new government. None, however, was capable of developing transformative legislation to induce desired new behaviors, let alone transformative legislation in favor of the poor black majority. In independent South Africa, in August 1995, the Senior State Counsel (the chief legislative drafter) with forty years' service to the apartheid regime, likewise continued to serve the new government even though its principal election platform (the Reconstruction and Development Programme, or RDP) called for massive institutional changes. This official readily admitted that he did not know how to draft transformative bills. Interview with R.P. Rossouw, *supra* note 55. *See generally* SEIDMAN, *supra* note 9, at 386.

[139] At least for the first three years after its independence, Zimbabwe's cabinet made no changes in the Cabinet Memorandum that controlled drafting procedures. Nor had South Africa's cabinet made such changes two years after the newly elected government took office in 1994.

[140] In restating Pareto's and Mosca's concept of the elite, Bottomore emphasizes this reality:

> [I]n every society there is, and must be, a minority which rules over the rest of society; this minority—the "political class" or "governing elite", [is] composed of those who, occupy the posts of political command and, more vaguely, those who can directly influence political decisions . . . .

T.B. BOTTOMORE, ELITES AND SOCIETY 12 (1964).

That is, access to influence officials, partly defines elite. Everywhere, the working rules of the administration give businessmen and other elite members easy access to the civil service, while excluding the masses. *See* John Gillespie, *The Role of the Bureaucracy in Managing Urban Land in Vietnam*, 5 PAC. RIM L. & POL'Y J. 59, 109–14 (1995); SMITH, *supra* note 24, at 186–89, 239–41; KOEHN, *supra* note 9, at 37–76; SEIDMAN, *supra* note 9, at 433; CHARLES BETTELHEIM, INDIA INDEPENDENT 116 (1971); FERREL HEADY, PUBLIC ADMINISTRATION: A COMPARATIVE PERSPECTIVE 69 (1966); A.L. ADU, THE CIVIL SERVICE IN NEW AFRICAN STATES 14 (1965).

clubs.[141] Civil servants naturally consult those in their own reference group.

Even if public servants want to consult with representatives of the poor, frequently they cannot. For example, from 1962 (the Unilateral Declaration of Independence) to the 1980 elections, Rhodesia faced insurrection. No (white) senior civil servants had the opportunity to communicate with liberation forces; as such, they lacked means to encourage black participation in the bill-making process.[142] In contrast, they had no difficulty obtaining input and feedback from elite white individuals and organizations, a bias reinforced by the civil servants' own interests.

c. *Interest.* In countries where rules direct senior civil servants to select "interested parties" for consultation, four categories of personal interest lead them to consult almost exclusively with those possessing power and privilege. First, government officials view time as scarce. From an efficiency standpoint, it makes sense to spend one's limited time conferring with those who possess the most power.[143]

Second, in accordance with reference-group theory,[144] civil servants—like other mortals—tend to favor members of their own reference group, i.e., the group to which they believe they belong or which they aspire to join. Senior civil servants every-

---

[141] *See* LLOYD, *supra* note 58, at 38; SEIDMAN, *supra* note 9, at chapter 20.

[142] Some governments have this capacity. Compare the bill-drafting systems in the former German Democratic Republic, *see infra* text accompanying note 173, and the policy-making system in Maoist China. *Cf.* J. Gardner, *Political Participation and Chinese Communism*, *in* PARTICIPATION IN POLITICS 218 (G. Parry ed. 1972):

> [A]ll correct leadership is necessarily from the masses to the masses. This means: Take the ideas of the masses (scattered and unsystematic ideas) and concentrate them (through study turn them into concentrated and systematic ideas); then go to the masses and propagate and explain these ideas until the masses embrace them, as their own, hold fast to them and translate them into action . . . . And so on, over and over again, in an endless spiral, with the ideas becoming more correct, more vital and richer each time.

*Id.*; Michael Oksenberg, *Methods of Communication Within the Chinese Bureaucracy*, 57 CHINA Q. 1 (1974) (discussing how high-level cadres fix local prices only after immersing themselves in the daily lives of the masses).

[143] *See* D.K. Leonard, *Communications and Decentralization*, *in* HYDEN, *supra* note 58, at 93 ("[T]he time available for communication is short, and . . . choices must be made as to [resource] allocation . . . . Among [the] group of influential units with which the administrator communicates, he may select a much smaller group of the most influential individuals, with whom he seeks to establish personal and intimate contact.").

[144] *See, e.g.*, ROBERT K. MERTON, SOCIAL THEORY AND SOCIAL STRUCTURE at chapter 9 (1957); HARRY M. JOHNSON, SOCIOLOGY: A SYSTEMATIC INTRODUCTION 39–46 (1960).

where tend to perceive themselves as part of the elite,[145] and as such, favor the elite.

Third, civil servants respond to those most attentive to them. Elite access to the civil service does not result merely by operation of implacable social forces. Elites expend considerable energy and resources to secure it. Immediately after Zimbabwe's independence in 1980, members of its Chamber of Commerce privately wined and dined each of the new government's ministers and permanent secretaries.[146]

Fourth, bribery, both naked and disguised, too often buys access.

d. *Ideology.* Despite a civil service convention of "serving the government of the day,"[147] few old-line civil servants ideologically support new populist governments. As in Zimbabwe in the 1980s and South Africa today, civil servants usually subscribe to elite rather than popular values.[148]

That appointed mandarins of the civil service exercise discretion in favor of the elite and not the masses hardly raises eyebrows. That elected officials frequently do the same requires more explanation.

### 3. Elected Officials

Newly elected, nominally populist officials rarely propose transformative laws or insist that civil servants draft them. Why do the committees that prioritize drafting requests—usually composed of cabinet members—so seldom give priority to transformative laws?

Theorists have offered various answers to explain why populist officials fail to enact populist laws. Some claim that official

---

[145] *See* Okumu, *supra* note 58, at 25; LLOYD, *supra* note 58, at 11; SEIDMAN, *supra* note 9, at 402. *See generally* ABERBACH, *supra* note 58. In the British tradition, not the minister but the senior civil servant has the title, "The Head of the Ministry." Typically, his office is as large as the minister's, furnished just as luxuriously, and is located directly across from the minister's office. At the end of a career in the civil service, senior civil servants in England almost always receive their baronetcy. The salaries of the most senior civil servants match their level of distinction. Today in South Africa, a director general (the head of a ministry) receives R 310,000 per year plus a once-only car allowance of R 200,000; a minister receives R 450,000 per annum.

[146] Through a misunderstanding, a friend of ours, a permanent secretary of a ministry, asked us to come to one of these as his guest. The Chamber of Commerce hosts, obviously embarrassed, asked us to leave.

[147] GARNER, *supra* note 137, at 34.

[148] *See supra* notes 57–61 and accompanying text.

populism seldom constitutes more than election-year rhetoric: office-seekers cynically mouth populist slogans only to achieve high offices and their delicious fruits.[149] That explanation defies empirical falsification;[150] the only evidence for a *secret* motivation comprises the act that motivation purports to explain.

Pluralist theorists argue that public officials have no agenda of their own. Interest-group bargaining takes place within the State's neutral framework. Outcomes reflect interest-group power, not officials' predilections.[151] Public choice theorists classify officials themselves as an interest group, a set of pirhanas[152] eternally snapping up money and electoral support.[153]

Review of the ROCCIPI agenda suggests three more viable hypotheses.

a. *Capacity.* Few elected officials understand the need for institutional transformation. Whether of the Left or Right when they first come to power, most third-world officials from previously colonized countries conceptualize the independence revolution as self government and welfare payments to the poor.[154] They have little capacity to develop a detailed legislative program likely to transform inherited institutions, much less to draft effectively implementable laws.[155] As a result, they remain captive to their experienced civil servants, whose obsequious "Yes, Minister," conceals the power to do precisely the opposite of what the minister requests. With the formally prescribed power relationships thus inverted, too often civil servants have manipulated ministers, rather than implementing their directives.[156]

---

[149] *See* FANON, *supra* note 7.

[150] *See* Karl Popper, *supra* note 109, at 33, 35–41 (arguing that propositions can never be verified, only falsified; inability to falsify constitutes one test of a true hypothesis).

[151] *See* Sunstein, *Interest Groups*, *supra* note 118, at 32; Sunstein, *Revival*, *supra* note 118, at 1542.

[152] *See* Rubin, *supra* note 10.

[153] *See* DAVID MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 5, 13 (1974); J. JOHANNES, TO SERVE THE PEOPLE (1984); J. FEREJOHN, PORK BARREL POLITICS 49–61 (1974); Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 391–94 (1983); *cf.* Daniel L. Farber & Phillip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987) (reviewing public choice literature and its impact on contemporary thought about public law).

[154] *See* SEIDMAN & SEIDMAN, *supra* note 2, at chapter 8.

[155] In neither South Africa nor Zimbabwe, for instance, prior to Independence, had a black lawyer ever drafted a law. Unless new, populist governments take steps to change the drafting institutions and their recruitment and socialization processes (for example, by rapidly training new drafters from a larger applicant pool), they will have little choice but to rely on entrenched officials to produce their bills.

[156] *See* SEYMOUR MARTIN LIPSET, AGRARIAN SOCIALISM (1950); O. ODINGA, NOT

b. *Interest and ideology.* Once in office, at the outset populist officials seemingly have little choice but to govern through existing, authoritarian, class-drenched institutions. A fatal race ensues: will the ministers transform the institutions, or vice versa?[157] More often than not, self interest ultimately leads officials to join the elite establishment.

Some elected officials respond to the seductive call of corruption, making decisions favoring those wealthy enough to pay bribes.[158] Others find all too attractive their rapid acquisition of power and privilege. Having won entry into the elite, why change the institutions that serve them so well?

Self-interest often metamorphoses into an ideology that rationalizes at most incremental change. For many, probably most, third-world elected leaders, social change comes to mean welfare payments to the poor. These payments, however, rapidly exhaust their countries' reserves and then their credit; as a result, the IMF and the World Bank often impose conditionalities and SAPs, and soon even the paltry welfare payments disappear.[159] Many third-world leaders then embrace market-driven ideologies that justify the growing gap between rich and poor: governments interfere at their peril with implacable market forces, no matter that they perpetuate poverty.

c. *Recapitulation* For the most part, neither civil service rules nor practices facilitate inputs from the majority of society; rather, they secretly open the doors of inherited bill-creation processes to the elite. The incapacity of civil servants to produce transformative bills combines with the limited access of those interested in transforming institutions to thwart the drafting of bills likely to alter fundamentally the institutional legacy. Ministerial dependence on the civil service and the rapid incorporation of newly elected officials into old elites quickly emasculate both their ability and desire to implement transformative

---

YET UHURU 247 (1967) ("The Civil Service, I found, could frustrate the best plans of the best intentioned government. Given a chance, top civil servants can direct a minister, not the other way around. An inexperienced, naive, or unconscientious minister can be committed to a policy in flat contradiction to the overall policy of his government."); *see also* SEIDMAN, *supra* note 9, at 393.

[157] *See* SEIDMAN & SEIDMAN, *supra* note 2, at 145–95; Robert B. Seidman, *The Fatal Race: Law Making and the Implementation of Development Goals*, *in* LAW, ACCOUNTABILITY AND DEVELOPMENT: THEORIES, TECHNIQUES, AND AGENCIES OF DEVELOPMENT 79 (Third World Legal Studies 1992).

[158] *See, e.g.*, WILLIAM D. GRAF, THE NIGERIAN STATE: POLITICAL ECONOMY, STATE CLASS, AND POLITICAL SYSTEM IN THE POST COLONIAL ERA 112–14 (1988); Klitgaard, *supra* note 8.

[159] *See* SEIDMAN & SEIDMAN, *supra* note 2, at chapter 10.

legislation. That institutions so often win the fatal race by co-opting elected officials demonstrates the futility of hinging the definition of democracy solely on electoral contests.

In short, the failure to fulfill liberation promises does not reflect mere personal failings of fallible and corrupt humans; fallible and corrupt institutions make it almost inevitable. Merely electing or appointing more qualified officials will not solve the problem. Rather, the solution requires fundamentally altering the institutions through which officials govern. Until the bill-creation process itself undergoes transformation, bills responding to majority interests are unlikely to emerge.

## IV. SOLUTIONS

Whether in a post-colonial, post-apartheid, or post-Communist state, fulfilling democracy's promises requires laws that transform the old, authoritarian regime's institutional legacy. The new, populist governments that emerged by the end of the "short twentieth century"[160] have singularly failed to transform those institutions. Competitive elections have not prevented executive monopolization of legislative power and have proved insufficient to inspire institutional transformation. That transformation will likely occur only through carefully crafted laws that actually induce appropriate behavioral changes.

The causes of the problematic behaviors of the key executive actors who prioritize and draft bills, however, do not lie in perverse individual characteristics. Rather, they lie in the drafting institutions themselves, that is, in: (1) legislative drafting regulations that require neither empirical research nor justifications for bills grounded in reason informed by experience; (2) politicians' and civil servants' ignorance of how to use law to bring about the behavioral changes required for institutional transformation (an ignorance reflected in legislative theories that emphasize interest groups' power) and inadequate social science research skills necessary for investigating specific circumstances in each country; (3) a pervasive ideology opposed to populist measures; (4) the deep secrecy enshrined in the official secrecy acts that cloak the bill-making processes from public inspection;

---

[160] ERIC HOBSBAWM, THE AGE OF EXTREMES 3, 5 (1994). "Short Twentieth Century" refers to the "years from the outbreak of First World War to the collapse of the U.S.S.R." *Id.* at 5.

(5) the admission of input and feedback from those with power and privilege and the exclusion of input and feedback from the poor majority; and (6) over time, the old regime's hierarchical, authoritarian institutions' gradual co-optation of elected governors.

Of these causal factors, this Article views the co-optation of politicians not truly as a cause but more as a *condition* of the resistance to change.[161] The co-optation of politicians by authoritarian institutions over time seems less likely to occur if new governments rapidly implement effective legislation to transform those institutions to serve the people. Only if new governments change the old institutions before the old institutions change their leaders, however, can the people win the fatal race.

Governments can transform bill-creating institutions only by promulgating and effectively implementing new rules to alter or eliminate the identified causes of civil servants' and ministers' problematic behaviors. Some of these causes seem easy to eliminate. Governments could immediately replace the official secrecy acts, for example, with a Sunshine Law that expressly rejects secrecy and requires openness in the bill-creating process.[162] Recruiting new civil servants with the requisite drafting skills and instituting in-service education to equip them with an adequate legislative theory and appropriate social science skills

---

[161] That is, this Article does not purport to address all of the causes of the development of a bureaucratic bourgeoisie. *See* SEIDMAN & SEIDMAN, *supra* note 2, at chapter 9 (stating that to control the development of a bureaucratic bourgeoisie requires not only (1) electoral democracy and (2) transparency and accountability in government, but also (3) popular participation in on-going governmental decisions and (4) a vigorous civil society). Instead, this Article focuses on ways of developing transparency, accountability, and popular participation in only one, albeit important, aspect of government, the bill-creating process.

[162] The Swedish Constitution provides that:

> every Swedish national shall have free access to official documents . . . subject only to such restrictions as are demanded out of consideration for the security of the Realm and its relations with foreign powers, or with regard for activities for inspection . . . carried out by public authorities, or for the prevention or prosecution of crime . . . or out of consideration for the maintenance of privacy, security of person, decency and morality.

SWED. CONST. ch. 2, art. 1, *in* CONSTITUTIONS, *supra* note 62, at 85. The Constitution further provides that cases in which official documents are to be kept secret in accordance with the aforementioned principles "shall be clearly defined in a specific act of law." *Id.* Under that provision, reporters have, on occasion, even examined the ministerial mail before the minister had the opportunity to do so. *See* SEIDMAN, *supra* note 9, at 435. This openness has not caused the Swedish government to totter or fall. *See also* Enid Campbell, *Public Access to Government Documents*, 41 AUSTRALIAN L.J. 73, 73 (1967).

could help to eliminate ignorance about the uses of law to bring about behavioral change.

Enacting a rule requiring drafters to accompany a bill with a research report structured by an adequate legislative theory could have two consequences. First, the quality of a bill would presumably increase since it rests mainly on the quality of the research that underpins the bill. By specifying the research report's contents, authorities can specify the research that a drafter must conduct in order to ensure that the bill: (1) adequately addresses the causes of the problematic behaviors it purports to address; (2) proposes alternative solutions that will likely overcome these causes; and (3) chooses between the proposed solutions on the basis of comparative costs and benefits. Thus a drafting regulation can make it more likely that drafters will ground their bills on reason informed by experience. The research report provides a bill's principal quality control.

Second, except for the simplest bill, no minister, cabinet, or MP can evaluate a bill on its face. (How, on its face alone, does one evaluate a bill reorganizing the Central Bank?) Without an adequate research report, the responsible political authorities necessarily either surrender their law-making power to technocrats, or else decide for or against a bill in terms that exclude reason informed by experience.[163]

Above all, the formulation and implementation of laws likely to achieve essential institutional transformation require new rules that ensure popular participation in providing input and feedback in the bill-making process. Only rules geared toward mass participation will likely overcome the two interconnected causes that underlie many government officials' delay in pressing for essential transformative legislation: (1) the authoritarian ideology of many (if not most) civil servants; and (2) the institutionalized tendency for elected officials' interests and ideologies to

---

[163] *See* Robert B. Seidman, *supra* note 10, at 16, 17; *cf.* Ernst Freund, *Prolegomena to a Science of Legislation*, 13 U. ILL. L. REV. 264, 272–73 (1919). Freund argues, inter alia:

> The words of the statute are too often the only evidence of the legal thought that has gone into it. It is as though judicial reasoning had to be gathered from reports giving decrees only, without opinions . . . . Moreover, the habit of not supporting decisions by reasons inevitably reacts upon the quality of the decisions . . . . The rule in English and American legislation has been to state no reasons at all . . . . The scarcity of the material cannot fail to exercise a discouraging influence . . . . It is only upon the basis of paying material that a science can be expected to flourish.

*Id.*

merge with those that perpetuate the status quo. One is the flip side of the other: as analysis of decision-making systems (Figure 2) suggests, unless civil servants and politicians receive popular inputs, their legislative products will favor power and privilege rather than the populist cause.[164]

A government cannot simply copy another country's rules to transform its own institutions, nor can it successfully simply adopt another country's rules to facilitate mass participation in its own bill-making processes. A government can, however, learn valuable lessons from the efforts of other countries to open up that process. In the United States, for example, legislators' independent political bases combine with the absence of party discipline to endow legislators with potentially effective legislative power.[165] House and Senate legislative committees hold hearings at which the public can provide input to legislative decision-making. In principle, members of Congress rely mainly on these hearings and on staff investigations to determine the facts concerning the unique circumstances which bills must address.[166] In practice, however, in most instances the committees' staff and key congressional legislative aides significantly structure the hearings by determining who will testify. Furthermore, these hearings sometimes do precious little to develop facts.[167] Instead,

---

[164] A widely held intuitive model holds that first a person has "values" and then behaves in accordance with those values. The theory of cognitive dissonance predicts that the contrary also holds true: where an actor must perform particular activities, in time that actor develops values indicating that that behavior is right and proper. *See generally* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). Applied to this case, the theory of cognitive dissonance indicates that if a polity insists on popular participation in bill creation, in time civil servants will come to believe that popular participation is right and proper.

[165] That party discipline fosters executive legislative monopoly embodies a paradox inherent in the democratic ideal of parliamentary sovereignty. A central premise of democracy is that elections concern matters of principle, presumably expressed in the party platform, which the newly elected legislature and government pledge to enact and enforce. That premise assumes party discipline and responsibility: voters cast their ballots for party policies rather than for individuals. Hence the paradox: party discipline wars with democracy by making legislative supremacy improbable; party undiscipline wars with democracy by making elections all but meaningless. In the United States, because the members of Congress have relatively independent constituencies, the Executive does not invariably dominate the Congress; on the other hand, programs promised by the majority party do not invariably win in the Congress because some party members, although presumably elected on that platform, vote against it. That paradox underscores the need for more than electoral contestation. *See, e.g.*, FOLEY & OWENS, *supra* note 64; D.J. BOORSTIN, THE GENIUS OF AMERICAN POLITICS (1953); S. M. Lipset, *American Exceptionalism Reaffirmed, in* IS AMERICA DIFFERENT? (1991); *cf.* Bernard Susser, *Toward a Constitution for Israel*, 37 ST. LOUIS U. L.J. 939, 947–48 (1993) (discussing how the situation in Israel is diametrically opposite that of the United States).

[166] *See* Rubin, *supra* note 10, at 268–69. *See generally* Rubin, *supra* note 86, at 422.

[167] *See* Rubin, *supra* note 10, at 261–81; Gouvin, *supra* note 10.

they may merely become opportunities for supporters and opponents to register their support or opposition to proposed bills, while committee members bargain with affected interests.[168] All too often, the resulting bills reflect not reason informed by experience, but interest groups' relative power.[169]

The experience of the United States does not necessarily mean that legislative hearings cannot create conditions to ensure popular participation in the law-making process, but it does suggest that hearings alone do not suffice. Permitting public access to the input and feedback processes will likely improve legislative output only if the lawmakers adopt a legislative theory that guides them in substituting reason informed by experience for interest group pressures or the lawmakers' own values.[170]

On the federal level, the U.S. Administrative Procedure Act at least requires notice and opportunity for interested persons to comment on proposed administrative regulations.[171] These com-

---

[168] *See* Rubin, *supra* note 10, at 264–67; Gouvin, *supra* note 10.

[169] In the United States, as in the Third World, most legislators and their staff seem to adhere to one version or another of interest-group theory. *See supra* text accompanying notes 57–61; *see also* MARTIN CARNOY, THE STATE AND POLITICAL THEORY 9 (1984). From that theory, drafters might infer two principal requirements: their bills should (1) ensure formally fair procedures; and (2) respond to the claims and demands of all stakeholders. LEGAL DRAFTING, *supra* note 118. Nevertheless, in the United States, as elsewhere, Elmer Schattschneider describes the implications of pluralist theory bluntly: "[T]he flaw in the pluralist heaven is that the heavenly chorus sings with a strong upper-class accent." ELMER SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE: A REALIST'S VIEW OF DEMOCRACY IN AMERICA 35 (1960). If all law comes from bargains dominated by the powerful, those forces in effect hold the state captive. Bachrach & Baratz, *supra* note 31.

Interest group theory seems limited to a description of the problems posed by the U.S. legislative system. Implicitly adopting an ends-means methodology, its adherents seldom explain why merely providing an opportunity for stakeholders to present their claims and demands almost inevitably papers over inherent inequalities, rather than contributing to an increasingly effective use of logic and facts. *See, e.g.*, WILLIAM N. ESKRIDGE & PHILLIP P. FRICKEY, LEGISLATION: STATUTES AND CREATION OF PUBLIC POLICY (2d ed. 1985) (describing how drafters' "conceptual ingenuity" is needed to find solutions acceptable to major interest groups; a symbolic bill or incremental compromise may be sufficient).

[170] An appropriate legislative theory and methodology should serve not as a metaphor for the real world but as an heuristic to guide empirical research. *See* SEIDMAN & SEIDMAN, *supra* note 2, at 59–62; ALLISON, *supra* note 126 (stating that theory is a net whose mesh determines which facts are captured). At committee hearings on bills, legislators could conduct a kind of empirical research by asking questions concerning alternative hypotheses and the facts required to falsify them. Without an appropriate theory, however, their questions will at best reflect their intuitions as to how legislation may affect social change. Analogous to Keynes's view of economists, *see* JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY at v–viii (1951), a legislator without an explicit legislative theory remains in thrall to long-dead political theorists—a reality underscored by the Gouvin and Rubin studies. *See* Rubin, *supra* note 10; *see also* Gouvin, *supra* note 10.

[171] On the federal level, this requirement is codified at 5 U.S.C. § 553 (1994). On

ments can provide information as well as set forth interest groups' claims and demands. Apparently, administrative agencies generally regard these comments as opportunities to learn about the facts from people intimately involved with the matter.[172]

Prior to reunification, the German Democratic Republic adopted another system that seems to hold some promise for ensuring adequate input from stakeholders and others.[173] A ministry had to accompany every concept paper it sent to the Cabinet Committee on Legislation with a second paper describing the proposed drafting process: who would serve on the drafting committee; what hearings it would hold—and where; and a recommended timetable. Since not every bill requires full popular participation,[174] these procedures provided a flexible device for shaping the participation processes to match the bill's subject matter. The political leadership, represented by the Cabinet Committee on Legislation, retained responsibility for the final decision about whom to consult. An investigation of how this system worked in practice might assist in assessing its potential advantages and disadvantages. It remains unclear, however, whether an explicit theory structured the rules defining participants' presentation of facts in order to ensure the relevance of these facts to overcoming problematic behavior.

Whether officials receive popular input and feedback depends in large part upon their understanding of the bill-creating proc-

---

the state level, see, e.g., ALASKA STAT. § 44.62.190, .210 (Michie 1962); ARIZ. REV. STAT. § 41-1021 (1956); CAL. CODE REGS. § 11346.2 (West 1992); CONN. GEN. STAT. ANN. § 4-168 (West 1958); D.C. CODE ANN. § 1-1506 (1981); FLA. STAT. ANN. § 120.54 (West 1996); IDAHO CODE § 67-5220 to -5222 (1949); 5 ILL. COMP. STAT. 100/5-40 (West 1993); IOWA CODE ANN. § 17A.4 (West 1995); LA. REV. STAT. ANN. § 953 (West 1987). Nearly three quarters of the states have Administrative Procedure Acts. *See* Arthur Earl Bonfeld, *Administrative Procedure Acts in an Age of Comparative Scarcity*, 75 IOWA L. REV. 845, 845 (1990). For an analysis of an APA enacted by a foreign government, see Lorenz Kodderitzsch, *Japan's New Administrative Procedure Law: Reasons for its Enactment and Likely Implications*, 24 LAW IN JAPAN 105 (1990). Although the first two drafts of that Act emphasized the concept of participatory democracy, the third commission for administrative law deleted this concept in its draft and decided to formulate rules concerning planning and rulemaking procedures. *See id.* at 116.

[172] This Article's underlying thesis suggests that the more consistently the rules explicitly require such agencies to employ an adequate legislative theory to structure their analysis of the facts, the more likely it is that they will focus their attention on evidence relevant to ensuring that their regulations will help overcome the causes of social problems. Research concerning the practice under the existing APA rules might offer a useful test of this proposition.

[173] Interviews with G.D.R. state officials in East Berlin (1984).

[174] A bill designed to regulate technical characteristics of high-tension electrical lines probably need not possess the same processes for public participation as a new law concerning health care.

ess. If they adhere to a theory of legislation holding that legislation merely responds to interest-group pressures, then popular participation will likely become meaningless; the powerful and privileged can always mount greater pressures on government officials than can the less well-endowed. Only if law makers adopt a legislative theory that directs drafters to rest their bills on reason informed by experience can popular participation become more than an attempt by the mass of the population to lick up the few crumbs that fall from the table. A theory that finally rests on experience—on data—says that whoever has better data trumps the other. Such a theory constitutes the necessary (if not sufficient) condition for meaningful popular participation.

## CONCLUSION

All over the Third World, populist elected governments have failed miserably in carrying out their promises to improve the majority's quality of life. At a minimum, this seems to disprove the utility of a definition that identifies "democracy" solely with competitive elections. Elections seem likely to help improve the majority's lot only if the elected representatives have real (not merely nominal) power (including capacity) to make laws. In most countries, they do not; the executive has usurped the constitutional legislative power. To explain the frustration of populist dreams of people-oriented development requires examining not only the law-enacting, but also the bill-creating processes that too often take place behind a thick curtain of bureaucratic secrecy.

The available evidence suggests three reasons why bill-creating processes have generally failed to produce bills capable of transforming institutions in favor of the majority: (1) civil servants have had insufficient capacity to draft transformative bills and often have adopted anti-populist ideologies; (2) existing elite institutions have co-opted elected officials, who have had to rely on the civil service; and (3) exclusion from the bill-creation processes has frustrated those groups in civil society who have sought change. Resolving these difficulties requires popular participation in the bill-creating process as well as a legislative theory to guide civil servants and elected officials in formulating and assessing legislation on the basis of reason informed by experience. Alone, neither popular participation nor an adequate

legislative theory will suffice. An adequate legislative theory can at most ensure that the bills drafted will likely induce the behavioral changes needed to transform institutions. Only active mass participation in providing relevant facts and logic in the context of an open, accountable bill-making process will likely ensure that institutional changes will actually benefit the masses.

Democracy does require competitive elections, but it requires more than that to ensure that a government actually exercises state power on behalf of its popular constituencies. It requires processes that ensure both popular input and feedback to government decision-making so that bills grounded in reason informed by experience can emerge.

# ARTICLE

# PUTTING WORKER-MANAGEMENT RELATIONS IN CONTEXT: WHY EMPLOYEE REPRESENTATIONAL CHOICE NEEDS GREATER PROTECTION IN REFORM OF SECTION 8(a)(2) OF THE NLRA

NANCY K. KUBASEK*
WESTLEY J. HIERS**
SHANNON T. BROWNE***
CARRIE WILLIAMSON****

*Since the passage of the Wagner Act in 1935, both labor law and industrial relations have had to evolve in order to function effectively in an increasingly global economy. Unions and employers have traditionally accepted limitations on "company unionism" as inherent to collective bargaining's adversarial context under section 8(a)(2) of the National Labor Relations Act (NLRA). However, recent Congressional proposals such as the "Teamwork for Managers and Employees Act" (TEAM Act), which advocate greater employer flexibility in developing "Employee Involvement" programs, have sparked vigorous debate regarding the limits imposed by section 8(a)(2). Management desires to initiate such programs to achieve better economic competitiveness; unions are skeptical of these programs because they encroach upon worker control of the production process. In this Article, Professor Nancy Kubasek argues that, in passing the TEAM Act, the House of Representatives supported management's economic goals but overlooked the role played by adversarialism in industrial and labor relations. After analyzing this historical context of labor-management adversarialism, Professor Kubasek concludes that NLRA revisions must provide greater worker protection than that offered by the TEAM bill if the NLRA is to encourage employee involvement in the workplace of a global economy.*

## INTRODUCTION

On September 27, 1995, the House of Representatives passed "The Teamwork for Managers and Employees Act," commonly

*Professor of Legal Studies, Bowling Green State University; B.S., Bowling Green State University, 1978; J.D., University of Toledo College of Law, 1981.

**Ph.D. candidate (Industrial and Labor Relations), School of Industrial and Labor Relations at Cornell University, 1999; B.S., Bowling Green State University, 1994.

***Law Clerk to Judge Kathleen McDonald O'Malley of the United States District Court for the Northern District of Ohio; B.S., Bowling Green State University, 1992; J.D., Ohio State University Law School, 1996.

****Research Assistant, B.S. candidate, Bowling Green State University, 1997.

referred to as the "TEAM Act."[1] The TEAM Act would amend section 8(a)(2)[2] of the National Labor Relations Act

---

[1] H.R. 743, 104th Cong. (1995):

SEC. 2 FINDINGS AND PURPOSES

(a) Findings—Congress finds that—

(1) the escalating demands of global competition have compelled an increasing number of employers in the United States to make dramatic changes in workplace and employer-employee relationships;

(2) such changes involve an enhanced role for the employee in workplace decisionmaking, often referred to as "Employee Involvement", which has taken many forms, including self-managed work teams, quality-of-worklife, quality circles, and joint labor-management committees;

(3) Employee Involvement programs, which operate successfully in both unionized and nonunionized settings, have been established by over 80 percent of the largest employers in the United States and exist in an estimated 30,000 workplaces;

(4) in addition to enhancing the productivity and competitiveness of businesses in the United States, Employee Involvement programs have had a positive impact on the lives of such employees, better enabling them to reach their potential in the workforce;

(5) recognizing that foreign competitors have successfully utilized Employee Involvement techniques, the Congress has consistently joined business, labor and academic leaders in encouraging and recognizing successful Employee Involvement programs in the workplace through such incentives as the Malcolm Baldridge National Quality Award;

(6) employers who have instituted legitimate Employee Involvement programs have not done so to interfere with the collective bargaining rights guaranteed by the labor laws, as was the case in the 1930's when employers established deceptive sham "company unions" to avoid unionization; and

(7) Employee Involvement is currently threatened by legal interpretations of the prohibition against employer-dominated "company unions".

(b) PURPOSES—The purpose of this Act is—

(1) to protect legitimate Employee Involvement programs against governmental interference;

(2) to preserve existing protections against deceptive, coercive employer practices; and

(3) to allow legitimate Employee Involvement programs, in which workers may discuss issues involving terms and conditions of employment, to continue to evolve and proliferate.

Several Representatives offered amendments to this legislation, most of which were rejected. Rep. James P. Moran (D-Va.) offered an amendment stipulating that members of Employee Involvement committees would be "representatives of employees, elected by a majority of employees by secret ballot." 141 CONG. REC. H9547 (daily ed. Sept. 27, 1995). It failed 195-228. *Id.* at H9554–55. Rep. James A. Traficant (D-Ohio) offered an amendment requiring that employees be represented on Employment Involvement committees at least to the same extent as management; this amendment was accepted. *Id.* at H9552–53. Rep. Lloyd Doggett (D-Tex.) proposed an amendment that would have prevented employers from creating or altering team dynamics during "organizational or other concerted activities for the purpose of collective bargaining or other mutual aid or protection among such employees . . . ." *Id.* at H9553. Doggett's amendment failed 187-234. *Id.* at H9555. Rep. Thomas C. Sawyer's (D-Ohio) amendment also failed. *See infra* note 161.

[2] Section 8(a)(2) states that it shall be an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it . . . ." 29 U.S.C. § 158(a)(2) (1994). Congress originally enacted this section in 1935 to prevent the formation of company unions, which Senator Robert F. Wagner (D-N.Y.) believed operated contrary to the interests

(NLRA)[3] by establishing that employee involvement (EI)[4] schemes in nonunionized workplaces which "address matters of mutual interest" would not constitute unfair labor practices under the NLRA, provided that such teams would not attempt either to negotiate or to enter into collective bargaining agreements.[5] Representative Steve Gunderson (R-Wis.) proposed an original draft of the bill[6] in the winter of 1993, in response to the controversial *Electromation*[7] decision of the National Labor Relations Board (NLRB). The business community's sentiment was that *Electromation* threatened the use of EI programs which had become increasingly vital to global economic competitiveness,[8] and Rep. Gunderson sought corporate guidance in drafting his bill.[9]

---

of workers by chilling organization by external unions. *See* Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1456–61 (1993).

[3] 29 U.S.C. §§ 151–169 (1994).

[4] The Act says that EI may take many forms, "including self-managed work teams, quality-of-worklife, quality circles, and joint labor-management committees." TEAM Act, § 2(a)(2), *supra* note 1.

[5] *See* § 2(a)(6). For a full discussion, see *infra* notes 55–78 and accompanying text.

[6] H.R. 1529, 103d Cong. (1993).

[7] Electromation, Inc., 309 N.L.R.B. 990 (1992). See *infra* note 71 for a more complete discussion.

[8] *See, e.g.*, William C. Byham, *Manager's Journal: Congress Should Strengthen the Corporate Team*, WALL ST. J., Feb. 5, 1996, at A14 (claiming that certain NLRB rulings have deterred American business leaders from using worker-management teams); Michael A. Verespej, *New Rules on Employee Involvement*, INDUSTRY WK., Feb. 1, 1993, at 55 (quoting management attorney Martin Payson's opinion that *Electromation* "puts into question every participation group that employers have put into place the past 20 years"). *See also The Teamwork for Employment and Management Act of 1995: Hearing on S. 295 Before the Senate Comm. on Labor and Human Resources*, 104th Cong. (1995). Harold Coxson states that the section of the NLRA that "prevents the formation of the 1930s style sham unions also acts as a barrier to today's legitimate workplace cooperation and employee empowerment . . . . This threat has become manifest to employees and employers alike as a result of recent decisions of the National Labor Relations Board ("NLRB"), most notably in the well-publicized *Electromation* and *Du Pont*. The threat of unfair labor practice charges and an order by the NLRB for workers and employers to disestablish workplace teams, operates as a chill on legitimate and long-standing cooperative relationships throughout the country." *Id.* at 58 (statement of Harold P. Coxson, Representative of the TEAM Coalition). Senator Nancy L. Kassebaum (R-Kan.), Chair of the Committee on Labor and Human Resources, expressed a similar sentiment: "In the National Labor Relations Board's *Electromation* decision, the Board invalidated one company's worker management committee. The decision has called into question the legality of all employee involvement programs." *Id.* at 2 (opening statement of Sen. Kassebaum).

[9] *See Gunderson Seeks Management Consensus on Legislation to Overrule* Electromation, [Jan. 28, 1993] Daily Lab. Rep. (BNA) No. 17, Jan. 28, 1993, at A-4 (stating that at a January 27 breakfast meeting with the National Association of Manufacturers, Rep. Gunderson sought employer consensus on a legislative response to *Electromation*).

In April of 1996, the Senate Labor and Human Resources Committee approved S. 295, which had passed in the House of Representatives by a narrow margin. On July 10, the Senate passed H.R. 743[10] by an even narrower margin.[11] On July 30, 1996, as promised, President Clinton vetoed the bill.[12]

The divide among lawmakers regarding the TEAM Act reflects the discussion in the academic community of a broader issue: the desirability of a labor law regime that fosters worker cooperation.[13] We analyze both sides of the adversarial model in labor

---

[10] This bill was nearly identical to S. 295.

[11] The bill passed by a vote of 53-46, largely along party lines, with Republican representatives favoring the bill. 54 CONG. Q. WKLY. 28 (July 13, 1996).

[12] The President delivered his veto to the House of Representatives with the following message on July 30, 1996:

> To the House of Representatives:
>
> I am returning herewith without my approval, H.R. 743, the "Teamwork for Employees and Managers Act of 1995." This act would undermine crucial employee protections.
>
> I strongly support workplace practices that promote cooperative labor-management relations. In order for the United States to remain globally competitive into the next century, employees must recognize their stake in their employer's business, employers must value their employees' labor, and each must work in partnership with each other.
>
> Cooperative efforts, by promoting mutual trust and respect, can encourage innovation, improve productivity, and enhance the efficiency and performance of American workplaces.
>
> Current law provides for a wide variety of cooperative workplace efforts. It permits employers to work with employees in quality circles to improve quality, efficiency, and productivity. Current law also allows employers to delegate significant managerial responsibilities to employee work teams, sponsor brainstorming sessions, and solicit employee suggestions and criticisms. Today, 30,000 workplaces across the country have employee involvement plans. According to one recent survey, 96 percent of large employers already have established such programs.
>
> I strongly support further labor-management cooperation within the broad parameters allowed under current law. To the extent that recent National Labor Relations Board (NLRB) decisions have created uncertainty as to the scope of permissible cooperation, the NLRB, in the exercise of its independent authority, should provide guidance to clarify the broad legal boundaries of the labor-management teamwork. The Congress rejected a more narrowly defined proposal designed to accomplish that objective.
>
> Instead, this legislation, rather than promoting genuine teamwork, would undermine the system of collective bargaining that has served this country so well for many decades. It would do this by allowing employers to establish company unions where no union currently exists and permitting company-dominated unions where employees are in the process of determining whether to be represented by a union. Rather than encouraging true workplace cooperation, this bill would abolish protections that ensure independent and democratic representation in the workplace . . . .

President's message to Congress vetoing H.R. 743, *reprinted in* 54 CONG. Q. WKLY. 32 (Aug. 10, 1996).

[13] For arguments supporting the amendment of the NLRA to promote worker cooperation, see Michael S. Albright, *The Legality of Employee Participation Programs Following the NLRB's* Electromation, Inc. *Decision*, 1993 DET. C.L. REV. 1035 (1993);

relations: the management-dominated labor relations model that has been advanced in support of the TEAM Act, and the union-dominated labor relations model that has been advanced in opposition to the TEAM Act. Supporters of the Act stress the demands of global competition in advocating nearly unfettered employer discretion in deploying EI programs in the workplace. Opponents of the Act argue that the proposed legislation's revision of 8(a)(2) would create a legal framework similar to that which existed in the heyday of company unions; the implicit assumption is that contemporary employers, like their predecessors, would take advantage of that framework. We argue that section 8(a)(2) of the NLRA should be amended to provide employers with the flexibility they need to compete in the changing economic environment but also to protect the democratic right of workers to seek independent representation in the workplace. We believe that although the TEAM Act meets the first criterion, it fails miserably on the second count.

---

Michael H. LeRoy, *Employer Domination of Labor Organizations and the* Electromation *Case: An Empirical Public Policy Analysis*, 61 GEO. WASH. L. REV. 1812 (1993) (presenting empirical evidence that employer domination of labor organizations generally has not been a problem and arguing that amendment of NLRA to provide for cooperative labor relations should proceed more quickly); Martin T. Moe, *Participatory Workplace Decisionmaking and the NLRA: Section 8(a)(2),* Electromation, *and the Specter of the Company Union*, 68 N.Y.U. L. REV. 1127 (1993); Joseph B. Ryan, *The Encouragement of Labor-Management Cooperation: Improving American Productivity Through Revision of the National Labor Relations Act*, 40 UCLA L. REV. 571 (1992).

There are many arguments against labor law reform in worker-management cooperation. *See* A.B. Cochran III, *We Participate, They Decide: The Real Stakes in Revising Section 8(a)(2) of the National Labor Relations Act*, 16 BERKELEY J. EMP. & LAB. L. 458, 460 (1995) (arguing that "drastic revisions in the legal protection against company domination of labor organizations are unnecessary and that genuine participation is most likely when employees are represented by autonomous, self-directed organizations"); Steven H. London, *The New Industrial Relations Ideology and the Decline of Labor*, 18 POL'Y STUD. 481, 489 (1989–90) (arguing that "the new ideologies of cooperation are largely reformulated industrial pluralist strategies for the historic goals of controlling the work process to increase productivity and lower labor costs"); Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge*, 12 INDUS. REL. L.J. 233 (1990) (arguing that the dominance of "rightist" ideological approaches in contemporary workplaces prevents management-oriented cooperative programs from advancing workers' interests); Note, *Collective Bargaining as an Industrial System: An Argument Against Judicial Revision of Section 8(a)(2) of the National Labor Relations Act*, 96 HARV. L. REV. 1662 (1983).

Other articles address the TEAM Act specifically. *Compare* Michael H. LeRoy, *Can TEAM Work? Implications of an* Electromation *and* DuPont *Compliance Analysis for the TEAM Act*, 71 NOTRE DAME L. REV. 215 (1996) (advocating passage of the TEAM Act) *with* Charles J. Morris, *Will There be a New Direction for American Industrial Relations?—A Hard Look at the TEAM Bill, the Sawyer Substitute Bill, and the Employee Involvement Bill*, 47 LAB. L.J. 89 (arguing that the TEAM Act would effectively repeal section 8(a)(2) labor protections). Morris supports the Employee Involvement Bill, which was put together by six labor law and industrial relations professors and has since received support from at least a dozen more. *Id.* at 98.

Our argument consists of four parts. First, we highlight the desirability of EI as a means of enhancing firm competitiveness in an increasingly globalized environment[14] where workplace cooperativeness is especially important to economic success.[15] Second, we discuss the TEAM Act as a response to the need for legally protected EI programs. In the second section, we also analyze the differing assumptions held about management by supporters and opponents of the TEAM Act. Third, we argue that, contrary to the rhetoric of TEAM Act proponents, adversarialism in labor-management relations is not gone from the workplace and, thus, more protections for labor than are afforded by the TEAM Act are necessary. Fourth, we argue that the Employee Involvement Act of 1996 is a viable alternative to the TEAM Act that strikes the balance necessary in maintaining corporate competitiveness while protecting workers and their unions from the negative potential of EI.[16]

## I. THE NEED FOR EMPLOYEE INVOLVEMENT IN THE WORKPLACE

Although the estimated extent of EI in the workplace varies, the consensus is that there has been an increase in its use in the past several years.[17] A number of commentators have claimed

---

[14] *See generally* PETER DICKEN, GLOBAL SHIFT: THE INTERNATIONALIZATION OF ECONOMIC ACTIVITY (2d ed. 1992).

[15] For the claim that cooperative labor relations can be crucial to economic success, see William Lazonick, *Cooperative Employment Relations and Japanese Economic Growth, in* CAPITAL, THE STATE, AND LABOUR: A GLOBAL PERSPECTIVE 70, 70–110 (Juliet B. Schor & Jong-Il You eds., 1995).

[16] See Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 COLUM. L. REV. 753, 904–18 (1994), for a well-documented discussion of the dangers inherent in worker-management cooperation.

[17] *See* H.R. Rep. No. 104-248 (1995) (Minority View) (asserting that Employee involvement is now practiced by as many as 30,000 employers according to the majority's estimate, including 96% of large firms); COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS 7 (Dec. 1994) (reporting results from the study on Workplace Representation and Participation, which found that 52% of the respondents had some form of employee participation operating in their workplace); EILEEN APPELBAUM & ROSEMARY BATT, THE NEW AMERICAN WORKPLACE: TRANSFORMING WORK SYSTEMS IN THE UNITED STATES 60 (1994) (reporting that the percentage of Fortune 1000 companies using at least one EI practice increased from 70 to 85% between 1987 and 1990). *Cf.* Paul Osterman, *How Common is Workplace Transformation and Who Adopts It?*, 47 INDUS. & LAB. REL. REV. 173 (1994). In a representative sample of 694 firms, Osterman found that "about 35% of private sector establishments with 50 or more employees appear to have made substantial use of flexible work organization in 1992." *Id.* at 186. Notably, 49.1% of workplace

that EI yields greater productivity and efficiency,[18] and reviews of the empirical literature lend support to this claim.[19] Supporters of the TEAM Act point to the productivity potential of EI, increasing foreign competition, and the alleged threat of *Electromation* to justify reform.[20] Although we do not accept the TEAM Act proponents' interpretation of *Electromation*[21] or their blanket endorsement of EI as leading to greater worker satisfaction in a way not threatening to unionization initiatives,[22] we do support the TEAM Act's goal of encouraging greater employee participation in the workplace. Our views are consistent with the rise of EI in a broader context of changes in the international economy, specifically the emergence of the new automation regime of flexible production.

### A. *From Mass to More Flexible Forms of Production*

Fordism, the dominant model of twentieth-century production, has three primary characteristics: the separation of conception from execution, the substitution of skilled workers with unskilled workers, and the use of universal machinery to produce one product for mass markets.[23] The intellectual underpinnings of the Fordist model of production come from two giants in the

---

teams, 71.1% of Total Quality Management, and 67.9% of Quality Circles or problem-solving groups were introduced in the five years prior to 1992. *Id.*

[18] See Barenberg, *supra* note 16, at 890–904, for a discussion of the potential efficacy of one form of EI, workplace teams, not only in improving productivity and efficiency, but also in augmenting worker autonomy and self-realization.

[19] In a statistical meta-analysis of 43 published studies, it was found that most worker participation plans are positively correlated at a small but statistically significant level with increased productivity. *See* Chris Doucouliagos, *Worker Participation and Productivity in Labor-Managed and Participatory Capitalist Firms: A Meta-Analysis*, 49 INDUS. & LAB. REL. REV. 58, 66–73 (1995). Labor-owned and labor-managed firms had stronger correlations with increased productivity than did firms with other forms of participation, such as Quality Circles. *Id.* at 67–69. *See also* David I. Levine & Laura D. Tyson, *Participation, Productivity, and the Firm's Environment*, *in* PAYING FOR PRODUCTIVITY: A LOOK AT THE EVIDENCE 183, 188–204 (Alan S. Blinder ed., 1990) (reviewing the empirical literature on participation schemes from economics, industrial relations, organizational behavior, and other social sciences and concluding that "participation *usually* leads to small, short-run improvements in performance and *sometimes* leads to significant, long-lasting improvements in performance. There is usually a positive, often small, effect of participation on productivity . . . and almost never a negative effect." *Id.* at 203–04).

[20] *See* TEAM Act, *supra* note 1.

[21] *See infra* note 71.

[22] *See infra* notes 79–89 and accompanying text.

[23] *See* CHARLES F. SABEL, WORK AND POLITICS: THE DIVISION OF LABOR IN INDUSTRY 32–33, 194–95 (1982).

history of management theory in the United States, Frederick Taylor and Henry Ford. It was Taylor who advocated the radical separation of product design from the production process itself.[24] In the first decades of the twentieth century, many American managers moved to apply Taylorist principles to systems of mass production.[25] The greatest obstacle to doing so, the strong tradition of craft workers, was handled by integrating craft workers into managerial positions such as foreman and supervisor, thereby undermining the unions constituted by these workers.[26] Henry Ford then gave the application of Taylorist principles to mass production its 'Fordist' flavor by instituting the five dollar day in the 1920s in order to reduce worker turnover, gain acceptance for speed-up of the assembly line, and make possible the consumption of his vehicles by the production employees.[27]

In the years surrounding World War II, the Fordist model of production and management spread throughout the nation's industries and workplaces.[28] The model's success in contributing to the tremendous rates of economic growth in the 1950s and 1960s[29] depended in part on the compromise made between labor and management, as embodied in Ford's original management policy: laborers were given increased wages in exchange for increased productivity and acquiescence to exclusive managerial

---

[24] *See* FREDERICK W. TAYLOR, *Shop Management, in* SCIENTIFIC MANAGEMENT 17, 98–99 (1947) ("All possible brain work should be removed from the shop and centered in the planning or laying-out department."). See HARRY BRAVERMAN, LABOR AND MONOPOLY CAPITAL: THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY 112–20 (1974), for an excellent discussion of Taylor's scientific management principles, especially in terms of their function as a management tool in gaining nearly absolute control over the labor process.

[25] *See* WILLIAM LAZONICK, COMPETITIVE ADVANTAGE ON THE SHOP FLOOR 222–36 (1990).

[26] Between 1900 and 1920, there was more than a threefold increase in the number of foremen, with the bulk of the increase caused by movement of craft workers into foremen positions. *Id.* at 229.

[27] Antonio Gramsci described the outcome of Ford's management policies as "the formation of a new type of worker, in whom a monopoly is created through high wages." Antonio Gramsci, FURTHER SELECTIONS FROM THE PRISON NOTEBOOKS 433 (1994).

[28] *See* MICHEL AGLIETTA, A THEORY OF CAPITALIST REGULATION 180–95 (1979); APPELBAUM & BATT, *supra* note 17, at 14; Robert Boyer, *Capital-Labor Relations in OECD Countries: From the Fordist Golden Age to Contrasted National Trajectories, in* CAPITAL, THE STATE AND LABOR: A GLOBAL PERSPECTIVE, *supra* note 15, at 18, 20–27 (specifying that this model took hold in several advanced industrial countries besides the United States, including France, Italy, the United Kingdom, and West Germany).

[29] In the 1950s and 1960s, the annual GNP growth rate was 3.2 and 4.5%, respectively, while annual output per employee grew at an annual rate of between 2.1 and 2.6%. *See* BEN J. WATTENBERG, THE STATISTICAL HISTORY OF THE UNITED STATES: FROM COLONIAL TIMES TO THE PRESENT 225 (1976).

control over production and strategy.[30] In this way, the United States was guaranteed that its tremendous capabilities in the area of mass production would be complemented by the mass consumption of a working and middle class with ever-increasing incomes, while American management's obsession with 'taking skills off the shop floor'[31] was satiated as well.[32]

Nevertheless, at the end of the 1960s and the beginning of the 1970s, Fordism began to lose its efficacy as a model of production and a promoter of economic growth.[33] Two aspects of the Fordist model of production contributed to its decline. First, the relative simplicity of the machinery employed in this production process and the minimal amount of skill required to operate it, made the process easily adoptable by industrializing countries. As a result, since the 1970s competition in the mass-produced goods sector has come increasingly from Newly Industrializing Countries (NICs) such as Brazil, Korea, Mexico, Singapore, and Taiwan, which can match American productivity at a fraction of the labor cost.[34] Second, not only have more efficient manufacturers of mass-produced goods emerged, but the desirability of

---

[30] *See* Boyer, *supra* note 28, at 22.

[31] *See* LAZONICK, *supra* note 25, at 228–32.

[32] For an account of the post-WWII struggle between labor and management over control of the production process and larger issues of firm operations, see generally HOWELL J. HARRIS, THE RIGHT TO MANAGE: INDUSTRIAL RELATIONS POLICIES OF AMERICAN BUSINESS IN THE 1940S (1982). Management eventually won by way of the Fordist compromise, leaving much of the workforce engaged in unskilled and semi-skilled production tasks. *Id.*

The support given to this "right to manage" by the courts, in the form of "managerial prerogatives" is canvassed and critiqued in JAMES B. ATLESON, VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW (1980). It is notable that TEAM Act supporters highlight the managerial desire to increase workforce skills via EI programs, such as self-directed teams. *See* 141 CONG. REC. H9521 (daily ed. Sept. 27, 1995) (statement of Representative Sam Johnson (R-Tex.)). When put in this historical perspective, we can see that the push for greater flexibility and capability to increase employee skills comes in the wake of a prior campaign to do just the opposite.

[33] There is a considerable disparity between productivity rates before and after 1973, when rates dropped from 0.9% to 0.4%. *See* OECD, STRUCTURAL ADJUSTMENTS AND ECONOMIC PERFORMANCE 195 (1988). In addition, wages have dropped in comparison with those in other advanced industrial countries. In 1975, of Belgium, Canada, Denmark, France, Germany, Italy, Sweden, and the United Kingdom, only Belgium and Sweden had higher wages than those in the United States. By 1992, however, only the United Kingdom had *lower* wages than the United States, while wage rates in countries such as Belgium, Denmark, Germany, Italy, and Sweden exceeded those in the United States by 20 to 60%. *See* COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT 4 (1994).

[34] *See* SABEL, *supra* note 23, at 195–98. This is the very globalization of the economy that supporters of the TEAM Act point to as a rationale for promoting the use of apparently more productive EI programs. Indeed, the reality of comparable productivity rates at a fraction of the labor cost in foreign manufacturing firms should not be ignored in the consideration of labor law reform. However, because the economy is not

standardized goods has declined as well.[35] With the rise of quality-conscious and differentiated consumer product markets, the cost advantage of mass production has waned.[36]

---

independent of the effects we impose through working condition reforms, we should be cautioned against adopting even mildly anti-labor legislation as a necessary response to lower foreign labor costs. Conceiving of the domestic economy as subject to inexorable international pressures, though, tends to "naturalize" the world economy, or to conceptualize it as separate from everyday political choices. *See* FRED BLOCK, POST-INDUSTRIAL POSSIBILITIES: A CRITIQUE OF ECONOMIC DISCOURSE 16–17 (1990). One such political choice includes U.S. support given to subcontracting labor-intensive production processes in developing countries via U.S. customs items 807.00 and 806.30. Under these items, "an American importer does not have to pay duty on the value of the U.S. parts or materials incorporated in the product being imported." The tariff policy of the United States "encouraged American manufacturers of electronics products, garments and toys which were threatened by foreign competition, to increasingly subcontract most labor-intensive phases of production such as assembly of semiconductors or sewing of garments to Third World countries beginning in the second half of the 1960s." *See* Rene Ofreneo, *International Subcontracting and Philippine Industrial Relations*, 13 PHILIPPINE J. INDUS. REL. 31, 34–35 (1989). Here, we see that Philippine competition leading to the loss of American jobs and American competitiveness can come via the subcontracting practices of U.S. firms. This point also holds for another scenario in the increasingly globalized economy, namely, one in which cries of intensified global competition can mask international *collaboration* between firms. For example, among the Big Three automobile manufacturers, Ford owns 25% of Mazda and 10% of Korea's Kia, General Motors owns 40% of Isuzu and 50% of Daewoo Motors, and Chrysler owns nearly 25% of Mitsubishi. Similarly, in the electronics industry, General Electric owns 40% of Toshiba. *See* Wilson McLeod, *Labor-Management Cooperation: Competing Visions and Labor's Challenge*, 12 INDUS. REL. L.J. 249 n.67 (1990).

[35] *See* APPLEBAUM & BATT, *supra* note 17, at 15. *See also* Egil Skorstad, *Mass Production, Flexible Specialization and Just-In-Time: Future Development Trends of Industrial Production and Consequences on Conditions of Work*, 23 FUTURES 1075, 1075–84 (1991) (arguing that industrial mass production has reached a crisis because of its inability to respond to rapidly changing market demands). Much of this decline in demand for standardized goods probably can be attributed to their saturation of consumer markets. By 1970, 99% of American households had televisions, refrigerators, radios, and electric irons, and 90% had automatic clothes washers, toasters, and vacuum cleaners; these figures represent a dramatic increase from the 1950s, when they rested between 40 and 50%, respectively. *See* MICHAEL J. PIORE & CHARLES F. SABEL, THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY 184 (1984). Another factor proferred as contributing to the decline of standardized product markets is the competitiveness of consumerism: one cannot best the next person by purchasing mass-produced goods. SABEL, *supra* note 23, at 199.

[36] This loss in the cost advantage of mass-produced goods can be understood by examining the insights of the learning curve perspective found in management literature. This framework considers the reduction in labor hours in relation to cumulative units produced: hours per unit decrease with each doubling of production. This reduction is a result of learning along the lines of 'practice makes perfect': the production process becomes more and more efficient as the company repetitively makes a larger volume of the *same* product. Therefore, whatever the firm learns in moving down the learning curve is the most efficient method of mass producing a standardized item. The learning curve perspective highlights why a mass production process would lose its cost advantage when faced with more differentiated and quality-conscious markets: the efficiency of mass production depends upon there being profitability in producing a monolithic product, and having to change the quality of a product or produce a greater variety undermines the foundation of mass production's success,

The emerging alternative to Fordism is a more specialized, automated, and flexible method of production.[37] Although it can take a variety of forms,[38] characteristic of this alternative are the rejection of Fordism's radical separation of conception and execution in the production process and the promotion of collaboration between designers and producers in using general machinery to make a variety of goods (in contrast to Fordism's standardized production).[39]

The trend away from mass production[40] and toward automation has important implications for national labor policy.[41] As a

---

namely, efficiency through repetition. *See* APPELBAUM & BATT, *supra* note 17, at 16–17.

[37] *See* Thomas H. Klier, *How Lean Manufacturing Changes the Way We Understand the Manufacturing Sector*, 17 ECON. PERSP. (Federal Reserve Bank of Chicago) 2–9 (1993) (arguing that manufacturing is undergoing a transition from mass production to a lean production system); Paul Milgrom & John Roberts, *The Economics of Modern Manufacturing: Technology, Strategy, and Organization* 80 AM. ECON. REV. 511–28 (1990) (arguing that the flexible multiproduct firm is becoming the new model, replacing mass production). Evidence from several industries also highlights this change to more flexible production models. For the auto industry, see THE AUTOMOBILE INDUSTRY AND ITS WORKERS: BETWEEN FORDISM AND FLEXIBILITY (Steven Tolliday & Jonathan Zeitlin eds., 1990); Steve Babson, *UAW, Lean Production, and Labor-Management Relations at AutoAlliance, in* NORTH AMERICAN AUTO UNIONS IN CRISIS: LEAN PRODUCTION AS CONTESTED TERRAIN 81–100 (William C. Green & Ernest J. Yanarella eds., 1996). In petrochemicals, see D. Gibbs, *A New Era of Flexibility? Some Evidence and Problems from the Petrochemicals Industry*, 23 ENV'T & PLAN. 1429–46 (1991) (reporting results indicating that the petrochemicals industry is moving towards flexible production). In the motion picture industry, see Alan Paul, *Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry*, 47 INDUS. & LAB. REL. REV. 663 (1994).

[38] The most dramatic contrast to date is probably the Japanese and Swedish systems of flexible production, at least in terms of work organization and conditions. Under Japan's lean production system, the workplace is extremely intensive and the teams carrying out the production are not autonomous; rather, they are subject to considerable control by the foreman. In a Swedish variant of flexible production, on the other hand, workplace teams enjoy full autonomy. At Volvo's Uddevalla plant, teams assemble whole cars independent of managerial supervision. *See* APPLEBAUM & BATT, *supra* note 17, at 29–37. For a more thorough discussion of Japan's flexible production system, see generally JAMES P. WOMACK ET AL., THE MACHINE THAT CHANGED THE WORLD: THE STORY OF LEAN PRODUCTION (1990). For a like discussion of Sweden's flexible production, see generally CHRISTIAN BERGGREN, ALTERNATIVES TO LEAN PRODUCTION: WORK ORGANIZATION IN THE SWEDISH AUTO INDUSTRY (1992).

[39] *See* SABEL, *supra* note 23, at 194, 202.

[40] We are not suggesting that mass production has been abandoned altogether in favor of flexible production or automation. Neither of these systems of production is monolithic. Thus, following others, *supra* note 35, we claim that the emerging work systems' commonality is a trend away from mass production, not necessarily a clearly definable new paradigm of production.

[41] One implication, the validity and substance of which for the most part goes beyond this Article, is the possible harmful effects of flexible production on the workforce. *See* Bennett Harrison, *The Dark Side of Flexible Production*, TECH. REV., May–June 1994, at 38–45 (arguing that attendant to the trend toward flexible production has been an increase in the number of workers who are shut out of the full-time labor force and who receive low wages and few benefits); Ian M. Taplin, *Flexible Production, Rigid*

number of commentators have suggested, the NLRA was designed to oversee and guide labor-management relations in the context of mass production and is not as well suited for the requirements of more flexible work arrangements and production processes.[42] Labor relations developed within the adversarial context of Fordism because workers received relatively high wages for executing simple, individualized tasks.[43] In that context, arms-length bargaining and rigid work rules were not a hindrance to successful organizational performance.[44] In contrast, flexible production requires more collaborative production work[45] and a greater degree of trust between labor and management.[46]

---

*Jobs: Lessons from the Clothing Industry*, 22 WORK & OCCUPATIONS 412, 412–38 (1995) (arguing that flexibility in a labor-intensive industry such as garment and apparel production is tantamount only to an intensification of the labor process).

[42] *See* William C. Green, *The Transformation of the NLRA Paradigm: The Future of Labor-Management Relations in Post-Fordist Auto Plants*, *in* NORTH AMERICAN AUTO UNIONS IN CRISIS, *supra* note 37, at 161, 165–67 (arguing that the NLRA is the legal foundation of the Fordist model of adversarial labor relations); Barenberg, *supra* note 16, at 879–81.

[43] *See* Boyer, *supra* note 28.

[44] Job control unionism was a cornerstone of the New Deal system of labor relations and embodied most of the rigidity of this system. The components of job control unionism include highly formalized contracts and a quasi-judicial grievance procedure to arbitrate labor-management disputes. *See* THOMAS A. KOCHAN ET AL., THE TRANSFORMATION OF AMERICAN INDUSTRIAL RELATIONS 28–29 (2d ed. 1994).

[45] *See* Harry C. Katz & Charles F. Sabel, *Industrial Relations and Industrial Adjustment in the Car Industry*, 21 INDUS. REL. 295, 295–314 (1985) (arguing that the new demands of more flexible production made by increasing international competition require less rigid and adversarial mode of industrial relations in the car industry).

[46] *See* SABEL, *supra* note 23, at 194 (arguing that flexible production requires both high trust organizations and employee acceptance of such organizations because a great degree of coordination is needed to adjust machinery set-up and product configuration); Edward H. Lorenz, *Flexible Production Systems and the Social Construction of Trust*, 21 POL. & SOC'Y 307, 307–24 (1993) (arguing that the cooperation necessary to successful flexible production requires that workers place a high degree of trust in one another). In the context of one kind of flexible production, just-in-time (JIT), this requirement of high trust and cooperation between workers and management is perhaps most pronounced. JIT contrasts with "Just-in-Case" (JIC) production, which goes along with mass production: goods are produced in response to a *forecasted* demand. In the case of JIT, however, goods are produced in response to *actual or current* demand. This reduces the inventory problems associated with mass production, but not without affecting the necessary character of labor-management relations. Without accumulated inventory, employer profits and continued viability are not protected in the face of a labor dispute escalating into a strike, either in the employer's own firm or in a firm or industry on which the employer's company is dependent; hence, the need from a managerial perspective for more cooperative labor relations and a more high trust organization. *See* Erica Schoenberger, *Competition, Time, and Space in Industrial Change*, *in* GARY GEREFFI & MIGUEL KORZENIEWICZ, COMMODITY CHAINS AND GLOBAL CAPITALISM 51–55 (1994).

### B. *The Current Case for Employee Involvement*

When analyzed in the context of changing production requirements and competitive pressures for American business, the increased use of EI in the workplace and Congress's attempt to protect EI through the TEAM Act make sense. In addition, EI's desirability is increased by the benefits it can provide to workers.[47] For instance, one scholar argues that the new popularity of EI is an opportunity for the revitalization of the labor movement.[48] Indeed, the dominant alternative to EI, unilateral decision-making by management, is not desirable for anyone even minimally concerned with workplace democracy in labor law reform. As one supporter of the TEAM Act has stated, it is paradoxical for those legislators who consider themselves friends of labor to oppose legislation that promotes EI in favor of the status quo of managerial unilateralism.[49]

---

[47] See Barenberg, *supra* note 16, at 890–904, for a discussion of the potential that one form of flexibility—workplace teams—has not only for improving firm productivity and efficiency, but also for increasing worker autonomy and facilitating his or her self-realization. *See also* SABEL, *supra* note 23, at 203–10 (highlighting post-Fordism's potential for leveling workplace hierarchies).

[48] See CHARLES C. HECKSCHER, THE NEW UNIONISM: EMPLOYEE INVOLVEMENT IN THE CHANGING CORPORATION (1988), for an analogy between the current unionism crisis and the unionism crisis of the 1920s. Heckscher claims that both resulted from changes in the production system. In the earlier crisis, labor unions were temporarily undermined by the shift from craft to mass production, in large part because they were organized along craft lines. *Id.* at 7–8. Similarly, the contemporary union movement faces difficulties because of the transition from mass to flexible production. *Id.* Labor's solution to the 1920s crisis, the organization of industrial unions that conformed better to the increasingly dominant mode of producing—mass production—has become no longer adequate now that mass production itself is breaking down. *Id.* However, just as labor unions in the 1920s were able to solve their crisis by shifting from craft to industrial unions, so too can the current union movement make a similar adjustment from industrial to what Heckscher calls "associational" unionism, which is "a form more appropriate to rapid economic change, flexible systems of management, and shifting employee loyalties." *Id.* The main characteristics of associational unionism include increased internal education and participation, increased alliances both among the new associational unions and between business and community, and increased focus on principles that go beyond bread-and-butter unionism, such as compensation scaled to performance and workplace autonomy. *Id.* at 188–90.

[49] Representative Gunderson (R-Wis.) highlighted this best during floor debate on H.R. 743: "The facts are that today management in a nonunion setting can tell employees to do whatever they want and it is legal. Today, if management in a nonunion setting sits down and, voluntarily working with employees, reaches a mutual conclusion on how to make changes within the workplace, it is illegal." 141 CONG REC. H9516, 9523 (daily ed. Sept. 27, 1995) (statement of Rep. Gunderson). Although we disagree with Representative Gunderson's claim that managerial involvement of workers in decisionmaking is illegal under current law, *see infra* note 72, we agree that failure to support employee involvement given a legal regime that does not prevent managerial unilateralism in a nonunion environment is highly problematic. However, neither the TEAM Act nor any of the alternatives offered would put an end to this

Just as EI has a variety of forms, however, it can be legislatively supported in different ways. Supporters of the TEAM Act have proceeded with their favored legislation without gaining the blessing of America's unions, the only collective voice of workers.[50] The fact that these supporters neglected unions[51] in the legislative process is especially problematic given empirical evidence indicating that EI is never more successful than when implemented in a unionized workplace[52] and considering that major elements of the labor movement have expressed strong support for EI.[53] The kindest interpretation of this neglect is that

---

managerial unilateralism; management would retain the discretion to dissolve any EI program it wished.

[50] *See The TEAM Act: Legal Problems with Employee Involvement Programs*: Hearing of the Comm. on Labor and Human Resources, *United States Senate*, 104th Cong. (1996). Comments made at this hearing illustrate organized labor's antagonism toward the TEAM Act: "[W]e are strongly opposed to the TEAM Act because we believe that for the overwhelming majority of employee involvement programs, this bill is unnecessary and, rather than facilitating legitimate team and other employee involvement approaches, the bill's main effect would be to remove one of the very few effective protections left for workers who do truly want an independent voice in their workplaces, whether in the form of a union or any other type of committee or association that is not ultimately to be under management's thumb." (*id.* at 26) (statement of AFL-CIO Gen. Counsel, Jonathan P. Hiatt); "The UAW strongly opposes the proposed TEAM Act." (*id.* at 28) (statement of Alan Reuther, Legislative Director of the United Auto Workers); "The inevitable conclusion reached . . . is that the purpose of S. 295 is not to clear up some ambiguity in the law . . . . The bill, quite simply, would make it easier for employer-dominated organizations . . . to rival and thwart independent organizing activities by workers." (*id.* at 56) (statement of Arthur A. Coia, General President of the Laborers' International Union of North America).

[51] It should be noted that, while Congress has neither gained the blessings of nor consulted the union movement in drafting the TEAM Act, Congress did consult employee surveys signifying support of EI programs. However, these positive surveys do not express worker support for the TEAM Act per se, rather they evidence employee support for EI as a general idea. If it were indeed the case that workers supported the promotion of EI but not the TEAM Act, they would not be alone. *See infra* notes 73–74 and accompanying text.

[52] *See* Adrienne E. Eaton & Paula B. Voos, *Unions and Contemporary Innovations in Work Organization, Compensation, and Employee Participation, in* UNIONS AND ECONOMIC COMPETITIVENESS 173, 174–75 (Lawrence Mishel & Paula B. Voos eds., 1992) (arguing based on data analysis from the General Accounting Office that "[T]he workplace programs that predominate in the union sector are more likely to increase productivity than the one program, profit-sharing, which is more likely to be found in the nonunion sector."); Maryellen R. Kelley & Bennett Harrison, *Unions, Technology, and Labor-Management Cooperation, in* UNIONS AND ECONOMIC COMPETITIVENESS, *id.* at 247, 274 (concluding from regression analyses that adopting programmable automation in the presence of EI programs causes positive gains only when plants are unionized); William N. Cooke, *Employee Participation Programs, Group-Based Incentives, and Company Performance: A Union-Nonunion Comparison*, 47 INDUS. & LAB. REL. REV. 594 (1994) (arguing that employee participation programs enhance company performance more when implemented in a unionized setting); Robert Drago, *Quality Circle Survival: An Exploratory Analysis*, 27 INDUS. REL. 336 (1988) (arguing that Quality Circles are more vital in a unionized workplace).

[53] *See* AFL-CIO, THE NEW AMERICAN WORKPLACE: A LABOR PERSPECTIVE (1994) ("It is incumbent on unions to take the initiative in stimulating, sustaining, and

congresspersons who have supported the TEAM Act have assumed that EI is uniformly good for American workers and, thus, no consultation or consensus building is necessary.[54] As will be argued below, this is a flawed assumption, and it is this lack of attention to American workers and their unions, as well as the dangers potentially posed by EI in the somewhat unique context of U.S. labor-management relations, that is the fundamental weakness of the TEAM Act.

## II. The Team Act as a Response

Perceiving that *Electromation* posed a threat to the EI programs and believing such programs to be vital to national economic competitiveness, Senator Kassebaum and Representative Gunderson sponsored the TEAM Act in their respective chambers of Congress.[55] The purpose of the Act is to make it clear that employers and employees can work together through different EI programs to confront and solve a vast array of problems in the workplace.[56]

---

institutionalizing a new system of work organization based upon full and equal labor-management partnerships.").

[54] A case also could be made that supporters of the TEAM Act are antagonistic to the union movement and consider it a negative societal force that seeks only to hinder progress. *See, e.g.*, 141 Cong. Rec. H9516–21 (daily ed. Sept. 27, 1995) ("The real reason that unions are screaming [at the prospects of passing the TEAM Act] is they are afraid of losing power by allowing employees to work with their employers to solve basic problems without the heavy hand of union interference.") (statement of Rep. Sam Johnson (R-Tex.)). Bolstering the validity of this perspective is the fact that the House bill's sponsor sought the guidance of the National Association of Manufacturers, but not of organized labor. *See supra* note 9, at A-4 to A-5. Notably, the National Association of Manufacturers has been rabidly anti-union for quite some time. *See infra* note 111 and accompanying text.

[55] *See The TEAM Act: Legal Problems with Employee Involvement Programs, Hearing of the Comm. On Labor and Human Resources, United States Senate, Appendix 1*, 104th Cong., n.50 (1996). Sen. Kassebaum states,

> In the National Labor Relations Board's *Electromation* decision, the Board invalidated one company's worker management committee. This decision has called into question the legality of all employee involvement programs . . . . One tool that workers and supervisors need to meet the challenge of economic competition is employee involvement . . . . Employee teams now tackle problems that only corporate executives would have dealt with in the past—quality control, budgets, scheduling, and hiring decisions . . . .

(opening statement of Sen. Kassebaum, Chair of Committee on Labor and Human Resources).

[56] *See* TEAM Act, *supra* note 1 ("An Act to amend the National Labor Relations Act to allow labor management cooperative efforts that improve economic competitiveness in the United States to continue to thrive . . . ."). This was a central purpose of the Act throughout its period of consideration. *See* H.R. Rep. No. 104-248, at 4 (1995) ("The TEAM Act would clarify the legality of employee involvement structures by

### A. *The TEAM Act*

As passed by the House of Representatives, the TEAM Act states seven findings and three purposes.[57] Among the House's findings are that global competition has compelled employers to make "dramatic changes in workplace and employer-employee relationships," which often take the form of EI programs.[58] Such programs have been established by over eighty percent of the largest employers and currently exist in about 30,000 workplaces, improving not only productivity and competitiveness but also having a "positive impact on the lives" of affected employees without interfering with their collective bargaining rights, as was the case in the 1920s and 1930s.[59] Moreover, Congress, in recognition of the successful use of EI programs by international competitors, has encouraged the use of EI programs through such incentives as the Malcolm Baldrige National Quality Award.[60] Now, Congress is concerned about the threat posed by legal interpretations of the prohibition against employer-dominated "company unions."[61]

In response to these findings, Congress delineated a number of purposes for the TEAM Act, including the protection of legitimate EI programs against governmental interference and the preservation of existing worker protections against deceptive employer practices.[62]

To accomplish these purposes, the TEAM Act amends section 8(a)(2) of the NLRA. If the TEAM Act were to pass, section 8(a)(2) would read as follows:[63]

> Sec. 8 (a) It shall be an unfair labor practice for an employer—. . .

---

amending the NLRA to add a proviso to section 8(a)(2) clarifying that it is not impermissible for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees participate, to address matters of mutual interest—including, among others, issues of quality, productivity, efficiency, and safety and health."); Robert M. Wells, *Subcommittee Approves Bill on Workplace 'Teams'*, 53 CONG. Q. WKLY. 759 (1995) ("The TEAM Bill would modify the . . . [NLRA] of 1935 to make clear that U.S. businesses can establish workplace groups consisting of both labor and management to address such issues as productivity, quality control, and safety.").

[57] *See* TEAM Act, *supra* note 1.

[58] *See id.*

[59] *See id.*

[60] *See id.*

[61] *See id.*

[62] *See id.*

[63] The proposed amendment is in bold.

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: Provided, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay:[64] **Provided further, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind, in which employees who participate to at least the same extent practicable as representatives of management participate, to address matters of mutual interest, including, but not limited to, issues of quality, productivity, efficiency, and safety and health, and which does not have, claim, or seek authority to be the exclusive bargaining representative of the employees or to negotiate or enter into collective bargaining agreements with the employer or to amend existing collective bargaining agreements between the employer and any labor organization, except that in a case in which a labor organization is the representative of such employees as provided in section 9(a), this proviso shall not apply ....**[65]

### B. *A Vituperative Response*

Individuals from Congress and labor criticized the TEAM Act on a number of grounds. First, critics sought to expose a profound managerial bias in the legislation.[66] They also claimed that

---

[64] NLRA, 29 U.S.C. § 158 (1982).

[65] TEAM Act, *supra* note 1.

[66] *See Hearing on H.R. 743: The Teamwork for Employees and Managers Act Before the Committee on Economic and Educational Opportunities, House of Representatives*, 104th Cong. 34 (1995) ("[T]he bill takes a discredited reactionary approach. If enacted, this legislation would give nothing to employees in the way of 'power'; rather the bill would take from workers their right to independent representation and give employers yet another means of maintaining their unilateral power over workers' terms and conditions of employment.") (statement of David M. Silberman, Director, AFL-CIO Task Force on Labor Law); *Hearing on Removing Impediments to Employee Participation/*Electromation *Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, House of Representatives*, 104th Cong. 155 (1995) ("[T]he TEAM Act would 'load the scales' on the employer's side.") (statement of the International Union, United Automobile, Aerospace and Agricultural Implement Workers of America [UAW]); H.R. REP. No. 248, 104th Cong. 35 (1995) (if the TEAM Act were passed, "[m]anagement would be entirely free to create, mold, and terminate employee organizations, at will, to deal with wages, benefits, and working conditions. For each such employee organization or plan it chooses to create, management would have *carte blanche* to select the employees' representatives, write the organization's bylaws, determine the organization's governing structure and operating procedures, and establish the organization's mission and

the Act's passage would pave the way for the return of company or 'sham' unions.[67] Similarly, several opponents suggested that the TEAM Act will hurt union organizing.[68] Others claimed that it is undemocratic.[69] Finally, at least one opponent of the TEAM Act argued that *Electromation* does not have the chilling effect that supporters of the TEAM Act allege.[70]

These assertions have received support from certain members of the academic community.[71] The Dunlop Commission spoke

---

jurisdiction. The legislation contains no conditions to ensure that such organizations are either legitimate or democratic. Rather, the legislation gives employers unfettered power to fashion employee organizations to the employer's own liking and to disband such organizations if and when doing so suits the employer's pleasure.") (Letter from Geri Marullo, Executive Director, American Nurses Association, to Harris Fawell (R-Ill.), Chairman, Subcommittee on Employer-Employee Relations) (1995).

[67] *See Hearing on H.R. 743: The Teamwork for Employees and Managers Act Before the Committee on Economic and Educational Opportunities, House of Representatives*, 104th Cong. 31 (1995) ("[T]his bill would legalize all the insidious practices of the 1920's and 1930's, practices which section 8(a)(2) of the NLRA was specifically enacted to proscribe.") (statement of David M. Silberman, Director, AFL-CIO Task Force on Labor Law).

[68] *See Hearing on Removing Impediments to Employee Participation/*Electromation *Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, House of Representatives*, 104th Cong. 172–73 (1995) ("The passage of H.R. 743 would be a disincentive for employees to exercise their legal right to union representation, while providing them with no means of influencing the decision making process within the organization.") (Letter from Geri Marullo, Executive Director, American Nurses Association); *Hearing on Removing Impediments to Employee Participation/*Electromation *Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, House of Representatives*, 104th Cong. 155 (1995) (arguing that the TEAM Act would reduce the likelihood of a successful union organizing campaign) (testimony of the Coalition of Labor Union Women).

[69] *See, e.g., Teamwork for Employment and Management Act of 1995: Hearing of the Committee on Labor and Human Resources, United States Senate*, 104th Cong. 61–64 (1995) (arguing that the TEAM Act would prevent employees from having a democratic voice in the workplace) (testimony of David M. Silberman, AFL-CIO).

[70] *The TEAM Act: Legal Problems with Employee Involvement Programs: Hearing of the Comm. on Labor and Human Resources*, 104th Cong. 26 (1996) ("[F]or the overwhelming majority of employee involvement programs, this bill is unnecessary . . . .") (testimony of Jonathan P. Hiatt, Gen. Counsel, AFL-CIO); *Hearing on Removing Impediments to Employee Participation/*Electromation *Before the Subcommittee on Employer-Employee Relations of the Committee on Economic and Educational Opportunities, House of Representatives*, 104th Cong. 167 (1995) ("Section 8(a)(2) does not prevent, or even inhibit, cooperative labor-management efforts to make the workplace more efficient or productive . . . .") (testimony of the Coalition of Labor Union Women).

[71] Academia has substantially supported the argument that section 8(a)(2) revisions are unnecessary to keep EI programs legal. *See, e.g.*, Charles J. Morris, Deja Vu *and 8(a)(2): What's Really Being Chilled by* Electromation*?*, 4 CORNELL J.L. & PUB. POL'Y 25, 25 (1994) ("The fame of *Electromation* relates more to its hype than to its type."). Morris goes on to distinguish between two different kinds of EI committees—those "in which employees engage in day-to-day decision-making or communications concerning the work with which they are involved" and those that are used to talk about issues such as grievances, labor disputes, wages, and conditions of work; the former are clearly legal and the latter clearly illegal. *See id.* at 27–28. *See also* Robert B. Moberly,

strongly in opposition to the TEAM Act,[72] which is quite significant given its recommendation that section 8(a)(2) be amended for the very same purpose that proponents of the TEAM Act allege their legislation is serving, namely, the encouragement of EI programs through an assurance that employers will not be found guilty of an unfair labor practice for implementing them.[73] In addition, more than 400 professors of labor law and industrial relations expressed their opposition to the TEAM Act in a formal letter to the Committee on Economic and Educational Opportunities.[74] Moreover, a substantial number of academics have sub-

---

*Worker Participation after* Electromation *and* DuPont, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW 147, 160 (Sheldon Friedman et al. eds., 1994) (arguing that no court or Board decision has outlawed an EI plan designed to improve productivity, quality, and efficiency, so long as the committee does not also deal with work conditions or compensation terms). James R. Rundle, Professor of Industrial and Labor Relations at the Extension Division of the School of Industrial and Labor Relations at Cornell University, has carried out an extensive empirical investigation of this matter. Rundle conducted a Lexis-Nexis search of NLRB cases for the years 1972–1983 using "8(a)(2)" and "disestablish!" or "dismantle!" or "disband!" as key words, hypothesizing that if section 8(a)(2) had limited the development of EI programs, "we would expect a rise in the number of disestablishment cases over time." *See* James R. Rundle, *Debate over the Ban on Employer-Dominated Labor Organizations: What is the Evidence?*, in RESTORING THE PROMISE OF AMERICAN LABOR LAW, *id.* at 147, 160–65. Professor Rundle found a total of 58 disestablishments under 8(a)(2), less than a third having occurred between 1983 and 1993. More significant with respect to the claim that EI programs pose no threat to labor unions or to workers' rights to organize, in only three of these cases was there *not* another unfair labor practice filed against the employer. *See id.* at 166. Rundle's evidence was included as an appendix to a Senate hearing. *See Teamwork for Employment and Management Act of 1995: Hearing on S. 295 Before the Senate Comm. on Labor and Human Resources*, 104th Cong. (1995).

This kind of detailed analysis of the issues surrounding section 8(a)(2) and *Electromation* strongly suggests that TEAM Act supporters confuse the issue surrounding proposed legislation by claiming that *Electromation* threatens all EI programs. These studies reveal that *Electromation* threatens only those EI schemes that involve management-appointed committees that deal with terms and conditions of employment. *See* Electromation, 309 N.L.R.B. 990, 997–99 (1993). Supporters of the TEAM Act do not clarify this point when talking about the implications of *Electromation*. However, the legislation itself suggests that they are well aware of this point, for although terms and conditions of employment are not explicitly mentioned in the text of the proposed amendment to section 8(a)(2), they can be found in the purposes of the Act. *See* TEAM Act, *supra* note 1.

[72] John Dunlop, Chairman of the Commission on the Future of Worker-Management Relations, publicly declared that "members of that commission . . . unanimously oppose enactment of H.R. 743." *See* H.R. REP. NO. 104-248, at 39 (1995). *See also TEAM Act Gets Low Marks from Scholars of Labor Law Who Warn of Sham Unions*, [Apr. 20, 1995] Daily Lab. Rep. (BNA) No. 76, at C-1 (Apr. 20, 1995) (quoting Paula B. Voos, a member of the Dunlop Commission, as warning that the TEAM Act did not "guard sufficiently against the return of company unionism . . . .").

[73] *See supra* note 72.

[74] *See* H.R. REP. NO. 104-248, at 38 (1995). The text of the letter is as follows:

> The stated purposes of this bill—promotion of legitimate employee involvement and genuine worker-management co-operation—are vital to the national interest. However, enactment of the TEAM Act would frustrate the realization of these goals by encouraging illegitimate forms of employee involvement and

mitted alternative legislation.[75] It is significant that many of these opponents of the TEAM Act are expressly in favor of promoting employee involvement and worker-management cooperation in the workplace.[76]

### C. *Managerial Benevolence and Countervailing Power*

Supporters of the TEAM Act in large part conceive of EI programs as unproblematic and welcome additions to the workplace that benefit employers and employees alike. A sampling of statements from the House debate over HR 743 demonstrates as much.[77]

---

discouraging the legitimate expression of worker voice.

For the past 60 years, it has been the policy of our labor law to encourage collective bargaining by protecting the right of workers to freely associate and select representatives of their own choosing. A cornerstone of that policy has been the prohibition, contained in section 8(a)(2) of the National Labor Relations Act, on employer domination of employee organizations and employee representation plans. That section was central to the NLRA and was enacted because prior to the NLRA's enactment, employer control of employee organizations and representation plans had been used widely and effectively to impede workers from organizing independent labor unions.

The proposed TEAM Act would negate the original purpose of section 8(a)(2) by permitting without limitation a revival of the very practices against which section 8(a)(2) was aimed. The legislation contains no safeguards to guarantee that employer-created representation plans function democratically and independently of the employer. Nor is there anything in the bill which would prevent employers from manipulating the employer-controlled organizations in order to thwart genuine employee voice. As a result, we are persuaded that passage of the TEAM Act would quickly lead to the return of the kind of employer-dominated employee organization and employee representation plans which existed in the 1920s and 1930s.

Employee involvement and worker-management cooperation can and should be fostered by means which do not further limit employees' freedom of association. The proposed TEAM Act represents a step backwards towards the discredited approaches of the 1920s and 1930s and away from true employee involvement and genuine worker-management co-operation. H.R. 743 and S. 295 should not be enacted into law.

[75] *See supra* note 15, at 104–07 (providing the text from a bill submitted to Congress by a number of labor law and industrial relations scholars including Thomas Kochan of the Massachusetts Institute of Technology, Clyde W. Summers of the University of Pennsylvania, and Harry C. Katz of the School of Industrial and Labor Relations at Cornell University).

[76] *Id.*

[77] 141 CONG. REC. H9516, 9516–56 (daily ed. Sept. 27, 1995). Rep. Thomas E. Petri (R-Wis.) claims that greater employee voice in substance and quality of production is "what employee involvement is all about." *Id.* According to Rep. Lindsey O. Graham (R-S.C.), encouraging EI is tantamount to "mak[ing] sure that when employees and employers want to, they can sit down and discuss how to run a business; how to make it better for the employer and better for the employee." *Id.* This suggestion of mutual benefit for employers and employees through EI programs manifests itself in the

In this context of mutual gains, the bill's promotion of EI programs is presumed to pose no threat to unionization efforts,[78] and the programs themselves bear no resemblance to the company unions in existence before the Wagner Act of 1935 enacted the language currently in section 8(a)(2).[79] According to one supporter of the TEAM bill, we are in the twilight of labor-management adversarialism.[80] Any antagonism that still remains, which might result in employer abuse of EI programs, is easily countered by the employee right to join a union.[81]

### D. *Discussion*

We have given an overview of the TEAM Act and examined the perspectives of both its supporters and detractors. The former praise the merits of the bill by pointing to its encouragement of EI as means of increasing the economic competitiveness of firms and augmenting employee satisfaction, while the latter allege that the TEAM Act is managerially biased and warn that it would have led to the return of company unions and employer domination. The dramatic disparity of these perspectives seems to derive at least in part from different evaluations of the current and recent history of worker-management relations in the United

---

comments of others as well. Rep. Charles W. Stenholm (D-Tex.) argues that encouragement of EI through the TEAM Act is not for either employers or employees, but rather for both. *Id.* More strongly, Rep. Harris W. Fawell (R-Ill.) calls EI a "win-win phenomenon" and claims that the TEAM bill should be called "a Freedom of Employees Act." *Id.* Rep. James M. Talent (R-Mo.), argues that this mutual gain makes American business more competitive internationally. *Id.*

[78] *See id.* at H9525 ("[The TEAM Act] is a threat to no one except to those who fear happier and more productive employees.") (statement of Rep. Fawell).

[79] *See id.* ("[E]mployee involvement teams are obviously not sham unions.").

[80] *See id.* at H9519–20. Rep. Talent contrasts the current state of employer-employee relations with the situation at the time of the passage of the Wagner Act: "[U]nder the bipolar world of the National Labor Relations Act as it was passed in 1935, employee relations had to be necessarily adversarial. Either management and labor eyed each other across the bargaining table in an adversarial fashion or the only other model was employers ramming it down the throat of employees. They did not anticipate what would happen 45 or 50 years later when people would work together and cooperate." *Id.* (statement of Rep. Talent)

[81] *See The Team Act: Hearings on Legal Problems with Employee Involvement Programs Hearing Before the Senate Comm. on Labor and Human Resources*, 104th Cong. 38–39 (1996) ("[I]f management tried to dictate, wouldn't that be the very thing that would drive workers to rebel and to seek unionization? And who is to determine what is a sham? Again, it seems to me that workers are not going to accept that in this day and age. There may have been a time when they were cowed into believing that that was the case. But I think there are many avenues open, and one is the avenue to join a union if the conditions are intolerable.") (statement of Sen. Kassebaum).

States: supporters of the TEAM bill find its reliance on managerial benevolence and good will unproblematic,[82] while opponents of the bill, fearing managerial abuse of power, express concern about the extent of the freedom afforded to management by the Act. The next section supports these concerns by examining the relationship of management and workers in the U.S. in its historical and contemporary context.

## III. MANAGERIAL ANTI-UNIONISM AS A CAUSE FOR CAUTION IN LABOR LAW REFORM

In an international perspective, U.S. business managers are exceptional in the degree of their antipathy toward unionization, both currently[83] and historically.[84] Although this point has not been a central one in the debate over the TEAM Act, the American public recognizes it,[85] and American firms admit it as well:

---

[82] *See* TEAM Act, *supra* note 1 (see especially the outlined purposes).

[83] *See* MICHAEL GOLDFIELD, THE DECLINE OF ORGANIZED LABOR IN THE UNITED STATES 190 (1987) ("In contrast to their counterparts in other developed capitalist countries, most U.S. capitalists have never fully accepted the legitimacy of unions.").

[84] *See* Sanford M. Jacoby, *American Exceptionalism Revisited: The Importance of Management*, *in* MASTERS TO MANAGERS: HISTORICAL AND COMPARATIVE PERSPECTIVES ON AMERICAN EMPLOYERS 173 (Sanford M. Jacoby ed., 1991). In a historical analysis, Jacoby turns exceptionalism, which seeks to explain the distinctiveness of U.S. unions—in terms of their conservativism, low union density, and job orientation—on its head by focusing on the character of the employers themselves. Jacoby claims that attention should be given to the role of employers whose "hostility towards unions has always been more extreme than that of employers in other nations." *Id.* at 174. To explain this difference, Jacoby argues that "American employers were more hostile to unions than other employers primarily because they had greater incentives and resources to be hostile, not merely because they faced less radical workers and unions." *Id.* at 187. These greater incentives, argues Jacoby, were economic (decentralized collective bargaining; highly job conscious unions; greater resources of the firm deriving from their comparatively larger size), *id.* at 178–79, political (existence of a state that was at best neutral towards unions; employers' having a greater degree of political power than elsewhere), *id.* at 182–83, and ideological (American individualism and bootstraps mentality that "breeds public sympathy for managers who argue that no one should be allowed to interfere with their right to control . . . ."), *id.* at 186. Hattam gives a more detailed view of the state's attitude toward labor in the 19th century and thereby supports Jacoby's contention that the character of unions in the United States has to do with much more than a peculiar worker ideology. *See generally* VICTORIA C. HATTAM, LABOR VISIONS AND STATE POWER: THE ORIGINS OF BUSINESS UNIONISM IN THE UNITED STATES (1993) (arguing that while the legislature provided support to unions in the 19th century, the judiciary used the conspiracy doctrine to quash strike action and unionization generally, thereby making the gains labor won in the political arena moot; therefore, labor unions turned increasingly to business unionism, central to which was the job control philosophy).

[85] *See* PAUL C. WEILER, GOVERNING THE WORKPLACE: THE FUTURE OF LABOR AND EMPLOYMENT LAW 240–41 n.22 (1990) (reporting a 1988 Gallup Poll of the general population in which 69% of the respondents agreed that "[C]orporations sometimes harass, intimidate, or fire employees who openly speak out for a union.").

a little over a decade ago, forty-five percent of firms in the Bureau of National Affairs Personnel Practices Forum said that being nonunion was the major industrial relations goal of the company.[86] In this section, we examine more closely the manifestations and consequences of this sentiment as it relates to union organizing, the securing of first contracts, and the use of EI programs. We conclude that the TEAM Act supporters' sanguine perception of labor-management relations in the United States ignores the adversarial context of the modern workplace.

### A. *Employer Response to Union Organizing*

Whatever the reason for management opposition to unionization,[87] it has been on the rise since the 1970s.[88] This increasing antagonism is significant, given evidence suggesting that the extent of managerial opposition to a union organizing drive is an important factor in determining the success or failure of a union's NLRB representation election.[89] One scholar of American labor argues that employer resistance to unionization has played a substantial role in overall union decline over the last few decades.[90]

---

[86] *See* Richard B. Freeman & Morris M. Kleiner, *Employer Behavior in the Face of Union Organizing Drives*, 43 INDUS. & LAB. REL. REV. 351, 351 (1990) (reporting the survey).

[87] Two economists claim that the prime determinant of managerial opposition to a unionization effort is the likely loss of profits due to unionization. *See id.* at 357 (analyzing data from the AFL-CIO and interviews conducted with managers and concluding that the prime determinant of managerial opposition to unionization is the likely loss of profits due to unionization, as measured by the difference between the surveyed firms' own compensation plan and average union wages in the region).

[88] *See infra* notes 97–114 and accompanying text.

[89] *See* Richard B. Freeman, *Why Are Unions Faring Poorly in NLRB Representation Elections?*, *in* CHALLENGES AND CHOICES FACING AMERICAN LABOR 54 (Thomas A. Kochan ed., 1985) (analyzing 12 studies of representation elections from the late 1960s to early 1980s and concluding that "managerial opposition to unionism, particularly illegal campaign tactics, is a major, if not *the* major, determinant of NLRB elections"); William T. Dickens, *The Effect of Company Campaigns on Certification Election:* Law and Reality *Once Again*, 36 INDUS. & LAB. REL. REV. 560 (1983) (studying a sample of 1273 workers in establishments where representation elections have been held and finding that employer threats and actions against union supporters, some written communication, and captive-audience speeches all have a statistically significant effect on voting); *see also* JULIUS G. GETMAN ET AL., UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976) (presenting the results of the original survey).

[90] *See* GOLDFIELD, *supra* note 83, at 115–217. Before reaching this conclusion, Goldfield tests a number of hypotheses. First, he examines sociological explanations for union decline, such as demographic changes in the labor force (e.g., increase in the proportion of women and minorities) and changes in economic structure (i.e., shift from manufacturing to service economy), and rejects them. *See id.* at 115–52. He then

Increasing illegal employer resistance to union organizing manifests itself in a number of quantifiable ways.[91] Section 8(a)(3) of the NLRA makes it an unfair labor practice for an employer to discriminate against an employee for concerted activity, including union organizing.[92] The ratio of 8(a)(3) charges filed against an employer to representation elections held has gone up dramatically since the 1950s and 1960s. This ratio increased from 0.5 in the early 1950s to 2.1 by the second half of the 1970s.[93] By 1980, it reached 2.5.[94] Five years later, the number of 8(a)(3) charges for every election rose to 3.15.[95]

Of course, the fact that an employer has been charged does not mean that a violation actually occurred. A more conservative

---

makes use of econometric models to examine the validity of economic, political, and social cyclical variables as explanatory variables, testing a number of independent variables including unemployment, workers' economic grievances, general health of the economy, and profitability of industry. Goldfield concludes that while these variables explain much of the cyclical variations in union success over the years, they do not explain the persistent decline over the past few decades. *See id.* at 153–79. *Compare* Henry S. Farber & Alan Krueger, *Union Membership in the United States: The Decline Continues*, WORKING PAPER No. 4216, NATIONAL BUREAU OF ECONOMIC RESEARCH 18 (1992) (arguing based on 201 interviews of nonunion workers, as well as their analysis of data gathered through a 1984 survey by Lewis Harris Associates for the AFL-CIO, a 1987 Quality of Employment Survey, and the 1991 General Social Survey, that the decline of unionization is due to a decline in the worker demand for unions and "there is no evidence that any significant part of the decline in unionization is due to increased employer resistance") *with* Phil Comstock & Maier B. Fox, *Employer Tactics and Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 71, at 91–96 (presenting data based on over 150,000 telephone interviews of nonunion workers conducted over the last decade and arguing that the demand for unions among nonunion workers has increased substantially since the mid-1980s).

[91] It is important to state at the outset that union unfair labor practices are not quantitatively comparable to those committed by employers and, thus, illegal tactics by unions do not offset those committed by employers. In 1990, only 29% of the nearly 34,000 unfair labor practice (ULP) charges were filed against unions. *See* FACT FINDING REPORT, *supra* note 33, at 70. Also, because only 25.4% of union ULP charges were found meritorious, the union share of *meritorious* charges was just 17%. *See id.* at 83.

[92] *See* 29 U.S.C. § 158(a)(3) (1982).

[93] *See* FACT FINDING REPORT, *supra* note 33, at 69. In the early 1950s, there were approximately 6000 elections per year and 3000 section 8(a)(3) violations. In the late 1970s, the annual average of elections was 7500, while the section 8(a)(3) violations per year stood at 16,000. *See id.* The FACT FINDING REPORT, as well as other sources reported here, calculates its data from annual reports of the NLRB.

[94] *See* WEILER, *supra* note 85, at 238 n.18. There were over 18,300 section 8(a)(3) charges in 1980 and a total of 7296 elections. *See id.* at n.18 and accompanying text. *Cf.* Freeman & Kleiner, *supra* note 86, at 46 (stating that the number of employers unfairly firing workers for their union activity increased threefold between 1960 and 1980).

[95] *See* WEILER, *supra* note 85, at 238 n.18. The total number of section 8(a)(3) charges actually decreased between 1980 and 1985, dropping to 11,800; however, there was an even greater drop in the number of elections, to 3749. As a consequence, the ratio of section 8(a)(3) violations per election increased. *See id.* at n.18 and accompanying text.

gauge of the extent of employers' illegal resistance to union organizing campaigns is the number of worker reinstatements offered. Worker reinstatement, along with back pay, is the remedy for 8(a)(3) claims the NLRB finds meritorious.[96] Taken as an average of five year increments, the ratio of workers offered reinstatement after their employers' 8(a)(3) violations to the number of workers voting for a union has increased dramatically since the 1950s, reaching one in forty-eight by 1990.[97] Likewise, the number of NLRB representation elections producing reinstatement offers has increased from one in twenty in the early 1950s to one in four between 1986 and 1990.[98]

Some tactics taken by management, though not against the law, also illustrate managerial antagonism toward unions.[99] First, between 1972 and 1984, the percentage of NLRB union certification elections conducted for which employer consent was given decreased from 15.9 to just 2.5, while stipulated elections increased from 63.4 to 82.3% of all elections.[100] Prevalent but less quantifiable has been the proliferation of anti-union programs since the 1970s by various employer trade associations.[101] For example, in 1977, the National Association of Manufacturers formed the "Council on a Union-Free Environment," whose purpose is the elimination of unions among manu-

---

[96] *See* FACT FINDING REPORT, *supra* note 33, at 70. *See also* GOLDFIELD, *supra* note 83, at 196.

[97] *See* FACT FINDING REPORT, *supra* note 33, at 84. The ratio was just 1 in 689 between 1951 and 1955, and still just 1 in 92 for the years 1976–1980. *See id. See also* GOLDFIELD, *supra* note 83, at 196.

[98] *See id.* This ratio was nearly 1 in 3 between 1981 and 1985. *See id. Cf.* Freeman & Kleiner, *supra* note 86, at 53 (stating that in 1980 the ratio of persons fired for union activity to the number of "yes" voters was 1 to 20). *See also* GOLDFIELD, *supra* note 83, at 196.

[99] In a study of 261 NLRB elections between July 1986 and June 1987 involving single union elections among AFL-CIO affiliates in units with 50 or more eligible voters, Bronfenbrenner found that employers engaged in anti-union tactics, either legal or illegal, in more than 75% of the cases. These tactics included some combination of discharges, anti-union committees, and the hiring of anti-union consultants. *See* Kate L. Bronfenbrenner, *Employer Behavior in Certification Elections and First-Contract Campaigns: Implications for Labor Law Reform*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 71, at 76–80.

[100] *See* GOLDFIELD, *supra* note 83, at 203. Consent elections are those in which the organizers give the employer the proportion of certification cards necessary to conduct an election (i.e., one-half of the relevant workforce), and the employer agrees to the representation election. Stipulated elections are those in which the employer does not agree, but the NLRB approves.

[101] *See id.* at 190–92. Trade associations that have initiated anti-union programs include the following: the National Association of Manufacturers, the American Hospital Association, the Associated Builders and Contractors, the Associated General Contractors, the National Retail Merchants Association, the National Public Employee Relations Association, and the Master Printers Association. *See id.* at 190.

facturers.[102] Another example is the "Business Roundtable," an association put together by a number of large industrial companies.[103] Since the Roundtable's founding in 1969, union density in its target sector, construction, has fallen from over 50% in the 1960s to just 23.5% in 1984.[104]

Supplementing these trade association programs has been the emergence of anti-union management consulting firms. These firms have evolved from an "atypical" status in the 1950s to a multibillion-dollar industry,[105] illustrating the extent to which "union busting has become the convention among U.S. employers."[106] A study of 261 NLRB elections between July of 1986 and June of 1987 confirms the widespread use of anti-union management consulting firms[107] and highlights other popular tactics as well, including the use of anti-union committees.[108]

### B. *Securing First Contracts*

Unions' difficulty in securing first contracts offers another example of the substantial role of managerial antagonism in thwarting the efforts of workers and their unions. Before further examining the role played by management, it is useful to examine the data illustrating this difficulty.

Labor unions' rate of failure in securing first contracts has increased markedly since its first estimation in the 1950s of roughly 14%.[109] A number of studies employing different methodologies and using different sample populations confirm this increase. One researcher concludes, based on both state and national data, that the failure rate stood at between 23 and 28% in

---

[102] *See id.* at 191.

[103] *See id.*

[104] *See id.* at 192.

[105] *See id.* at 193 (estimating the size of the management consulting industry at $2 billion in 1982).

[106] Richard W. Hurd & Joseph B. Uehlein, *Patterned Responses to Organizing: Case Studies of the Union-Busting Convention, in* RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 71, at 61. Hurd and Uehlein make this claim based on data on 167 organizing campaigns in 36 states from the Industrial Union Department of the AFL-CIO. *See id.* "Nearly half the cases . . . [involved] workers being disciplined, laid off, or fired for union activity. In most of them, the NLRB eventually ruled against the employer—but long after the campaign had been over." *Id.* at 66.

[107] *See* Bronfenbrenner, *supra* note 99, at 80 (reporting that employers used these consultants in 71% of the sample of campaigns).

[108] These committees were used in 42% of the cases. *See id.* at 82.

[109] *See* FACT FINDING REPORT, *supra* note 33, at 73.

the late 1970s and early 1980s.[110] The Dunlop Commission estimates the first contract rate as falling somewhere between 20 and 37%.[111] Another study estimated that 35% of all successful elections in 1987 did not yield first contracts.[112] Yet another study estimates a failure rate of 40% between 1986 and 1993.[113]

In the 1950s, there was one 8(a)(5) violation for approximately every six elections.[114] By the late 1970s, this ratio had increased to 1:1.[115] In the 1980s, the precipitous drop in the number of representation elections was not met by a parallel decrease in employer refusal to bargain charges. The ratio thus climbed to approximately 2.4:1.[116] As the number of elections continued to fall in the late 1980s, 8(a)(5) violations on the part of employers continued to increase.[117]

While the number of 8(a)(5) violations does not alone indicate the employer impact on failure to negotiate first contracts,[118] more specific studies confirm suspicions raised by the increase in employer refusals to bargain. In one study of contract negotiations after union recognition, employers engaged in surface bargaining 33% of the time, thereby significantly reducing the odds of securing a first contract.[119] The most extensive data on this matter comes from a study of 261 NLRB recognition elec-

---

[110] *See* WILLIAM N. COOKE, UNION ORGANIZING AND PUBLIC POLICY 60 (1985). Cooke analyzed two samples of certification elections, one based in Indiana and the other based nationally. *See id.* at ix. The failure rate was roughly the same for both cases. *See id.* at 60.

[111] *See* FACT FINDING REPORT, *supra* note 33, at 73.

[112] *See* Gordon R. Pavy, *Winning NLRB Elections and Establishing Collective Bargaining Relationships*, *in* RESTORING THE PROMISE OF AMERICAN LABOR LAW, *supra* note 71, at 113–15. Pavy bases his estimate on election data collected by the Industrial Union Department of the AFL-CIO.

[113] *See* FACT FINDING REPORT, *supra* note 33, at 73. Although not using the data for its own estimate, the Commission reports on the Federal Mediation Conciliation Service (FMCS) database of first contracts, which the FMCS builds with the copies of all new certifications it informally receives from the NLRB. *See id.*

[114] *See* FACT FINDING REPORT, *supra* note 33, at 69. In the early 1950s, there were approximately 6000 elections and 1000 section 8(a)(5) employer violations per year.

[115] This ratio reflects that there were approximately 7500 elections per year in the latter half of the 1970s, along with roughly an equal amount of section 8(a)(5) violations. *See id.*

[116] *See id.* at 81 (reporting that there were 9,186 section 8(a)(5) charges in 1985); WEILER, *supra* note 85, at 238 n.18. (reporting that there were 3749 representation elections in 1985). The ratio was calculated by dividing the former figure by the latter.

[117] In 1990, there were 10,024 section 8(a)(5) violations. *See* FACT FINDING REPORT, *supra* note 33, at 83.

[118] *See id.* at 67 (noting that the Board has expanded the interpretation of section 8(a)(5) and, thus, many charges do not take place within the context of attempts to negotiate first contracts).

[119] *See* William N. Cooke, *Failure to Negotiate First Contracts*, 38 INDUS. & LAB. REL. REV. 163 (1985).

tions in the late 1980s.[120] Employers not only engaged in surface bargaining in 37% of the cases,[121] but also continued to hold captive audience meetings,[122] to make unilateral changes in workers' terms and conditions of employment,[123] and to discharge workers for union activity.[124] Taken together, these post-election tactics on the part of employers were associated with first contract rates 10 to 30% lower than those units where they were not used.[125] Also significant about these cases was employer refusal to recognize the union as the certified representative of the bargaining unit 23% of the time; although these challenges were dismissed as without merit in every single case, they were associated with significantly reduced first contract rates.[126] Finally, in one in seven elections studied, employers organized union decertification campaigns,[127] which, in the face of union inability to secure a first contract, tended to be quite effective.[128]

### C. *EI Programs*

Given the evidence of extensive employer tactics in the face of union organizing drives and attempts to secure first contracts, it should come as no surprise that anti-union sentiment sometimes underlies the deployment of EI programs, something that supporters of the TEAM bill seem unwilling to recognize.[129] Although there are no comprehensive quantitative data on this issue, as most EI studies have focused on productivity and

---

[120] See Bronfenbrenner, *supra* note 99, for details of the study.

[121] *See id.* at 83–84.

[122] This occurred in 21% of the cases. *See id.*

[123] This occurred in about 37% of the cases. *See id.*

[124] This tactic was used in roughly 30% of the cases. *See id.*

[125] *See id.*

[126] *See id.* at 86. The first contract success rate was 70% when these charges were made, as opposed to 83% when they were not. *See id.*

[127] *See id.*

[128] *See* Hurd & Uehlein, *supra* note 106, at 71–73 (citing examples of successful union decertifications after failure to negotiate a first contract). One illustration of this phenomenon cited by Hurd and Uehlein is of the Bakery, Confectionary and Tobacco Workers' International Union (BCTW) and their struggles at a frozen food plant in Indiana. After winning the representation election, the BCTW went to the bargaining table with the company, Dawn Frozen Foods. However, bargaining representatives of management refused to move on both simple issues like a union bulletin board and more substantive issues such as union security, dues check-off, and plant visitation rights for union representatives. After about a year, a decertification petition began to circulate with management support, and a few months later, the BCTW was decertified. *See id.* at 72–73.

[129] *See infra* notes 130–139 and accompanying text.

efficiency considerations, there is more than one example of this anti-unionism link to EI programs. These examples further illustrate the advisability of caution in reforming section 8(a)(2).

Participatory schemes in the United States have an illustrious anti-union history.[130] One of the earliest forms of EI, Quality of Work Life (QWL) programs, was used extensively by American managers in the 1960s and 1970s as "part of the broader union-avoidance strategies."[131] Today, in some work environments, these programs continue to function as a means of worker control rather than empowerment.[132] Anti-union management consultants have touted them as antidotes to unionization.[133] The National Association of Manufacturers even proclaims the utility of quality circles in keeping work environments union-free.[134]

In some cases, EI programs are used to thwart union representation campaigns. Guillermo J. Grenier, Director of the Florida Center for Labor Research and Studies, spent several months inside Johnson and Johnson's Ethicon plant in Albuquerque, New Mexico.[135] The company's goal from the beginning was to

---

[130] *See, e.g.*, RAYMOND L. HOGLER & GUILLERMO J. GRENIER, EMPLOYEE PARTICIPATION AND LABOR LAW IN THE AMERICAN WORKPLACE 116 (1992) (stating that "participation schemes have a traditional place in management history as devices for controlling labor"). *See also* Thomas C. Kohler, *Models of Worker Participation: The Uncertain Significance of Section 8(a)(2)*, 27 B.C. L. REV. 499, 516 (1986) (arguing that "all [participatory arrangements] stem from the research and theories of the human relations school of Elton Mayo and its successors—the organizational behaviorists (OB)—whose work has been advanced on behalf of management"). Notably, Elton Mayo and the rest of the Human Relations school had as their explicit task the avoidance of labor unions, which they considered a result of conflict in the workplace that was in no way a necessary part of the labor-management relationship. *See* LOREN BARITZ, THE SERVANTS OF POWER: A HISTORY OF THE USE OF SOCIAL SCIENCE IN AMERICAN INDUSTRY 167–90 (1960).

[131] KOCHAN ET AL., *supra* note 44, at 150.

[132] *See, e.g.*, DONALD M. WELLS, EMPTY PROMISES: QUALITY OF WORKING LIFE PROGRAMS AND THE LABOR MOVEMENT 122–23 (1988). Wells interviewed managers in nonunionized plants where there were QWL programs. In these programs, managers initiated and used employee teams as a means of indirect control. One manager reported that he placed confidants in allegedly self-managing teams to let him know about their internal practices. These agents were also used to shape the direction of team decision-making by criticizing the more independent-minded workers, who then would drop out. *See id.*

[133] *See* MIKE PARKER, INSIDE THE CIRCLE 114 (1985). Parker quotes one anti-union management consultant's comments to the California Hospital Management Association: "In recent years, methods such as the Quality Circle (QC) have been proposed and used to give employees a greater say in how their jobs are performed. The perceived benefits of such 'shared management' include greater employee job satisfaction, less turnover, improved communications between management and employees, less absenteeism, higher productivity, and less employer susceptibility to union organizing." *Id.*

[134] *See id.*

[135] His experiences are reported in several publications. *See* GUILLERMO J. GRENIER,

keep a union out. Ethicon picked its geographical site largely on this basis.[136] Posted inside the factory gates was the following: "Our workers can present themselves and receive fair and responsive treatment from this company without the need or intervention of a third party such as a union."[137] When a union did attempt to organize, the company used "participation" to stall its formation.[138] The Quality Circle developer played a central role in this effort.[139] Further evidence demonstrated that the company also made use of teams to isolate and demobilize pro-union workers.[140]

In addition to using EI programs already in place, employers have also formed such programs in response to union organizing drives. In one case, the Steelworkers had already gained enough authorization cards to hold a union election when the company began its antiunion campaign. As reported by an employee at Senate hearings, part of that campaign was the use of labor-management committees:

> First, the company set up weekly small group meetings on every shift, and we were required to attend. At these meetings, for the first time, supervisors asked us for suggestions on safety and productivity. They also told us that these

---

INHUMAN RELATIONS: QUALITY CIRCLES AND ANTI-UNIONISM IN AMERICAN INDUSTRY (1988); HOGLER & GRENIER, *supra* note 130, at 110–16; PARKER, *supra* note 133, at 115–16.

[136] A manager cited this reason for locating in Albuquerque: "Ethicon simply has to cut back on employee wages and benefits. Most of our plants are union. Here [in the West] we have a better chance of keeping them out not just now but forever." HOGLER & GRENIER, *supra* note 130, at 111.

[137] GRENIER, *supra* note 135, at ix.

[138] *See id.* at 116–38. "[R]ather than being used as a method to increase worker control over the working environment, the production team, a quality circle derivative, was used by management to increase its control over workers' attitudes and behavior during an anti-union campaign." *Id.* at 158.

[139] *See* HOGLER & GRENIER, *supra* note 130, at 114 (quoting the QC developer at Ethicon as saying the following: "As the guy in charge of QC development, I have to keep the QC in tune with company goals. The goal now is to keep out the union.").

[140] *See* PARKER, *supra* note 133, at 115–16. Grenier described teamwork operations in the following way:

> According to Jaramillo [a social psychologist who is the plant personnel manager], teams are used as part of a strategy to "isolate" pro-union employees from their fellow team members. The "isolated" individual can then be dealt with in some fashion: he or she can be fired for not having "team support" (one of the "objective criteria" for termination at Ethicon), or for a poor "attitude" or other factors ostensibly unrelated to union support . . . . Where union members are not fired, their personal isolation from other team members can be used by management (or by anti-union employees acting on behalf of management) to make union members look like "losers" to their fellow workers and discredit the union itself.

*Id.*

> meetings were to show us that they cared about us and that we therefore did not need a union, and that the company would do anything to keep a union out of the plant.[141]

Another case of an employer using an EI-type program to thwart a unionization effort went to the U.S. Court of Appeals.[142] Concerns about safety in the workplace prompted employees to solicit the United Food and Commercial Workers Union (UFCW) for an organizing effort.[143] In response, the employer set up committees of sales assistants to discuss issues determined solely by senior management.[144] The company told people on the committees that the union was unnecessary and offered to retrieve the authorization cards for them.[145] Despite the employer's contention that "a strict interpretation of the statute would reinforce an 'archaic adversarial approach to labor relations,'"[146] the Court ruled that there had been a violation of section 8(a)(2).[147]

### D. *The TEAM Act Revisited*

Supporters of the TEAM Act contend that EI programs have not and will not be used to thwart organizational efforts by workers and their unions.[148] Their proposed legislation seems to embody this belief, providing for only the most basic regulation of employer use of EI programs.[149] The Act even allows employers to discuss terms and conditions of employment with committees formed of their own volition,[150] a domain reserved for employee-elected unions since the passage of the Wagner Act.

---

[141] *National Labor Relations Act Practices and Operations: Hearings Before the Subcommittee on Labor of the Committee on Labor and Human Resources of the United States Senate*, 100th Cong. 21 (1988) (statement of Norman Medows, employee of Crane Resistoflex in Jacksonville, Fla.).

[142] Lawson Company v. NLRB, 753 F.2d 471 (6th Cir. 1985).

[143] *See id.* at 474.

[144] *See id.* at 477. The Court stated: "[Committees were set up] in direct response to the organizational campaign. The committee held no meetings apart from its discussions with management, formed no coherent program or plan of action, and discussed only those subjects that Lawson's senior management determined were of greatest concern to the employees . . . . Discussions proceeded according to an agenda prepared by management." *Id.*

[145] *See id.* at 473.

[146] *Id.* at 477.

[147] *See id.* at 473.

[148] *See supra* notes 129–139 and accompanying text.

[149] *See* TEAM Act, *supra* note 1.

[150] *See id.*

Far more caution is needed in reforming section 8(a)(2) to meet the demands of the changing economic environment if an employee's right to seek independent representation in the workplace is to be preserved as well. As indicated by our discussion of managerial antagonism towards unions, adversarialism is not gone from the stage of U.S. labor-management relations, and the managerial benevolence presumed by many of the Act's supporters is at best unrealistic; nothing illustrates this better than employers' use of EI programs to thwart unionization efforts. Opponents of the Team Act argue that it will bring back the company unions of the 1920s and 1930s. Our analysis supports this argument by demonstrating that the anti-union ideology of those employers who set up company unions more than a half-century ago is alive and well today.

Of course, all this is not to say either that all EI programs are ill-advised or that all managers are anti-union. Indeed, as we have argued above, EI programs are becoming increasingly necessary to maintain firm competitiveness in a rapidly changing economy.[151] The TEAM Act would have given managers broad discretion in deploying these programs, but would not have implemented corresponding protections for workers. What is needed is an alternative that will provide employers with necessary discretion without sacrificing worker protection.

## IV. Searching for an Alternative

The most prominent alternative approach to 8(a)(2) reform is the Sawyer Substitute Bill, HA822.[152] On the day the House

---

[151] See part I for this argument.

[152] HA 822, 141 Cong. Rec. H9536-9537 (daily ed. Sept. 27, 1995). The text of the Sawyer Substitute Bill reads as follows:

> SECTION 1. SHORT TITLE
>
> This Act may be cited as the "Teamwork for Employees and Managers Act of 1995."
>
> SEC. 2. FINDINGS AND PURPOSES
>
> (a) Findings—Congress finds that—
>
> (1) the escalating demands of global competition have compelled an increasing number of employers in the United States to make dramatic changes in workplace and employer-employee relationships;
>
> (2) such changes involve an enhanced role for the employee in workplace decisionmaking, often referred to as "Employee Involvement," which has taken many forms, including self-managed work teams, quality-of-worklife, quality circles, and joint labor-management committees;
>
> (3) Employee Involvement programs, which operate successfully in both unionized settings, have been established by over 80% of the largest employers

passed the TEAM Act, Representative Sawyer (D-Ohio) offered HA822 as a challenge, claiming it would provide employers

---

in the United States and exist in an estimated 30,000 workplaces;

(4) in addition to enhancing the productivity and competitiveness of businesses in the United States, Employee Involvement programs have had a positive impact on the lives of such employees, better enabling them to reach their potential in the workforce;

(5) recognizing that foreign competitors have successfully utilized Employee Involvement techniques, the Congress has consistently joined business, labor and academic leaders in encouraging and recognizing successful Employee Involvement programs in the workplace through such incentives as the Malcom Baldrige National Quality Award;

(6) most employers who have instituted legitimate Employee Involvement programs have done so in order to enhance efficiency and quality rather than to interfere with the rights guaranteed to employees by the National Labor Relations Act; and

(7) the prohibition of the National Labor Relations Act against employer domination or interference with the formation or administration of a labor organization has produced some uncertainty and apprehension among employers regarding the continued development of Employee Involvement programs.

(b) PURPOSES—The purpose of this Act is—

(1) to protect legitimate Employee Involvement programs against governmental interference;

(2) to preserve existing protections against deceptive, coercive employer practices; and

(3) to promote the enhanced competitiveness of American business by providing for the continued development of legitimate Employee Involvement programs.

SEC. 3 EMPLOYER EXCEPTION.

Section 8(a)(2) of the National Labor Relations Act is amended by striking the semi-colon and inserting the following:

": *Provided further*, That it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in—

"(i) a method of work organization based upon employee-managed work units, notwithstanding the fact that such work units may hold periodic meetings in which all employees assigned to the unit discuss and, subject to agreement with the exclusive bargaining representative, if any, decide upon conditions of work within the work unit;

"(ii) a method of work organization based upon supervisor-managed work units, notwithstanding the fact that such work units may hold periodic meetings of all employees and supervisors assigned to the unit to discuss the unit's work responsibilities and in the course of such meetings on occasion discuss conditions or work within the work unit; or

"(iii) committees created to recommend or to decide upon means of improving the design, quality, or method of producing, distributing, or selling the employer's product or service, notwithstanding the fact that such committees on isolated occasions, in considering design quality, or production issues, may discuss directly related issues concerning conditions or work: *Provided further*, That the preceding proviso shall not apply if—

"(A) a labor organization is the representative of such employees as provided in section 9(a);

"(B) the employer creates or alters the work unit or committee during organizational activity among the employer's employees or discourages employees from exercising their rights under section 7 of the Act;

"(C) the employer interferes with, restrains, or coerces any employee because of the employee's participation in or refusal to participate in discus-

with the protection they need in deploying EI programs.[153] At the same time, Sawyer expressed concern about protecting workers from employer domination,[154] and, based on that concern, rejected the TEAM bill.[155] Sawyer's intent in proposing his substitute bill was "to promote workplace cooperation without either jeopardizing workers' rights or leaving open to question the legality of legitimate employee involvement programs under Section 8(a)(2)."[156]

The Sawyer bill does succeed where the TEAM Act fails, namely, in giving attention to the protection of workers' rights in the process of labor law reform.[157] While this end is laudable, however, the bill's means of doing so are quite restrictive. The Sawyer bill's approach to balancing employer flexibility and worker protection is to delineate three categories of EI programs that would be considered legitimate under the NLRA.[158] While

---

sions of conditions of work which otherwise would be permitted by subparagraph (i), (ii), or (iii); or

"(D) an employer establishes or maintains an entity authorized by subparagraph (i), (ii), or (iii) which discusses conditions of work of employees who are represented under section 9 of the Act without first engaging in the collective bargaining required by the Act: *Provided further*, That individuals who participate in an entity established pursuant to subparagraph (i), (ii), or (iii) shall not be deemed to be supervisors or managers by virtue of such participation.".

[153] Representative Sawyer stated that this bill would create "safe havens that make it absolutely sure that employers can establish, assist, maintain, and participate in any employee-involvement program for the purpose of improving design, or methods of producing, or selling a product or service, and additional discussion on related terms and conditions of employment . . . [without being in] violation of 8(a)(2)." 141 CONG. REC. H9545 (daily ed. Sept. 27, 1995) (statement of Rep. Sawyer).

[154] *See id.* at H9537 ("I am first to concede that those who are the strongest advocates for this measure are well intentioned. They have no reason to be concerned with those abused by less principled employers, but we must be.").

[155] *See id.* ("H.R. 743 would undoubtedly allow these discussions [of terms and conditions of employment related to the primary task of an EI committee] as well. I take no issue with that. Unfortunately, it would also allow conditions of work to be the sole focus of workplace teams, and this simply goes too far.").

[156] *Id.* at H9527.

[157] This emphasis on worker protection probably derives in part from Sawyer's more cautious evaluation of current EI programs than that offered by the drafters of the TEAM bill. *See* the Findings section of the Sawyer bill, *supra* note 152 ("Congress finds that . . . *most* employers who have instituted legitimate Employee Involvement programs have done so in order to enhance efficiency and quality rather than to interfere with the rights guaranteed to employees by the National Labor Relations Act . . . .") (emphasis added). *Cf.* the Findings section of the TEAM Act, *supra* note 1: ("Congress finds that . . . employers who have instituted legitimate Employee Involvement programs have not done so to interfere with the collective bargaining rights guaranteed by the labor laws . . . ."). Thus, Sawyer's bill recognizes that managerial anti-unionism has continued salience and sometimes manifests itself in the deployment of EI programs.

[158] The Sawyer bill permits three general EI arrangements: (1) employee-managed

this approach no doubt provides a bulwark against employer abuses that might arise in the deployment of EI, it sacrifices too much flexibility in the process.[159]

The balance between employer flexibility and worker protection is clearly a delicate matter. Detailed regulation regarding which kinds of EI are legitimate, such as that provided by Sawyer, might be desirable if absolutely necessary to protect workers. However, another alternative, discussed below, demonstrates that this extensive approach is not necessary. Greater employer flexibility in the implementation of EI than the Sawyer bill allows can be achieved while still providing employee protection.

### A. *The Employee Involvement Act of 1996*[160]

Dissatisfied with the current legislative alternatives to labor law reform now being considered in Congress, a number of labor law and industrial relations professors have drafted the Employee Involvement Act of 1996, which reflects their own vision of the ways in which 8(a)(2) should be revised to meet the challenges of an increasingly competitive economic environment.[161]

---

work units, (2) supervisor-managed work units, and (3) committees formed to recommend or devise means of improving the production and sale of an employer's product. *See supra* note 152.

[159]For a somewhat different critique, focusing on the Sawyer bill's ambiguity and superfluity, see Morris, *supra* note 71, at 97–98.

[160]This alternative bill's original title was the Employee Involvement Act of 1995. *See* Morris, *supra* note 71, at 104.

[161]The proposed bill reads as follows:

> A proposed bill submitted by a committee of labor law and industrial relations professors as a substitute for S. 295 and H.R. 743 to the Labor and Human Resources Committee, United States Senate, and to the Committee on Economic and Educational Opportunities, United States House of Representatives.
>
> A BILL
>
> To amend the National Labor Relations Act to encourage labor management cooperative efforts that improve economic competitiveness and the quality of life in the American workplace, to provide for notices to employees, and for other purposes.
>
> Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,
>
> SECTION 1. SHORT TITLE. This Act may be cited as the "Employee Involvement Act of 1996."
>
> SECTION 2. FINDINGS AND PURPOSES
>
> (a) FINDINGS.—Congress finds that—
>
> (l) as a result of escalating demands of global competition and other incentives to operate more efficiently, dramatic changes in workplace and employer-employee relationships have occurred in the United States in recent years;

(2) such changes involve an enhanced role for employees in workplace decision-making, often referred to as "Employee Involvement," which has taken many forms, including, but not limited to, self-managed work teams, quality-of-worklife, quality circles, and joint labor-management committees;

(3) it is estimated that various forms of Employee Involvement programs, which have operated in both unionized and nonunionized settings, have been established by over eighty percent of the largest employers in the United States and exist in approximately 702,000 workplaces;

(4) in addition to enhancing the productivity and competitiveness of business in the United States, Employee Involvement programs have had a positive impact on the lives of employees involved in such programs, better enabling them to achieve their workforce potential;

(5) Employee Involvement has been shown to be a vital part of employer-employee efforts to improve workplace safety and health and to resolve workplace problems before they escalate into conflicts over rights that require adjudication by a governmental agency or court of law;

(6) Employee Involvement programs should be encouraged by the Congress and positively supported by the National Labor Relations Act; and

(7) Employees should have easy access to information and assistance regarding their rights and responsibilities under the National Labor Relations Act.

(b) PURPOSES.—The purpose of this Act is—

(1) to protect and encourage legitimate Employee Involvement programs;

(2) to preserve existing protections against deceptive and coercive employer practices and to preserve existing protections of employees' rights;

(3) to allow legitimate Employee Involvement programs to continue to evolve and proliferate;

(4) to allow employers and employees flexibility to construct Employee Involvement programs that make the most sense in the context of their particular workplaces without undue governmental interference;

(5) to encourage employers and employees to internalize responsibility for meeting their legal obligations and continuously improving workplace safety and health, and to develop effective systems for resolving workplace disputes that involve matters regulated by public law;

(6) to protect the democratic right of employees to choose their own representatives when Employee Involvement programs represent or purport to represent them; and

(7) to guarantee that employees have easy access to information and assistance about their rights under the National Labor Relations Act.

SEC. 3. ADDITION TO DEFINITIONS SECTION

Section 2 of the National Labor Relations Act is amended by adding the following:

"(15) The term "secret ballot" means the expression by ballot or other voting method, but in no event by proxy, of a choice with respect to any election or vote which is cast and tallied in such a manner that the person expressing such choice cannot be identified with the choice expressed."

SEC. 4. EXCEPTIONS TO SECTION 8(a)(2) UNFAIR LABOR PRACTICE PROVISION

Section 8(a)(2) of the National Labor Relations Act is amended by striking the semicolon and inserting the following:

":Provided further, That as to employees in any workplace where such employees are not represented by a labor organization under section 9, it shall not constitute or be evidence of an unfair labor practice under this paragraph for an employer to establish, assist, maintain, or participate in any organization or entity of any kind in which employees participate, which addresses matters of mutual interest, including but not limited to issues of quality, productivity, and efficiency, if the employer can establish that such employer has posted and continues to post in a place or places easily seen by all affected employees the current written notice required by section 8(a)(6), and that

The EI Act would allow employers to tailor EI programs to the needs of their own particular workplace without sacrificing employee protection.[162]

---

"(A) such organization or entity does not represent, or purport to represent employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, whether overtly or indirectly, and that no person or member of that organization or entity represents or purports to represent employees, whether overtly or indirectly, for any such purposes; or

"(B) if such organization or entity represents or purports to represent employees concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, or in which any person or member within that organization or entity represents or purports to represent employees for any such purposes, (i) such organization or entity has been selected or approved by a majority of the affected employees by secret ballot by which such employees were afforded an unrestricted opportunity to express their approval or disapproval in accordance with fair and reliable procedures; (ii) such employees have the right and exercise that right, to select for themselves, without interference or participation by the employer, any person or persons who are not supervisors or other members of management to represent them in dealing with the employer concerning grievances, labor disputes, wages, rates of pay, hours of employment or conditions of work; (iii) at the time the aforesaid organization or entity was selected or approved in accordance with this subparagraph there was not in progress a union organizational campaign involving the affected employees of which the employer had knowledge; and (iv) the employer is not in violation of any other provision of Section 8(a) of the Act; provided that nothing contained in this proviso shall be construed to bar the termination or require the continuation of any organization or entity established pursuant to this proviso.

":Provided further, That although the organizations or entities described in the preceding proviso may be used to enhance employee participation in various forms of decision-making and the outcome of such decision-making may be expressed in a variety of ways, such outcome shall not be expressed in the form of an enforceable statutory collective bargaining agreement unless the labor organization party to that agreement is effectively free of employer domination or interference at the time the agreement is negotiated and executed."

SEC. 5. ADDITION OF UNFAIR LABOR PRACTICE NOTICE PROVISION

Section 8(a) of the National Labor Relations Act is amended by striking the period at the end of subsection (5) and inserting the following:

"(6) to fail to post and continue to post in a place or places easily seen by all employees a written notice which the Board shall promulgate, disseminate, and distribute in accordance with rules and regulations made and published pursuant to section 6, advising employees in clear language of the rights and responsibilities provided by this Act and the means by which employees can easily contact the Board's offices for information and assistance.

SEC. 6. LIMITATION ON EFFECT OF ACT

Nothing in this Act shall diminish any employee rights and responsibilities contained in other provisions of the National Labor Relations Act [hereinafter "EI Act"], as amended.

Morris, *supra* note 71, at 104–07, provides the full text of this bill.

[162] *See id.* at 99 ("The bill would allow creation of any grouping of employees, of whatever size or number or location, that best suits the circumstances prevailing at a particular company. Unlike the TEAM bill, however, the EI bill would provide assurance that such programs would be inherently fair to the affected employees.").

The EI Act's specific provisions are designed to achieve both of these goals. The Act's proposed amendment to section 8(a)(2) of the NLRA employs broad language to lend employers considerable discretion in constructing and deploying EI programs, stating that it would be permissible "for an employer to establish, assist, maintain, or participate in any organization or entity of any kind in which employees participate, which addresses matters of mutual interest, including but not limited to issues of quality, productivity, and efficiency . . . ."[163] The bill protects employees by making employers' enjoyment of this discretion contingent upon two conditions.

First, the Act requires that any employer who makes use of EI programs make available to employees in "clear language" a statement of employer and employee rights and responsibilities under the EI Act as well as "the means by which employees can easily contact the Board's offices for information and assistance."[164] To ensure that this requirement is met, the Act construes an employer's failure to carry out this duty as an unfair labor practice.[165]

Notably, this first condition has nothing to do with the content of the EI program itself but rather the context in which it is deployed.[166] In contrast, a second requirement of the Act does, like the Sawyer Substitute, regulate the actual content of any such programs. The EI Act requires that any "organization or entity" created as part of an EI program may not represent employees in issues dealing with grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work, even if it does so only incidentally to the committee's primary purpose.[167] This second condition, therefore, protects what has been the traditional domain of labor unions in employees' collective dealings with management.

The objection could be raised that the second provision goes too far in regulating employer use of EI programs, thereby undermining the very flexibility the Act purports to promote. However, the Act does create an exception to this prohibition which

---

[163] *Id.*

[164] *Id.* Morris, *supra* note 71, at 104–07, suggests that this access to the Board could be achieved via a toll-free line.

[165] *See* EI Act, *supra* note 161. See the amendment to section 8(a).

[166] Contrast this approach to that of the more restrictive Sawyer bill. *See supra* notes 152–159 and accompanying text.

[167] See provision (A) under the amendment to section 8(a)(2) of the EI Act, *supra* note 161.

allows employers to create committees dealing with such matters as long as the democratic rights of employees over their organs of representation are protected. Organizations or entities that are a part of an EI program and seek to represent or purport to represent employee interests in grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work are legal under the EI Act provided that the following conditions are met: (1) the organization or entity is selected and approved by a majority of affected employees via secret ballot;[168] (2) employees have the right to choose representatives who are not supervisors or managers; (3) there is no union organizational campaign in progress, of which the employer is aware, during selection of the organization; and (4) the employer is not committing any other unfair labor practice under the NLRA.[169]

### B. *The EI Act as a Superior Alternative*

Unlike the TEAM bill, the EI Act addresses the concern of worker protection in amending section 8(a)(2) of the NLRA. If passed, the Act would ensure that employee concerns about the deployment of EI in the workplace could be expressed to an NLRB representative expeditiously.[170] In addition, the Act would put conditions on the use of EI programs which, while not dictating the character and scope of EI arrangements, would help protect employees against the formation of 'sham' organizations that would not represent their interests.[171] Moreover, by not permitting the formation of EI committees dealing with fundamental bargaining items like wages and work conditions during a union campaign, the EI Act would prevent employers from using these arrangements to thwart unionization.[172]

At the same time, these conditions would not constitute micro-management of employer use of EI. Under the Act, almost any EI arrangement imaginable would be legal as long as the employer maintained the right of workers to select their repre-

---

[168] The Act defines "secret ballot" in the following manner: "the expression by ballot or other voting method, but in no event by proxy, of a choice with respect to any election or vote which is cast and tallied in such a manner that the person expressing such choice cannot be identified with the choice expressed." *Id.* at section 3.

[169] *Id.* at section 4(B).

[170] *See supra* notes 161–164 and accompanying text.

[171] *See supra* note 167 and accompanying text.

[172] *See* EI Act, *supra* note 161, at section 4(A).

sentatives democratically and confidentially. Many committees would be legal even without such a democratic voice.[173] Significantly, even when employees would have the right to choose their EI committee's representatives under the Act, employers would still maintain control over the life of the committee, and could choose to form or terminate a committee at any time.[174]

## V. CONCLUSION

A central purpose of the TEAM Act, as passed by the House of Representatives, is the promotion and protection of legitimate EI programs in the workplace as a means of maintaining national economic competitiveness. We have argued that the TEAM Act will be unable to achieve this goal because it neglects the qualifier "legitimate": because the TEAM Act gives employers the widest latitude in the deployment of EI programs, it does not protect workers' rights. As we argued above, drafters and supporters of the TEAM bill seem oblivious to the long and continuing history of managerial antagonism towards unions and worker efforts to form them. In short, they fail to recognize that adversarialism is not gone from the scene of U.S. worker-management relations.

The historical context in which members of Congress currently are revising Section 8(a)(2) of the NLRA demands that greater worker protection figure into such revisions. Drafters of the EI Act have made a creative and thoughtful effort to do so without sacrificing the goal of employer flexibility, which was the original impetus for reform. As members of the Senate consider what direction they will take in revising the NLRA to encourage employee involvement in the workplace, our hope is that they will consider the merits of the EI Act.

---

[173] The requirement that employees select committee members applies only in certain situations. *Id.* at section (b)(6).

[174] *See* EI Act, *supra* note 169, at section 4(B). After stating all the conditions under which employers may establish EI arrangements that deal with wages and other such matters, the proposed Act states: "nothing contained in this proviso shall be construed to bar the termination or require the continuation of any organization or entity established pursuant to this proviso."

# ARTICLE

# TOWARD A CRITICAL RACE REFORMIST CONCEPTION OF MINIMUM WAGE REGIMES: EXPLODING THE POWER OF MYTH, FANTASY, AND HIERARCHY

HARRY HUTCHISON*

*This Article calls for an intense examination of minimum wage regimes in light of the deplorable situation facing many minority, low-skilled workers. The author provides a searching mode of analysis drawn from Critical Race Theory and classical-liberal civil rights scholarship that ferrets out any evidence of discriminatory intent, whether explicit or implicit, in the support of minimum wage programs and also uncovers the discriminatory effects of minimum wage laws. Despite the widely held belief that minimum wage regimes are a progressive program aimed at helping the disadvantaged, the author concludes, after applying a Critical Race reformist perspective, that minimum wage regimes are in fact an abuse of power and that the nation needs to reevaluate its commitment to minimum wage laws.*

> The blues is a music about human will and human frailty, just as the brilliance of the Constitution is that it recognizes grand human possibility with the same clarity that it does human frailty, which is why I say it has a tragic base. Just as the blues assumes that any man or any woman can be unfaithful, the Constitution assumes that nothing is innately good, that nothing is lasting—nothing, that is, other than the perpetual danger of abused power.
>
> —Stanley Crouch[1]

The structure of the American economy and society is undergoing radical change. Instead of simply accepting progressive paradigms,[2] such as the need for minimum wage laws, the nation needs an informed commitment to new approaches. As the opening quote by Stanley Crouch suggests, it is crucial to closely

---

* Associate Professor of Law, University of Detroit Mercy, School of Law. M.A., Wayne State University, 1975; M.B.A., University of Michigan, 1977; J.D., Wayne State University, 1986. The author wishes to thank the following reviewers: Elizabeth McKay, Roy Brooks, David Neumark, Pamela Lysaght, Robert Sedler, Wendy Wilcox, Leon Lysaght, and Stephen Mazurak. The usual caveat applies. The author also wishes to thank the University of Detroit Mercy, School of Law for financial assistance as well as Enrique Griffin and Richard Rockwood for research assistance. Special thanks to Kimberly Jackson and Marsha Walker for secretarial assistance.

[1] STANLEY CROUCH, THE ALL-AMERICAN SKIN GAME, OR, THE DECOY OF THE RACE: THE LONG AND THE SHORT OF IT, 1990–1994 10 (1995).

[2] Anthony D. Taib, *Racial Justice in the Age of the Global Economy: Community Empowerment and Global Strategy*, 44 DUKE L.J. 928 (1995).

examine aspects of society and government that many believe to be innately good to ensure that they are not masking abuses of power. This Article proposes a method for analyzing minimum wage regimes in this spirit.

This Article, premised largely on Critical Race Theory ("CRT") insights, is secondarily informed by classical-liberal reformist views of disparate impact and challenges fundamental, egalitarian assumptions that some associate with the minimum wage movement. Even when examining seemingly neutral areas of law, CRT is able to find "concepts of 'race' and racism always already there."[3] Moreover, CRT posits that "America's cultural identity, values, and meanings cannot be separated from its past and present social relations of domination and power."[4] Classical-liberal reformists bring to the table the idea that policy-makers should be held responsible for any discriminatory effects of their programs, regardless of a lack of evidence of discriminatory intent.

Both CRT and classical-liberal reformists believe that laws should be examined from an outsider-premised fairness perspective. Fairness to outsiders means fairness to those groups such as African Americans whose perspective and concerns "have not been traditionally part of legal scholarship."[5] In addition, individuals and groups that have been excluded from America's concern and consciousness when public policy is debated or decided are the primary focus of an outsider perspective.

Given the situation facing many minorities and African Americans in particular, the current progressive paradigms do not seem to be working, and the need to re-examine our approaches to helping the disadvantaged becomes even more pressing. The percentage of black children in poverty rose from thirty-nine to forty-six percent during the period from 1974 to 1993, and the percentage of the black population living in so-called "underclass" areas has increased by more than fifty percent during the period from 1970 to 1990.[6] Additionally, "[m]ore than half of all

---

[3] Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 750 (1994).

[4] John O. Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Authentic Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2132 (1992).

[5] Mary I. Coombs, *Outsider Scholarship: The Law Review Stories*, 63 U. COLO. L. REV. 683, 683–84 (1992); *see also* Mari J. Matsuda, *Legal Storytelling: Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2323 (1989); Harris, *supra* note 3, at 744.

[6] *See* HERBERT STEIN & MURRAY FOSS, THE NEW ILLUSTRATED GUIDE TO THE AMERICAN ECONOMY 134–37 (1995).

black males between twenty-five and thirty-four are jobless or 'underemployed.' Other social indices are equally discouraging: In 1993, 2.3 million black men were sent to jail while 23,000 received a college diploma—a ratio of a hundred to one."[7] Further, while strong evidence exists that dramatic racial differences in unemployment did not exist 60 to 100 years ago, the unemployment rate for non-whites in general, and African Americans in particular, has risen relative to whites since the 1930s.[8] This wrenching portrait has been presented against a backdrop of claims of "rising profits,"[9] assertions of "falling wages,"[10] and the reality of declining union membership.[11]

Amidst this deplorable iconograph of African American reality,[12] an emerging movement strives to increase the minimum

---

[7] HENRY LOUIS GATES, JR. & CORNEL WEST, THE FUTURE OF THE RACE 24–25 (1996).

[8] *See* RICHARD VEDDER & LOWELL GALLAWAY, OUT OF WORK: UNEMPLOYMENT AND GOVERNMENT IN TWENTIETH-CENTURY AMERICA 269–87 (1993).

[9] Despite the rhetoric of rising profits, Department of Commerce, Bureau of Economic Analysis, statistics suggest that corporate profits as a share of national income have fallen from approximately 19% in 1950 to 9% during the 1990s. *See* Kenneth Deavers, *Soaring Profits, Stagnating Real Wages: Not the Real Story,* 1 FACT & FALLACY (Dec. 1995) (on file with the Employment Policy Foundation, 1015 15th St., N.W., Ste. 1200, Washington, D.C. 20005). Further, to the extent that economic rents are generated by imperfectly competitive firms and industries, such economic rents are captured by labor while capital owners receive few monopoly rents. *See* Lawrence F. Katz & Lawrence H. Summers, *Industry Rents: Evidence and Implications, in* BROOKINGS PAPERS ON ECONOMIC ACTIVITY: MICROECONOMICS 209, 209–10 (Martin Neil Bailey & Clifford Winston eds., 1989).

[10] *See, e.g., Obey Blames Reaganomics, Fed Policy for Falling Wages, Declining Job Security,* BNA WASHINGTON INSIDER, Mar. 12, 1996, *available in* LEXIS, Legis Library, BNA File.

Another issue related to falling wages is the decreasing size of the middle class. For example, Senator Bradley and Congressman Schumer recently sponsored a Congressional forum to discuss the growing gap between "rich" and "poor" in America. *See* Kenneth Deavers, *The Shrinking Middle Class: More American Families Gain than Fall Behind,* 2 FACT & FALLACY 1 (Jan. 1996) (on file with the Employment Policy Foundation, 1015 15th St., N.W., Ste. 1200, Washington, DC 20005). However, over the past 25 years, American middle-class families have become better off. The decline in the size of the middle class is primarily the result of growth in the share of individuals in upper-class families.

Any discussion of falling wages and declining incomes turns on how income is measured. For example, in 1993, many individuals in lower-class families had higher real income (that is, income adjusted for purchasing power) than individuals in middle-class families in 1969, because *size-adjusted* U.S. median real family income grew by more than 20%. *See id.* Furthermore, income should include total compensation. While real hourly wages have risen by 10–15% during the period from 1960 through 1994, real hourly compensation has risen by almost 60% during the same period. *See* Deavers, *Soaring Profits, supra* note 9.

[11] *See* Leo Troy & Neil Sheflin, *Going Public: New Unionism on the Rise,* DET. NEWS, Sept. 6, 1992, at 3B ("Less than 12% of the [United States] private sector is unionized down from a peak of 36% in 1953"), *cited in* Harry G. Hutchison, *Through The Pruneyard Coherently: Resolving the Collision of Private Property Rights and Nonemployee Union Access Claims,* 78 MARQ. L. REV. 1, 3 (1994).

[12] Nor is this sense of discouragement limited to African Americans who are

wage as an anti-poverty vehicle.[13] This movement is driven partly by the view that poverty, in the sense of lack of money and assets, correlates highly with other modes of disadvantage, such as limited educational opportunity, political marginalization, unemployment, underemployment, and being a victim of racism.[14]

Minimum wage laws strive to better the lives of disadvantaged individuals by ensuring a "living wage"[15] premised on seemingly "neutral" principles.[16] This movement, largely propelled by the authors of a recent study,[17] challenges the prevailing view of economists that "the federal minimum-wage law adds to unem-

---

members of the "underclass." As one observer points out: "Blacks [even middle-class ones] fully understand that to be an African-American is in many respects to be uniquely branded for failure." ELLIS COSE, THE RAGE OF A PRIVILEGED CLASS 163 (1993).

[13] "During most of the 1960s and 1970s, a person working full time, year round, at the minimum wage would have received an income roughly equal to the poverty threshold for a family of three. During the 1980s, 'full time, year round earnings at the minimum wage have declined relative to the poverty thresholds.'" Daryl Marc Shapiro, *Will an Increased Minimum Wage Help the Homeless?*, 45 U. MIAMI L. REV. 651, 659 (1990–1991) (quoting Ralph E. Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation to Income & Poverty*, MONTHLY LAB. REV., June 1987, at 27). One commentator claims that inequality is rising more swiftly in the United States than elsewhere at least partly because of a relatively low minimum wage. *See* John W. Lee, *Critique of Current Congressional Capital Gains Contentions*, 15 VA. TAX REV. 1, 55 (1995). *But see* W. Michael Cox & Richard Alm, *By Our Own Bootstraps: Economic Opportunity & the Dynamics of Income Distribution*, ANNUAL REPORT, FEDERAL RESERVE BANK OF DALLAS 2, 8 (1995) (pointing out that individuals in the lowest income quintile in 1974 saw their incomes rise on average by $25,322 over the 16-year period from 1975 to 1991 while those in the highest income quintile had a $3,974 increase in real income, on average).

[14] *See* Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 247 (1995).

[15] The term "living wage" can be traced back to a 1937 case that upheld a Washington State statute precluding the employment of women and minors at wages that were not adequate for their maintenance. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 386 (1937). Under the name of "living wage," Baltimore, Milwaukee and Santa Clara County, California have enacted laws mandating a minimum wage at rates above the federal level for certain employees. *See* Steve Hanke, *Looks Like Charity, Smells Like Pork*, FORBES, May 6, 1996, at 87.

[16] As one union leader explained: "nobody needs a raise more than the workers who do the difficult, sometimes the most dangerous, and the dirty jobs for poverty wages." Richard Trumka, AFL-CIO, testifying on behalf of a minimum wage increase before the Senate Labor and Human Resources Comm., Dec. 19, 1995, Federal News Service, *available in* LEXIS, Legis Library, ALLNWS File.

[17] *See* DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995) (containing several studies that assert that minimum wages do not cost jobs). *But see* David Neumark & William Wascher, *The Effect of New Jersey's Minimum Wage Increase on Fast-Food Employment: A Re-Evaluation Using Payroll Records* (Jan. 1996 (Revised)) (on file with David Neumark, Department of Economics, Michigan State University, East Lansing, MI 48824); Donald Deere et al., *Sense and Nonsense on the Minimum Wage*, 1 REGULATION 47 (1995) (discussing how economic common sense and past research contradict Card-Krueger); Richard B. Berman, *Dog Bites Man: Minimum Wage Hikes Still Hurt*, WALL ST. J., Mar. 29, 1995, at A12; Bradley S. Wimmer, *Minimum-Wage Increases and*

ployment, particularly for teenagers and minorities."[18] The crusade in favor of higher minimum wages has been joined by politicians and commentators alike.[19] This movement demands that the federal minimum wage as well as state minimum wages[20] be increased above the poverty level and that the increase be indexed to protect purchasing power.[21] Further, it is asserted that: "Law should steadily raise the social minimum wage and benefits package so as to mitigate the discriminatory effects of labor market segmentation"[22] as part of an exigent expansion in workplace democracy.[23]

The claims made by minimum wage proponents have engendered a spirited counterattack.[24] Among the claims made by opponents is the assertion that this movement is spearheaded by the AFL-CIO "seeking to buy a Democratic Congress in the next election."[25] In addition, the minimum wage has been called "destructive."[26] Given the deplorable situation facing many African Americans in particular, and poor Americans generally, it is

---

*Employment in Franchised Fast-Food Restaurants*, 17 J. LAB. RES. 211 (1996) (suggesting that the Card-Krueger results are not statistically significant).

[18] VEDDER & GALLAWAY, OUT OF WORK, *supra* note 8, at 257.

[19] *See* Obey, *supra* note 10.

[20] *See, e.g., States Can Take Wage Lead While Washington Waffles*, USA TODAY, Apr. 17, 1996, at 12A. A number of states have raised their minimum wage above the federal minimum. These states include Alaska, Connecticut, Hawaii, Iowa, Massachusetts, New Jersey, Oregon, Rhode Island, Vermont, and Washington. In addition, the District of Columbia, Puerto Rico (for a limited number of occupational categories), and the Virgin Islands have higher minimum wage rates than those currently available at the federal level. *Id.; see also* Richard R. Nelson, *State Labor Legislation Enacted in 1995*, MONTHLY LAB. REV., Jan.–Feb. 1996, at 47.

[21] *See* Edward Irons, *Raise the Minimum Wage: Our Multi-layered Labor Market Undercuts the Underclass*, BLACK ENTERPRISE, Dec. 1, 1995, at 28; *see also* William Quigley, *The Minimum Wage and the Working Poor*, AMERICA, June 3, 1995, at 6 (dismissing claims that a rise in wages will hasten the transfer of jobs to foreign markets).

[22] Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 5 (1988).

[23] *See id.* at 2. The concept "social minimum wage" eludes determination. For at least one view of the social minimum wage that includes government mandated minimum wages and benefits and conditions, see Klare, *Toward New Strategies*, *supra* note 14, at 260.

[24] *See* Daniel Seligman, *Voodoo Economics, Minimum Wage Department*, FORTUNE, Mar. 6, 1995, at 217; Wallace B. Doolin, *Minimum Wage Means Maximum Unemployment*, INSIGHT ON THE NEWS, Nov. 7, 1994, at 35; Daniel Seligman, *Fantasia 101*, FORTUNE, May 13, 1996, at 202 (quoting Gary Becker as stating that the "most basic law in economics . . . [is] that a rise in the cost of labor, capital, or other inputs lowers demand for that input").

[25] Bruce Josten, *Wage Hikes Hurt the Poor*, USA TODAY, Apr. 17, 1996, at 12A.

[26] Rep. Jim Saxton, Vice Chairman, *Opening Statement*, Joint Economic Committee, Feb. 22, 1995, *available in* LEXIS, Legis Library, ALLNWS File.

necessary to deconstruct such proposals from a Critical Race[27] reformist[28] perspective that "dissent[s] from dominant norms."[29]

In applying a Critical Race reformist perspective, this Article considers the impact of federal and state minimum wage laws on employment, the economic analysis of the effects of higher minimum wages, and the empirical veracity of the Card-Krueger study that buttresses the current minimum wage movement. In addition, I compare the interests and minimum wage advocacy of groups such as United States labor unions[30] with South African trade unions, and workers who have supported such laws.[31]

After considering the historical and cultural contexts of the minimum wage, and after reviewing the disparate effects of such regimes, I conclude that from a Critical Race reformist perspective grounded in the premise that fairness[32] to "outsider groups . . . should constitute the central concern of civil rights policy,"[33] minimum wage laws as currently formulated must be seen as an abuse of power. In contrast to the apparently neutral claim of nondiscrimination,[34] minimum wage policies continue to subor-

---

[27] Critical Race Theory may be impossible to define succinctly. Suffice it to say that CRT "favors an asymmetrical ideal of racial equality which rejects race-blindness in favor of an 'empowerment' model that permits taking affirmative steps to achieve a level playing field." Roy L. Brooks & Mary Jo Newborn, *Critical Race Theory and Classical-Liberal Civil Rights Scholarship: A Distinction Without a Difference?*, 82 CAL. L. REV. 787, 790 (1994) (footnote omitted); *see also* Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393 (1990); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741 (1994); Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893 (contending that CRT is committed to the struggle against racism, particularly as institutionalized in and by law); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

[28] *See generally* Brooks & Newborn, *supra* note 27, at 804–10.

[29] Calmore, *Critical Race Theory*, *supra* note 4, at 2135.

[30] *See, e.g.*, William J. Moore et al., *The Political Influence of Unions and Corporations on COPE Votes in the U.S. Senate, 1979–1988*, 16 J. LAB. RES. 203 (1995) (finding that no evidence suggests that unions' political influence has been declining). For a more general introduction, see Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q. J. ECON. 371 (1983).

[31] For an article discussing the methods, purposes and uses of comparative labor law, see Alvin L. Goldman, *Methods of Comparative Labor Law in the United States*, 7 COMP. LAB. L. 319 (1986).

[32] For an approach that sees justice as fairness and "conveys the idea that the principles of justice are agreed to in an initial situation that is fair," see JOHN RAWLS, A THEORY OF JUSTICE 12 (1971).

[33] Brooks & Newborn, *supra* note 27, at 838.

[34] *See* Mitchell v. Pilgrim Holiness Church Corp., 210 F. 2d. 879 (7th Cir.), *cert. denied*, 347 U.S. 1013 (1954) (holding that the Fair Labor Standards Act is reasonable, nondiscriminatory regulation in the interest of society for welfare of all workers).

dinate members of minority groups and solidify the exclusion of African Americans and others from the workplace.

The next section briefly explores the distinction between CRT's culturally informed intent approach and the reformists' version of the effects test for racial disadvantage. Part II looks at the statutory framework of minimum wage laws, the purported rationales for wage regulation, and the breadth of the coverage of minimum wage regimes. Part III examines minimum wage theory and empirical data. Part IV discusses the underlying policies and similarities between union/worker-created split labor markets in the United States and South Africa.

## I. Critical Race Theory Informed by the Reformists' Perspective

Despite their differences, both Critical Race theory and classical-liberal civil rights scholarship provide important modes of analysis for determining whether minimum wage laws can be supported from an outsider-premised fairness perspective.[35] Classical-liberal traditionalists believe in the principle of Formal Equality of Opportunity ("FEO") to combat racial discrimination, but both Critical Race theorists ("race crits") and classical-liberal reformists ("reformists") demand more than FEO to deal with racism. Race crits believe that FEO reacts only to "the most obvious and grotesque forms of racism, whereas most forms of racism are deeply embedded in the framework of our society."[36] They define racism on two levels—substantive and procedural. It is not simply supremacist attitudes (substantive) but it is also individual or institutionalized behavior (procedural) that have the effect of subordinating persons of color to whites.[37] Race crits endorse extensive sociolegal tradeoffs favoring people of color, including deployment of a culturally informed intent test.[38]

While the focus of CRT is on broadening the concept of intent, classical-liberal reformists look to the effects of allegedly racist laws in order to find discrimination. The intent standard

---

[35] Brooks & Newborn, *supra* note 27. This section relies heavily on the work of Brooks and Newborn and their comparison of classical-liberalism and CRT modes of analysis generally and as bases for determining liability for equal protection purposes.

[36] *Id.* at 798.

[37] *See id.* at 799.

[38] Lawrence, *supra* note 27, at 321.

may be more effective in ferreting out hidden racist attitudes, but it is not as straightforward to apply as the more objective effects test. When used in conjunction with each other, these two modes of analysis provide an insightful framework for exploring the potentially discriminatory nature of minimum wage laws.

### A. *Deploying a Culturally Informed Intent Approach*

The culturally informed intent approach is premised on the following idea:

> Traditional notions of intent do not reflect the fact that decisions about racial matters are influenced in large part by factors that can be characterized as neither intentional—in the sense that certain outcomes are self-consciously sought—nor unintentional—in the sense that the outcomes are random, fortuitous, and uninfluenced by the decisionmaker's beliefs, desires, and wishes.[39]

Therefore, while retention of the traditional intent test makes sense in the face of truly grotesque forms of discrimination, it is important to consider the unconscious and incompletely articulated nature of racially discriminatory beliefs and ideas.[40] Because of a shared experience of racial discrimination, Americans "also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about non-whites."[41] Given this common historical and cultural heritage and given that authority figures—among others—transmit certain beliefs and preferences, mandating "proof of conscious or intentional motivation as a prerequisite to constitutional recognition that a decision is race-dependent ignores much of what we understand about how the human mind works."[42] It also ignores the history of American race relations and its effect on the individual and collective unconscious.[43]

The culturally informed intent test, drawn largely from the work of Charles Lawrence, has much to offer as it may assist courts and legal examiners to retreat from a limited, and limit-

---

[39] *Id.* at 322.
[40] *Id.*
[41] *Id.*
[42] *Id.* at 323 (referring to Brest, *Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 43 (1976) for the use of the phrase "race-dependent").
[43] Lawrence, *supra* note 27, at 323.

ing, search for individualized blameworthiness and individual responsibility, especially where the actor has "internalized the relatively new American cultural morality which holds racism wrong or [has] learned racist attitudes and beliefs through tacit rather than explicit lessons."[44] The Lawrence approach, contrary to more conventional approaches, renders a more realistic and a more comprehensive assessment of whether a particular policy is racist.

On the other hand, deploying a comprehensive and workable version of Lawrence's culturally informed intent test may be difficult for several reasons: (1) the inability of the courts or others to psychoanalyze individuals or collective governmental decisionmakers,[45] and (2) the difficulty of ascertaining with clarity proof of unconscious racial motivation either individually or collectively.[46] A more modest but less comprehensive approach that incorporates at least some of the culturally informed intent method would consider: (1) the historic economic interests of proponents of a particular statute or policy, (2) a review of the historical context that investigates, among other things, whether proponents of the new policy or retention of the old policy are allied with or have been apologists for exclusionary devices either prior to or concurrently with the statute at issue, and (3) any direct or indirect evidence of conscious racial motivation and adherence to racist ideology.

Such a test would consider whether the statute or policy at issue can be seen as part of a movement that creates or substantiates the existence of outsiders. In addition, the approach helps determine whether the statute is fair to outsider groups. Other modes of analysis, including deployment of the traditional intent test when the discrimination takes a particularly grotesque form, remain acceptable from a CRT perspective and should also be employed where appropriate.

### B. *The Reformists' Perspective*

Reformists are greatly concerned about the rate of racial progress since the 1950s. The reformists believe that Formal Equality of Opportunity has been implemented in ways that subordi-

---

[44] *Id.* at 344.
[45] *See id.* at 327.
[46] *See generally id.* at 355–78.

nate African Americans and other racial minorities.[47] Moreover, "reformists emphasize the need to execute FEO more effectively by giving greater deference to the civil rights of racial minorities."[48] As Brooks and Newborn illumine, the reformists "may be willing to go as far as, or even farther than, race crits in making sociolegal trade-offs that favor racial minorities."[49] Contrary to race crits, however, reformists proceed from the premise that FEO is conceptually sound.[50] The soundness of FEO is not, however, the end of reformists' analysis, as they posit that FEO is operationally flawed and criticize rather than embrace the intent test.[51] From a reformist perspective, legal responsibility should depend on the legal propriety of what is done rather than the moral propriety of what was willed.[52] Therefore, knowledge of the discriminatory effects, if any, of minimum wages would sufficiently prove the contention that minimum wages constitute a form of racial oppression from a reformist vantage point.

### C. *Toward a Convergence: A Critical Race Reformist Approach*

Given both the difficulties that must be surmounted in employing a comprehensive culturally informed intent approach and the powerful insights derived from this perspective, the following bifurcated, analytical approach for analyzing minimum wages and other analogous regimes is proposed. The first step is to employ an analysis that proceeds from an outsider's perspective, historically and culturally informed, but does not concede that FEO is conceptually sound. This approach calls for the investigation of sociolegal insights derived from economics, history, and analogous international patterns to assess the level of supremacist attitudes and subordinating behavior. This examination is coupled with a review of the empirical record to determine whether minimum wages are truly an egalitarian, neutral anti-poverty vehicle from the vantage point of African Americans. Secondly, consistent with the view that greater deference should

---

[47] Brooks & Newborn, *supra* note 27, at 797 (footnote omitted).
[48] *Id.*
[49] *Id.* at 812.
[50] *See id.* at 807.
[51] *Id.*
[52] *Id.* ("Based on this fundamental distinction between morality and law, reformists conclude that legal responsibility should depend on the effects of what a person does.")

be given to the civil rights and concerns of minorities, if it can be shown that the proponents of minimum wages have knowledge or should have knowledge of any discriminatory effects, that evidence (either historical or otherwise) would effectively challenge the asserted neutrality of minimum wages. Taken together, these two approaches constitute what can be called a Critical Race reformist approach.

## II. MINIMUM WAGE LAWS

As part of the first prong of the Critical Race reformist approach discussed above, it is necessary to review the empirical record "to determine whether minimum wages are truly an egalitarian, neutral anti-poverty vehicle from the vantage point of African-Americans."[53] This task involves an understanding of the basic statutory framework and coverage of the minimum wage laws, a discussion of the progressive rationales behind minimum wage legislation, and a review of the empirical evidence to ascertain whether the low-income and minority families that are the purported beneficiaries of higher minimum wages are in fact getting any assistance.

### A. *Statutory Framework*

The federal version of the minimum wage is part of the Fair Labor Standards Act (FLSA).[54] Its stated purpose is to constrain "labor conditions detrimental to maintenance of the minimum standard of living . . ."[55] while not "substantially curtailing employment or earning power."[56] Prior to the 1961 Amendments to the FLSA, "coverage of [an] employee depended upon his own relation to interstate commerce in that the employee was not

---

[53] See discussion in prior paragraph.

[54] 29 U.S.C. § 201 (1996). "The FLSA established a minimum wage of twenty-five cents per hour for the first year it was in effect, with an increase to thirty cents in the second year, and forty cents in the seventh year." MARK ROTHSTEIN, EMPLOYMENT LAW 195 (1994). The minimum wage was increased in 1989, in two steps—from $3.35 to $4.25 per hour. *Id.* at 196. President Clinton recently signed legislation to raise the minimum wage by 45 cents per hour in 1996 and again in 1997. This would mean that the minimum wage would increase to $5.15 per hour by September 1997. *See* John F. Harris, *Minimum Wage Hiked in High Profile Signing*, WASH. POST, Aug. 21, 1996, at A4.

[55] 29 U.S.C. § 202 (1996).

[56] *Id.*

covered unless he was engaged in commerce or in production of goods for commerce."[57] Later, "Congress broadened the scope of the [FLSA] by adding enterprise coverage, which focuses instead on the nature of the employer's business. All employees of a covered enterprise are automatically covered without regard to the duties of each individual worker."[58]

Almost every state has a wage-hour law that requires the payment of a minimum wage. Some states set the wage lower than the federal rate for workers who are not covered by the federal legislation.[59] Importantly, the FLSA expressly allows states to impose a "higher [wage] . . . than federal law."[60] Some local governments have imposed local minimum wage laws and ordinances that require firms that do business with the local government entity to pay a minimum wage of up to $6.60 per hour in 1996.[61] Baltimore will require such employers to pay a minimum or living wage of $7.70 per hour for employees in 1998.[62] The presence of state and local minimum wage provisions affect the importance of the federal minimum wage. For example, an employee may not necessarily be covered by the federal minimum but nonetheless may be eligible for locally determined minimum wages. Furthermore, higher state and local minimum wages have been employed by some observers as the basis for the demand for a higher federal rate.[63]

### B. *Rationale*

The traditional rationale for minimum wage laws is to ensure a certain standard of living for disadvantaged American workers. Minimum wage laws are largely a product of the progressive New Deal era, which represented for some citizens a "desirable" shift from private ordering "in favor of direct public regulation,

---

[57] 29 U.S.C. § 203 (1996); *see also*, ROTHSTEIN, *supra* note 54, at 197–99. "Congress intended the term 'engaged in commerce' to extend to the limits of the commerce clause." *Id.* at 197.

[58] ROTHSTEIN, *supra* note 54, at 197. In order "[t]o qualify for enterprise coverage a business must satisfy three requirements: the statutory definition of 'enterprise', a commerce standard and a dollar volume test." *Id.* at 197–98.

[59] *Id.* at 227.

[60] *Id.*

[61] USA TODAY, *supra* note 20, at 12A. This approach is being implemented in Baltimore, Maryland, and Santa Clara County, California.

[62] *Id.*

[63] *See id.*

which ha[d] been thought strictly necessary to redress the perceived imbalance between the individual and the firm."[64]

In 1937, President Roosevelt, discussing the Fair Labor Standards Act, asserted "[a]ll but the hopelessly reactionary will agree that to conserve our primary resources of manpower, government must have some control over maximum hours, minimum wages . . . and the exploitation of unorganized labor."[65] The original version of FLSA created an independent agency called the Labor Standards Board, which was composed of five members.[66] The Board could investigate and order the payment of higher wages when it found that wages lower than a fair minimum wage were being paid to employees in certain occupations due to the inadequacy or ineffectiveness of collective bargaining.[67] Upon signing the FLSA, Roosevelt commented that "[e]xcept for the Social Security Act, [the FLSA] is the most far-reaching, far-sighted program ever adopted here or in any [other] country."[68]

In upholding federal minimum wage laws, the United States Supreme Court has employed the same traditional rationale in viewing the minimum wage as a progressive program to help disadvantaged workers. In United States v. Darby, 312 U.S. 100 (1941), the Court ruled that Congress has the constitutional power to prohibit the shipment in interstate commerce of goods that are manufactured by employees whose wages are less than a prescribed minimum, since wages below the prescribed level would be "detrimental to the maintenance of the minimum standard of living necessary for health and general well-being . . . ."[69]

The rhetoric of protecting disadvantaged workers through minimum wage regulation has also been widely used by the labor

---

[64] Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984).

[65] Christine Neylon O'Brien, *Revising the Minimum Wage for the 1990s*, 12 LOY. L.A. INT'L & COMP. L.J. 217, 218 (1989) (quoting Nordlund, *A Brief History of the Fair Labor Standards Act*, 39 LAB. L.J. 715, 719 (1988)).

[66] John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, *in* AMERICAN LANDMARK LEGISLATION: THE FAIR LABOR ACT OF 1938 15 (Irving J. Sloan ed., 1984). The proposed creation of labor or wage boards mirrors to some extent the earlier enacted National Industrial Recovery Act (NIRA), which was subsequently invalidated by the United States Supreme Court.

[67] *Id.* The provision allowing minimum wages to be set by a Labor Standards Board was subsequently dropped.

[68] Shapiro, *supra* note 13, at 655.

[69] United States v. Darby, 312 U.S. 100, 109 (1941); *see also* West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding statute making it unlawful to employ women or minors under conditions of labor detrimental to their health or morals at wages that did not adequately provide for their maintenance).

unions.[70] Recent efforts to raise the minimum wage have been vigorously supported by various labor advocates,[71] including the president of the AFL-CIO, the president of the Amalgamated Clothing and Textile Workers Union and the president of the International Ladies Garment Workers Union.[72] For instance, Lane Kirkland, President of the AFL-CIO, stated: "To the extent that the minimum wage does not provide a living wage, public assistance must fill the need. In a very real sense employers who pay low wages receive a tax subsidy. This is unfair to the low-wage worker and other taxpayers, and it undermines the incentive to work."[73] In addition, he argued that since African Americans make up thirteen percent of those working for minimum wage, a "fair" minimum wage is a civil rights issue as well.[74] In dismissing arguments against a "moderate" minimum wage increase as "misleading or feeble," Secretary of Labor Robert Reich stated that raising the minimum wage is not simply a matter of economics, it is a question of morality.[75]

### C. *Coverage Generally*

Largely because of the contention that minimum wage workers tend to come disproportionately from low-income and minority families, the minimum wage has attracted the attention of social activists.[76] In analyzing the effects of minimum wage laws,

---

[70] Labor has been fighting for improved wages, hours and working conditions for more than a century. However, significant evidence suggests that the "original minimum wage law was enacted in part to decrease the advantage that low-wage Southern factories had over [higher-wage] Northern ones." JAMES BOVARD, LOST RIGHTS 92 (1994).

[71] Senator Edward Kennedy revived the debate over the minimum wage by proposing the Minimum Wage Restoration Act of 1987, S. 837, 100th Cong., 1st Sess. (1987). The proposal sought to increase the minimum wage from $3.35 per hour to $3.85 per hour in 1988, $4.25 in 1989, and $4.65 in 1990 "with raises thereafter indexed to fifty percent of the average hourly rate." *See* Neylon O'Brien, *supra* note 65, at 220; *see also Minimum Wage Restoration Act of 1987: Hearings on S. 837 Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 1 (1987).

[72] Neylon O'Brien, *supra* note 65, at 219–20. For evidence of more recent labor union advocacy, see Gerald F. Seib, *Organized Labor Shows a Pulse; GOP Feels Ill*, WALL ST. J., Apr. 24, 1996, at A16 (Republicans respond to pressure by the AFL-CIO to raise the minimum wage).

[73] *Minimum Wage Restoration Act of 1987: Hearing on S. 837 Before the Senate Comm. on Labor and Human Resources*, 100th Cong., 1st Sess. 300 (1987) (Statement of Lane Kirkland, President, AFL-CIO).

[74] *Id.* at 303.

[75] *Minimum Wage Hearings of the Senate Labor and Human Resources Committee*, Federal News Service, Dec. 19, 1995, *available in* LEXIS, Legis Library, ALLNWS File.

[76] CARD & KRUEGER, *supra* note 17, at 6.

it is crucial to examine whether low-income and minority families will in fact reap the benefits of higher wages. In the first place, are they a significant portion of those who are currently covered by a minimum wage? And secondly, what effect will a minimum wage increase have on the poverty of non-workers who might be deprived of future work given their current level of productivity?[77]

The statistical figures regarding the composition of workers currently working for minimum wage suggests that the poverty levels of minority and low-income individuals are not improved by wage regulation. In fact, a higher minimum wage is more likely to aid middle-class families.[78] Approximately fifty percent of minimum wage workers are teenagers or young adults aged twenty-one years or less.[79] Additionally, "most (almost seventy percent) live in families with incomes two or more times the official poverty level for their family size. The average family income of a teenage minimum wage worker is around $47,000; only twelve percent of these young minimum wage workers live in poor families."[80]

Further, while a significant number of older minimum wage workers are members of low-income families,[81] many of them are not the only income providers for the family. For this reason, it is unlikely that higher minimum wages will impact the overall poverty level of low-income families. "The average family income of minimum wage workers aged twenty-five to sixty-one is around $25,000."[82] Significantly only "twenty-three percent of minimum wage workers were the sole breadwinners in their families in the previous year. The wage and salary earnings of fifty-six percent of minimum wage workers account for twenty-five percent or less of their families' total wage and salary incomes."[83]

---

[77] Evidence mounts that federal minimum wage "requirements . . . have materially altered the market for relatively unskilled labor." VEDDER & GALLAWAY, *supra* note 8, at 39. The question of whether minimum wage laws in fact decrease employment for unskilled laborers will be addressed in part IV.

[78] James Aley, *Help for the Middle Class*, FORTUNE, Apr. 5, 1993, at 24 (citing Urban Institute economist Ronald Mincy).

[79] Mark Wilson, *Why Raising The Minimum Wage is a Bad Idea*, May 17, 1995, at 10 (on file at The Thomas A. Roe Institute for Economic Policy Studies, The Heritage Foundation, 214 Massachusetts Ave. N.E., Washington, DC 20002-4999).

[80] *Id.*

[81] *Id.* Twenty-seven percent of minimum wage workers over the age of 22 live in poor families, and 44% have family incomes below or near the poverty level.

[82] *Id.*

[83] *Id.*

Lastly, only "sixteen percent of minimum wage workers are full-year/full-time employees. Thirty-three percent are part-year/part-time employees and, almost half . . . are voluntary part-time workers."[84] Hence, even proponents of higher minimum wages concede that the effect of the minimum wage on the *overall* poverty rate of adults is statistically undetectable.[85]

## III. The Economics of Minimum Wages

The above section suggests that raising the minimum wage may not benefit the low-income and minority families that minimum wage proponents claim to protect. Applying a more complex economic analysis to the issue of minimum wage raises the possibility that minimum wage laws may in fact harm these families by lowering employment levels, particularly for unskilled labor. A Critical Race reformist examination of minimum wages can be advanced by understanding the negative effects of minimum wage regimes on African American unemployment. A first step in such an understanding is the development of a conceptual framework for analyzing how minimum wage regimes have worked and should work.

At the outset, it is important to realize the limitations of economic analysis. Economists attempt to discover "scientific laws of society" that predict human and market behavior.[86] Tension exists in combining the notion of the "individuals' freedom of action with the scientists' desire to discover the systematic aspects of the unintended and quite often unpredictable consequences of human action."[87] Proponents of the neo-classical model of economics assume that economic actors make decisions with perfect knowledge. However, if perfect knowledge is available, it becomes "pointless to ask how the market process can induce co-ordination among decisions; such co-ordination is already implied in the perfect knowledge assumption."[88] On the other hand, post-Keynesian economists see the future as uncertain and systematic coordination of the market as impossible.[89] The eco-

---

[84] *Id.*

[85] Card & Krueger, *supra* note 17, at 280.

[86] Stefano Zamagni, *Economic Laws, in* The Invisible Hand 99 (John Eatwell, Murray Milgate, & Peter Newman eds., 1989).

[87] *Id.*

[88] Israel M. Kirzner, The Meaning of Market Process 4–5 (1992).

[89] *Id.* at 5.

nomic analysis used in this Article is drawn from the work of Israel Kirzner, which reconciles these two extremes by suggesting that mutual knowledge is full of gaps at any given time, "yet the market process is understood to provide a systemic set of forces, set in motion by entrepreneurial alertness, which tend to reduce [but not necessarily eliminate] the extent of mutual ignorance."[90]

Kirzner's model concedes that the world is in a constant state of flux, but argues that the "rapidity and unpredictability of these changes [are] not, in general, so extreme as to frustrate the emergence of powerful and pervasive economic regularities."[91] Because entrepreneurs remain alert to discover profitable failures in the existing patterns of co-ordination, the market exhibits equilibrating tendencies that can be perceived over time.

### A. *Minimum Wage Theory*

Understanding the limits of economic analysis and theory as discussed above, it remains possible to investigate the theoretical economic effects of the imposition of a statutorily or union-mandated higher minimum wage if one works from two acceptable assumptions—perfect knowledge is unattainable and entrepreneurs prefer higher profits.

#### 1. Effects on Existing Workers

Assuming that a particular minimum wage increase is binding,[92] then to the extent that a minimum wage increase requires that employers pay *existing* workers the new higher rate, employers will determine by trial and error whether it makes financial sense to retain all, some, or any of the existing workers. Thus, the prevailing level of employment could potentially be adversely affected.[93] For example, suppose one box per day can be built using either two high-skilled workers or five low-skilled workers. If the wage of the high-skilled unionized box workers

---

[90] *Id.*

[91] *Id.*

[92] A "binding" minimum wage rate change increases the wage rate above the previously determined wage rate.

[93] *See* David E. Bernstein, *Roots of the 'Underclass': The Decline of Laissez-Faire Jurisprudence and The Rise of Racist Labor Legislation*, 43 AM. U. L. REV. 85, 130 n.320 (1993).

is $125 per day and the wage of the low-skilled workers is $40 per day, then the buyer of the box can employ two high-skilled workers for a total of $250 per box or five low-skilled workers for $200 per box. Successful box makers may choose to hire five low-skilled workers, assuming that all other costs are held constant. Therefore, high-skilled workers may have an economic incentive to insist that the government or the box industry trade association establish minimum wages of $60 per day and thus provide an economic incentive for box manufacturers to lay off low-skilled workers. Whatever the motives of the high-skilled box workers union, low-skilled workers will likely be adversely affected.[94]

#### 2. Effects on New Workers or Workers Not Currently in the Workforce

To the extent that the new higher minimum wage requires the employer to pay *new workers* at the higher hourly rate, employers will weigh whether employment of an additional worker makes financial sense. This could then potentially result in adverse effects on the rates of employment growth.[95]

#### 3. Effects on Potential Offsets

To the extent that a minimum wage raises labor costs and to the extent that demand for the product or service in issue remains unchanged, the employer must determine if the additional cost (net of offsets) can be shifted to consumers in the form of higher prices, to the shareholders in the form of lower returns, or a combination of both. Alternatively, she must consider whether other offsetting efficiencies are available, and finally, whether she should remain in the business.

### B. *The Prevailing Economic Vantage Point*

The prevailing view of economists has been that minimum wage laws adversely affect the most poorly educated and least experienced workers who are thereby "deprived of the opportu-

---

[94] *Id.*
[95] *See id.*

nity to improve their productivity through job experience."[96] While the topic of minimum wages has sparked a lively debate, especially when the data is broken down into component groups by age, race and gender, there is almost uniform agreement that non-whites are subject to the greatest risk of unemployment as a result of the imposition of minimum wage regimes.[97] In addition, to the extent that minimum wage laws create a surplus of labor at the higher and binding wage rate, such laws make "discrimination costless."[98] In 1948, when the minimum wage was forty cents per hour, "black youth were more likely than white youth to be in the labor force, and they had a lower unemployment rate."[99] Today "their unemployment rate is four times higher than in 1948 and twice as high as white youths."[100] Moreover, in 1956, when the minimum wage rate was increased by thirty-three percent, "non-white teenage unemployment increased from thirteen percent to more than twenty-four percent."[101] This reinforces the view of many economists who argue that "skilled union laborers know that the minimum wage raises both the demand for their services and their wages by making their competitors, unskilled labor, more expensive and thus less attractive to employers."[102]

In addition, a study of the 1990-91 two-staged federal minimum wage hike found that statutorily imposed wage increases for low-wage workers produced disproportionate and negative effects for African Americans and women in the form of increased unemployment.[103] This demonstrates that minimum wage regimes

---

[96] STEVEN E. RHOADS, THE ECONOMIST'S VIEW OF THE WORLD 102 (1993); *see also* Linda Gorman, *Minimum Wages*, *in* THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 499 (David Henderson, eds., 1993) (noting that 90% of the American Economic Association's members surveyed agreed that the minimum wage increases unemployment among low-skilled workers).

[97] *See, e.g.*, FINIS WELCH, MINIMUM WAGES: ISSUES AND EVIDENCE 40 (1978) (stating that based on coefficients of marginality, non-white males aged 20 years or older and non-white males and non-white females aged 16–19 were subject to the greatest risk of unemployment).

[98] RHOADS, *supra* note 96, at 102.

[99] *Id.*

[100] *Id.*

[101] *Id.* (footnote omitted).

[102] *Id.* at 104 (footnotes omitted). For a study that finds half the decline in black teenage employment since 1950 attributable to expansions in minimum wage law coverage, see PUBLIC INTEREST no. 67 (Spring 1982), *cited in id.* at 263. Additionally, a federal commission estimated that the 46% increase in the minimum wage in real terms between 1977 and 1981 resulted in the loss of 644,000 jobs. *See* BOVARD, *supra* note 70, at 92.

[103] Deere, *supra* note 17, at 51. The effect of increasing the minimum from $3.35 to

> focus on wages, not employment; *if* someone is employed, then he will receive at least the guaranteed wage. The law sets the terms of whatever employment happens to occur. The reduction in employment that results from increases in the minimum wage which is concentrated among those workers with the fewest skills, is the cruel 'dark side' of such legislation.[104]

### C. *The Card-Krueger View*

The Card-Krueger (CK) study, published in *Myth and Measurement*, is in reality a compilation of several studies that began in 1990.[105] The CK study challenges many of the conclusions linking higher minimum wages and unemployment discussed in the above section. David Card and Alan Krueger and, at times, Lawrence Katz examine the effects of a state-mandated minimum wage increase on the fast-food industry in New Jersey, the effects of a federally mandated minimum wage increase on the fast-food industry in Texas, and the effects of a state minimum wage increase in California on teenagers and the retail trade industry.[106] The CK study also relies on cross-state comparisons of the effects of the federal minimum wage on low-wage workers in concluding that higher minimum wages have no adverse employment effects.[107]

At the outset, it is important to note that certain questionable methods were employed in the CK study. The New Jersey and California studies are the results of so-called "natural" experiments.[108] This controversial methodology resembles the approach employed by researchers in the natural sciences in that the effects of a minimum wage change in one area are compared to areas that did not experience a minimum wage increase. The authors assert the superiority of this method in contrast to more conventional modes of analysis, such as econometric studies of

---

$3.80 was to reduce the employment of high school adult dropouts by 1.5% for all men, 2.5% for all women and 4.4% for African Americans; the effect of increasing the minimum from $3.35 to $4.25 was to reduce employment of high school adult dropouts by 3.1% for all men, 5.2% for all women and 6.7% for African Americans; moreover, African American teenagers were also disproportionately unemployed as a result of the minimum wage hike. *Id.*

[104] *Id.* at 52.

[105] CARD & KRUEGER, *supra* note 17.

[106] *Id.*

[107] *Id.* at 113, 140.

[108] *Id.* at 21–25.

time-series and cross-sectional data.[109] In New Jersey and Texas, the controversy that surrounds the natural experiment approach is reinforced by virtue of the fact that the study was based on telephone surveys as opposed to an examination of actual payroll records.[110]

### 1. The New Jersey Results

The New Jersey study has received the most attention and has provoked the most response. The effect of the New Jersey minimum wage increase on fast-food restaurants was compared to fast-food restaurants in eastern Pennsylvania, the control group. According to the study, fast-food entrepreneurs responded to the New Jersey minimum wage rate hike by expanding employment in New Jersey relative to Pennsylvania, where the minimum wage remained unchanged.[111] More specifically, the authors concede that their analysis of teenage unemployment opportunities is imprecise but assert that the results "do not point to any relative reduction in employment opportunities for low-wage workers in New Jersey."[112]

Significantly, the price of meals in New Jersey rose by about four percent relative to Pennsylvania.[113] This evidence indicates that higher minimum wages may result in higher prices.[114]

### 2. The Texas Results

The first round of the Texas survey was initiated in December 1990, eight months after the 1990 increase in the federal minimum wage to $3.80 per hour and four months before the scheduled April 1991 increase to $4.25. A second survey was conducted eight months later and included restaurants that had not responded to the first round of the survey. Adding to the uncertainty of the study, the Texas results were "associated with a

---

[109] Douglas K. Adie & Lowell Gallaway, *Book Review: Myth and Measurement: The New Economics of the Minimum Wage*, 15 CATO J. 137, 137–38 (Spring/Summer 1995).

[110] CARD & KRUEGER, *supra* note 17, at 28, 58.

[111] *Id.* at 66.

[112] *Id.* at 68.

[113] *Id.* at 54.

[114] *See* Wimmer, *supra* note 17 (pointing out that while there may not have been a minimum wage induced substitution of capital for labor, fast-food franchisees did raise prices three to four percent in response to the minimum wage increase). Importantly, higher prices lower the real (inflation adjusted) income of consumers.

relative expansion in employment at firms that were forced to raise pay in order to comply with the law."[115] The effect of the wage increase on the price of the products sold by the restaurants was imprecise. Consistent with the New Jersey study, the authors contend that the higher minimum wage had no effect, or at least no detectable negative effect, on either the net number of restaurants operating in a state or the rate of new restaurant openings.[116]

### .3. The California Results

The authors asserted that California's increase in the minimum wage had little or no adverse employment effects for low-wage workers.[117] But, after re-examining the evidence in response to academic criticism, they conceded that the alternative approaches used by other researchers indicate employment losses rather than gains for teenagers as a result of a higher wage minimum.[118] Still, on balance, Card and Krueger concluded that the state minimum wage increase "had a significant impact on wages, but no large or systematic effect on employment."[119]

### 4. The Overall Effect of the Minimum Wage on African Americans and the Level of Poverty

While it has been argued that prior minimum wage studies provide conflicting evidence on the issue of whether African Americans are more adversely affected than whites,[120] Card and Krueger conceded that after an investigation of those workers who are likely to be adversely affected by the minimum wage, twenty-one percent of the total "high probability" workers are African American.[121] This becomes important in light of the fact that African Americans currently constitute a disproportionate share of unemployed Americans.[122] Yet, Card and Krueger con-

---

[115] CARD & KRUEGER, *supra* note 17, at 58.

[116] *See id.* at 64.

[117] *See id.* at 110 (David Card performed the original study but it was embraced by both authors in their book, MYTH AND MEASUREMENT).

[118] *See id.*

[119] *Id.*

[120] *See id.* at 180–81.

[121] *Id.* at 138.

[122] ECONOMIC REPORT OF THE PRESIDENT 325 (1996). The African American unemployment rate was 14.3% in 1980 (last year of the Carter Presidency); 11.7% in 1988

clude that "though the minimum-wage increases were associated with substantial wage gains for low-wage workers . . . these gains did not lead to reduced employment opportunities."[123] Further, Card and Krueger indicate that the "effect of the minimum wage on the *overall* poverty rate of adults is statistically undetectable."[124]

### D. *Academic Responses to the Card-Krueger Study*

While it has been claimed that the Card-Krueger study is the result of the "most sophisticated techniques available to economists,"[125] there is no inherent reason to believe that Card and Krueger's methodology is superior to more conventional forms of economic analysis.[126] One of the major weaknesses of the CK study's approach is deficient data collection methodology.[127] In actuality, the application of sophisticated techniques to verifiable records as opposed to telephone survey data seems to confirm that higher minimum wages cost jobs.[128] When other scholars attempted to match the telephone survey data utilized by Card and Krueger with actual payroll records,[129] the results of the New Jersey study—on which much of the validity of their book hinges—disintegrate. In fact, when David Neumark and William Wascher examined New Jersey and Pennsylvania employment by reviewing actual payroll records, they were led ineluctably to the conclusion that an *increase* in minimum wages leads to a *decrease* in relative employment.[130] Accordingly, the credibility of CK's New Jersey-Pennsylvania conclusions is questionable.

The results of the Texas study are also beyond verification. Finis Welch points out that the Texas study of 100 fast-food

---

(last year of the Reagan Presidency); 14.1% in 1992 (last year of the Bush Presidency); and 10.4% in 1995. On the other hand, the overall unemployment rate for the United States was 7.1%, 5.5%, 7.4% and 5.6% during the same time periods. *Id.*

[123] CARD & KRUEGER, *supra* note 17, at 140; *see also id.* at 137–40.

[124] *Id.* at 280.

[125] Berman, *supra* note 17.

[126] Adie & Gallaway, *supra* note 109, at 138.

[127] *See generally* Finis Welch, Comment, 48 INDUS. & LAB. REL. REV. 842 (1995).

[128] Berman, *supra* note 17.

[129] Welch, *supra* note 127, at 849 (quoting Berman, *supra* note 17); *see also The Crippling Flaws in the New Jersey Fast Food Study* (2d ed., Apr. 1996) (on file at The Employment Policies Institute, Ste. 1110, 607 14th St., N.W., Washington, DC 20005) (stating that CK's New Jersey fast-food study is seriously flawed in terms of its data and its conclusion).

[130] Neumark & Wascher, *supra* note 17, at 1–2.

restaurants is inconclusive and uninformative.[131] Welch further states that students in an introductory statistics class understand that "an inconclusive result does not prove there is no effect."[132]

The California study, which primarily investigated teenage employment responses to the 1988 increase in the state minimum wage, gives rise to additional elementary issues. For instance, Card and Krueger maintain that there was a relative increase in teenage employment in California in comparison with the "control" group of Georgia, Florida, New Mexico, Arizona, and the Dallas-Fort Worth area of Texas despite the fact that California's teenage employment fell briefly and rebounded above previous levels.[133] Unfortunately, however, California's economy was expanding while the comparison areas were stagnant,[134] and therefore, one should expect teenage employment to rise in California relative to these areas.[135] This undercuts the CK study's causal claims. In fact, Taeil Kim and Lowell Taylor re-examined the California study. They concluded that "the greater the increase in wages due to the increased minimum, the greater the loss of employment."[136]

Lastly, another study principally authored by Card "examined differences across states in changes in teenage employment surrounding the 1990 increase in the federal minimum wage."[137] Card asserts that "if increases in the minimum [wage] reduce employment, it follows that the reductions should be greatest in the states with the lowest wages, because compliance with the increased minimum is more expensive in those states."[138] But as Welch argues, this is not necessarily true as the low-wage states were located in the South and Southwest "where relative employment growth was most rapid."[139]

In sum, there is no truly credible reason to embrace David Card and Alan Krueger's results. The results and methods of

---

[131] Welch, *supra* note 127, at 846.

[132] *Id.*

[133] CARD & KRUEGER, *supra* note 17, at 85–87; *see also* Welch, *supra* note 127, at 846.

[134] *Id.*

[135] In addition, Welch suggests that what economists call "background noise" may dominate the signal from the higher minimum wage and thus compound the unreliability of the California study. *See* Welch, *supra* note 127, at 847.

[136] Deere, *supra* note 17, at 54. While Card and Krueger concede the results reached by Kim and Taylor, they conclude that Kim and Taylor utilized weak data. *See* CARD & KRUEGER, *supra* note 17, at 101.

[137] Welch, *supra* note 127, at 847.

[138] *Id.*

[139] *Id.*

their study have been questioned and criticized by many.[140] Further, the authors themselves do not seem to see their study as supporting the higher minimum wage movement. As recently as 1993, when the results of the New Jersey study were available, Krueger said: "I want to emphasize that my comments should not be interpreted as support for the position that increasing the minimum wage is sound public policy."[141] Additional work is clearly required before anyone can accept the basic notion that higher mandated wage increases have positive effects, or at the very least, no negative effects on employment. Even disregarding this debate over the relationship between higher minimum wages and unemployment levels, Card and Krueger still concede little or no benefit from minimum wage regimes in terms of reduced poverty.

In any case, both the academic literature and the failings of the CK study contribute support to the inverse relationship between minimum wages and overall employment and to the inverse and disproportionately negative impact of the minimum wage on African American employment.[142] These disparate ef-

---

[140] *See* Charles Brown, Comment, 48 INDUS. & LAB. REL. REV. 828 (1995) (disagreeing with CK's claim that their results favor a model based on informational imperfections rather than a shortage of competing employers); Daniel S. Hammermesh, Comment, 48 INDUS. & LAB. REL. REV. 835 (1995) (CK's strongest evidence is fatally flawed). *But see* Paul Osterman, Comment, 48 INDUS. & LAB. REL. REV. 839 (1995) (the CK book is terrific); Richard Freeman, Comment, 48 INDUS. & LAB. REL. REV. 830 (1995) (the book has caused him to revise upward the level of the minimum wage at which income can be redistributed without causing job losses).

[141] Alan Krueger, *Have Increases in the Minimum Wage Reduced Employment?*, 2 JOBS & CAPITAL 11 (1993), *quoted in* Adie & Gallaway, *supra* note 109, at 139–40.

[142] Elementary economic theory suggests that as the price of an input rises, holding other things equal, the quantity demanded tends to fall. Accordingly, as the wage rate paid to minority workers rises (without commensurate improvement in human capital in the form of more education and more marketable skills), the quantity demanded for minority employment should fall as African Americans and other minority groups are disproportionately located in the low-skilled and hence most impacted wage groupings. The CK study attempted to disprove this formerly well-established notion without success, and accordingly, the validity of the academic literature that previously established the inverse relationship between minimum wages and overall employment remains intact.

While a complete listing of the available academic literature exceeds the scope of this enterprise, for further support for this view, see Marvin Kosters & Finis Welch, *The Effects of Minimum Wages on the Distribution of Changes in Aggregate Employment*, 62 AM. ECON. REV. 323–32 (1972); ARMEN A. ALCHIAN & WILLIAM R. ALLEN, EXCHANGE AND PRODUCTION: COMPETITION, COORDINATION, AND CONTROL 335 (3d ed. 1983) (stating that the groups most vulnerable to the adverse effects of minimum wages include teenagers, blacks, women and the aged); RICHARD B. MCKENZIE, MICROECONOMICS 313 (1986) (discussing how minimum wages tend to destabilize the employment of non-whites and the young); Gary S. Becker, *It's Simple: Hike the Minimum Wage, and You Put People Out of Work*, BUS. WK., Mar. 6, 1995, at 22 (stating that the CK studies are flawed and cannot justify going against the accumulated

fects likely constitute a form of racial discrimination that reinforces the poverty of African Americans in the United States.

A Critical Race reformist perspective demands that we examine the demonstrable effects of minimum wage regimes on African Americans, a group that has been excluded at times from our nation's calculus of the actual benefits of such schemes. The demonstrably negative effect of minimum wages on minorities calls into question the allegedly neutral considerations that minimum wage proponents deploy. It is possible that exclusionary animus, not neutrality, animates minimum wage advocacy.

The next section continues the application of a Critical Race reformist perspective to minimum wage regimes by examining labor history in an effort to determine if minimum wages are linked to a cultural context of resistance and liberation, or instead, are linked to forces of racial oppression. It also provides explicit and implicit information about whether the proponents of minimum wage laws had knowledge of both the effects and purposes of minimum wage regimes.

## IV. Deconstructing Minimum Wage Regimes: A Critical Race Reformist Perspective of Minimum Wages

### A. *Creating Outsiders in the United States: U.S. Labor Unions and African Americans*

While it has been asserted that the federal minimum wage law "is directed at unorganized and otherwise unprotected workers who lack legitimate bargaining power in the workplace,"[143] labor unions are among the most committed supporters of minimum wages. Therefore, for the purpose of assessing the true motivation behind minimum wage regimes, it is instructive to review unions' minimum wage advocacy within the context of American labor history.

---

evidence from the many past and present studies that find sizable negative effects of higher minimum wages on employment for low wage groups); Douglass North & Roger Miller, The Economics of Public Issues 125 (1983) (noting that when the minimum wage was increased by 33.3%, non-white teenage employment increased by close to 45%), *cited in* Rhoads, *supra* note 96, at 102; Deere, *supra* note 17; *see also supra* notes 102 and 103 and accompanying text.

[143] Garrett R. Krueger, Notes & Comments, *Straight-time Overtime and Salary Basis: Reform of the Fair Labor Standards Act*, 70 Wash. L. Rev. 1097, 1109 (1995).

The labor movement was primarily initiated by educated urban workers employed in relatively high-income crafts in the period prior to the 1850s. The early union movement was led by Samuel Gompers of the American Federation of Labor (AFL), which was "founded in 1881 as a federation of national trade unions, each composed of a particular craft."[144]

Other unions developed, including the Council of Industrial Organizations (CIO), which was allegedly less committed to racial hegemony than the AFL,[145] and several railroad unions, which were strongly committed to whites-only membership policies.[146] During the period from 1917 to 1933, total union membership doubled; by 1920, five million members or twelve percent of the labor force were unionized.[147] Membership later fell to 3.5 million prior to the Great Depression,[148] and bottomed out at 2.8 million in 1933.[149]

During the Depression, mass protests—the traditional means of labor union activism—gave way to politics.[150] Largely as a result of the disastrous economy and the influence of labor, several major pieces of labor-sensitive legislation were enacted.[151]

---

[144] MORGAN O. REYNOLDS, MAKING AMERICA POORER 5 (1987). Although initially supportive of the possibility of organizing unskilled workers, Gompers' philosophy changed after 1901. *See* BERNARD MANDEL, SAMUEL GOMPERS: A BIOGRAPHY 233 (1963). In 1905, Gompers stated: "the masses of the unskilled [workers] were probably unorganizable," blaming the workers' perceived lack of intelligence. *Id.*

[145] AUGUST MEIER & ELLIOTT RUDWICK, BLACK DETROIT AND THE RISE OF THE UAW 3–5 (1979). Nonetheless, "[f]ew CIO unions expended any energy in preventing their employers from discriminating in hiring." Bernstein, *supra* note 93, at 128.

[146] ROBERT H. ZEIGER, AMERICAN WORKERS, AMERICAN UNIONS 82 (2d ed. 1994) (most of the independent railroad unions barred blacks from membership). A selected list of labor organization that discriminated against blacks in 1930 includes the American Federation of Express Workers (AFEW); American Federation of Railway Workers (AFRW); American Train Dispatchers Association (ATDA); Boilermakers, Iron Shipbuilders and Helpers Union (BIS); Brotherhood of Dining Car Conductors (BDCC); Brotherhood of Locomotive Firemen and Enginemen (BLFE); Brotherhood of Railroad Trainmen (BRT); International Association of Machinists (IAM); Order of Railway Expressmen (ORE); and Railroad Yard Masters of America (RYMA). *See* Morgan Reynolds, *Labor Unions*, THE FORTUNE ENCYCLOPEDIA OF ECONOMICS 494, 498 (David Henderson ed. 1993) (citing F. Ray Marshall).

[147] REYNOLDS, *supra* note 144, at 7.

[148] *Id.* at 8.

[149] *Id.*

[150] ZEIGER, *supra* note 146, at 15–41.

[151] REYNOLDS, *supra* note 144, at 8. Franklin Delano Roosevelt's resounding re-election despite the strong opposition of powerful corporate interests "galvanized working-class communities." ZEIGER, *supra* note 146, at 46. John Lewis, head of the United Mineworkers Union and a leader of the CIO stressed: "'we must capitalize on the election . . . [and] organize' the industrial masses." *Id.* Soon afterward, "CIO unions won monumental victories in the two most obstinate open shop industries, auto and steel," despite at times their rather open conflict with African American workers. *Id.* *See generally* MEIER & RUDWICK, *supra* note 145, at 34–38. Contextually, it should

This period of pro-union, pro-labor legislation began with the enactment of the Railway Labor Act of 1926 and extended to the passage of the Fair Labor Standards Act (FLSA) of 1938.[152]

However, these advances did not benefit all groups equally. As Robert Weaver, an African American New Deal economist, observed: "wage differentials based on race rather than training, experience, or efficiency threatened to destroy not only the New Deal recovery program but any hope of having a really egalitarian labor movement in the United States."[153]

Weaver's fears were justified, as the history of American labor unions has been infused with discrimination toward African Americans. "Although AFL conventions often piously invoked American ideals of equality, in practice even organizations that espoused egalitarian sentiments consistently deferred to the prejudices of their southern white membership and acquiesced in discriminatory wage levels and segregated facilities."[154] The Railway Brotherhood, historically one of the most powerful union organizations, illustrates the union commitment to the norms of separation and white supremacy.

The Railway Brotherhood regularly organized strikes, occasionally violent, aimed at forcing employers to pursue a whites-only hiring policy.[155] Some railroad unions also tried to persuade legislatures to pass "full crew" laws,[156] which by 1939 were operative in twenty-four states.[157] While the stated purpose was to improve "safety," at the insistence of the unions, state railroad officials interpreted the laws to hold that the many black porters

---

be noted that while the "CIO unionists spoke for vast thousands of unskilled and semiskilled workers[,] [i]f a CIO union struck, employers, especially in the slackened labor market of the 1930s, could readily find replacements." ZEIGER, *supra* note 146, at 46. On the other hand, the AFL craft unions and the railroad unions were able to enforce "high wage demands" by exclusion, legislation and violence. The membership differences that existed between the CIO and the AFL may account for some of the differences in their approaches to, and support for, proposed legislation before and during the New Deal.

[152] *See* discussion of FLSA, *supra* notes 54–58 and accompanying text.

[153] JOHN HOPE FRANKLIN, RACIAL EQUALITY IN AMERICA 87–88 (1976).

[154] ZEIGER, *supra* note 146, at 83; *see also* Bernstein, *supra* note 93, at 94 (noting that white union members and leaders generally refused to consider the strategy of treating blacks as equals, despite the potential economic benefits).

[155] Bernstein, *supra* note 93, at 99.

[156] A full crew law was allegedly animated by safety concerns and required that a train crew must consist of an engineer, a fireman, a conductor, a brakeman, and a flagman. Individuals who were employed in these categories were considered trainmen. These laws served as make-work for union members but were used to exclude African Americans as state railroad officials at the urging of the unions. *See id.* at 100.

[157] *Id.*

who did trainmen's work were not trainmen for statutory purposes.[158] Black porters thus had "to be replaced by white trainmen in order to comply with the law."[159] These events underscore that "[w]hen the unions could not exclude blacks through the collective bargaining process, they turned to government in an attempt to monopolize the railroad labor force,"[160] thus anticipating the trade union movement's later efforts to pass federal legislation before and during the New Deal period.[161]

Many labor unions used federal law to further racist goals. For example, under the auspices of the Railway Labor Act, the Brotherhood of Locomotive Firemen became the federally approved exclusive bargaining agent for all railroad firemen. The Brotherhood, in complicity with the federal government, negotiated an agreement with the southeastern carriers requiring a fifty percent reduction in the number of black firemen.[162] This agreement remained in force until the early 1950s.[163] By that time, the proportion of black firemen on that railroad line had been reduced from about eighty-five percent to approximately thirty-five percent.[164]

Segregationist and white supremacist policies were not limited to railroad unions. Other unions often adhered to a pernicious racial hierarchy to further their social[165] and economic[166] goals.

---

[158] *Id.*

[159] *Id.* at 101.

[160] *Id.* at 100. "During the infamous 1909 Georgia Race Strike, the Brotherhood of Locomotive Firemen submitted a licensing bill to the Georgia Legislature, explaining, 'The justice which has been denied the white firemen of the Georgia Railroad may be secured . . . through legislation such as that now pending in the lawmaking body of the State of Georgia.'" *Id.*

[161] *See generally id.* After World War I, when racially motivated strikes failed, white trainmen also engaged in terrorism, killing several black trainmen. *Id.* at 105.

[162] *Id.* at 108.

[163] *Id.* at 108–10.

[164] *Id.* at 110. The percentage of black railroad firemen in the entire South fell from 41.4% in 1920 to 33.1% in 1930 to 20.5% in 1940 and down to 7% in 1960. *Id.*

[165] *Id.* at 95. Many unions functioned as lodges or private clubs, sometimes replete with secret rites and membership rolls. *See* REYNOLDS, *supra* note 144, at 5.

[166] Capitalists generally desire the cheapest possible labor. On the other hand, workers from the dominant ethnic group resist the lower wage competition and accordingly bring pressure to bear on employers through law, crafts, and unions to entrench their advantage. GEORGE FREDERICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY 212 (1981). One theory predicts that "white workers would be the principal agents directly responsible for the growth of regularized patterns of racial discrimination in the industrial sphere." *Id.* While "[i]ndustrial capitalism may be a major cause of social and economic inequality in the modern world, it makes little historical sense to view capitalism as the source of ideologies directly sanctioning racial discrimination." *Id.* at 199. As Frederickson demonstrates:

Many white union members' loyalty to their unions transcended "narrow pecuniary self-interest"[167] and included "a powerful desire for esteem and status."[168] Thus, many white members wanted to exclude blacks from their unions because they believed that their "own social status would decline if they associated with blacks."[169]

Consistent with economic theory, unions also understood that if they "could exclude blacks, as well as women and immigrants, the supply of labor in their trades would decline significantly, leading to a significant rise in the price employers would pay for union labor."[170] Even "the CIO unions themselves, though embracing a racially egalitarian ideology, were inconsistent when it came to battling discrimination against black workers and, constrained by the prejudices of the white rank and file, often failed to live up to their official principles."[171] Union leaders and union members thus adhered to an "ideological collage" replete with racial domination and oppression for their own personal gratification[172] and to fulfill their own economic desires.[173]

---

> white-supremacist attitudes and policies originated in preindustrial settings where masters of European extraction lorded it over dark-skinned slaves or servants. The notion that nonwhites were created unequal to perform a servile role beneath the dignity of Europeans first became a militant idealogy or fighting faith when some of the values associated with the rise of *laissez-faire* capitalism in Great Britain and the northern United States were perceived by the holders of slaves or quasi-slaves as patently antagonistic to their practice of racial subordination.

*Id.* While it may be difficult to describe from a CRT perspective the free market as a vehicle of resistance to the forces of domination and white supremacy, market forces drew opposition from proponents of exclusion and subordination. *See id.* at 199–205.

[167] Richard McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1084 (1995) (footnote omitted).

[168] *Id.*

[169] Bernstein, *supra* note 93, at 95 (footnote omitted); *see also* McAdams, *supra* note 167, at 1084.

[170] Bernstein, *supra* note 93, at 95.

[171] MEIER & RUDNICK, *supra* note 145, at 4. One CIO union, the UAW, actually had an anti-discrimination clause in its constitution. *Id.* at 36. While Henry Ford, the head of Ford Motor Company, was not a supporter of the virulent anti-black sentiments that were widespread at the time, he was a strong supporter of racial segregation. *Id.* at 11–12.

[172] John O. Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 206 (1982).

[173] Although this labor union apartheid existed, African Americans who found jobs sometimes accepted white-led unions in fear of being frozen out of employment. MEIER & RUDNICK, *supra* note 145, at 108. Many of these African American workers were loyal to their employers, despite the fact that these employers "rarely placed blacks on an equal footing with whites." *Id.* at 3.

The exclusionary practices of labor unions took many forms.[174] One author notes that before the passage of the Civil Rights Act of 1964, "[m]any unions, for example, had formal prohibitions against black membership, and many others relegated black members to auxiliary or segregated locals."[175] In this way,

> unions without formal restrictions were able to exclude blacks or members of other minority groups by less formal means, such as requirements that new members be sponsored by present members, or rules allowing proposed new members to be blackballed by the votes of only a handful of present members, or membership policies giving preference to the relatives of present members.[176]

Exclusionary practices were most prevalent where the unions controlled access to work.[177]

When Congress enacted the National Industrial Recovery Act (NIRA), an act that had harmful effects on African Americans, during the New Deal, it did so with significant labor union support. As one civil rights activist of the 1930s noted, "the NIRA served to redistribute employment and resources from blacks—the most destitute of Americans suffering from the De-

---

[174] The United States Supreme Court reinforced this pattern of exclusion in Steele v. Louisville & Nashville Railroad, 323 U.S. 192 (1944). In *Steele*, the Court declined to require a railroad union to admit African Americans despite the union's status as an exclusive bargaining agent. *See* Michael J. Goldberg, *Affirmative Action in Union Government: The Landrum-Griffin Act Implications*, 44 OHIO ST. L.J. 649, 652 n.26 (1983) (footnotes omitted). The Court did hold that such unions have a statutory duty to represent all members of a bargaining unit fairly, whether they are members or not. *Steele* at 202–04. Nonetheless, the *Steele* decision confirms what Spann generally refers to as an incapacity of the Court "to constrain judicial discretion in a manner sufficient to prevent domination of the judicial process by the majoritarian preferences embodied in the socialized values of individual justices." Giradeau A. Spann, *Pure Politics*, 88 MICH. L. REV. 1971, 1975 (1990). The Court in *Steele* thus reified the exclusion of African Americans consistent with majoritarian preferences. This decision ensured a split within the United States labor market, which is defined by George Frederickson as "a labor market [which] contain[s] at least two groups of workers whose price of labor differs for the same work, or would differ if they did the same work." FREDERICKSON, *supra* note 166 (quoting Edna Bonacich).

[175] Goldberg, *supra* note 174, at 652 (footnotes omitted).

[176] *Id.*

[177] *Id. See, e.g.*, Local 53 of the International Association of Heat and Frost Insulators and Asbestos Workers v. Vogler, 407 F. 2d 1047 (5th Cir. 1969) (union claimed that its policy of excluding workers not related to current members by blood or marriage was nondiscriminatory). *See generally* WILLIAM GOULD, BLACK WORKERS IN WHITE UNIONS 67–98 (1977). Another commentator points out that black artisans were more prevalent in the American South where *more* prejudice but *less* discrimination existed, largely because of insistent labor union control in the Northern part of the United States and the lack of such union control in the South. *See* THOMAS SOWELL, PREFERENTIAL POLICIES: AN INTERNATIONAL PERSPECTIVE 31 (1990).

pression—to the white masses."[178] Trade unions took advantage of the monopoly powers granted to them by the NIRA[179] and its minimum wage provisions[180] to displace African American workers. Since African Americans were disproportionately located in the South, the NIRA's minimum wage provisions disadvantaged African Americans in terms of employment because the specified wage rate precluded generally low-wage, non-union Southern firms from undercutting Northern ones.[181] Further, the implementation of the FLSA caused "between 30,000 and 50,000 workers [mostly Southern blacks]" to lose their jobs within two weeks, according to the Labor Department.[182] When the proposed law or regulation disfavored African Americans either directly or indirectly, unions and their supporters often supported such rules.[183]

This oppressive history continued through the 1950s and into the 1960s, as the combined "AFL-CIO failed to compel some of its affiliates to stop discriminatory and segregationist practices."[184] In 1959, when A. Philip Randolph, the only black member of the twenty-seven member executive council, raised the issue at the AFL-CIO convention, AFL-CIO President George Meany ridiculed him: "Who the hell appointed you as the guardian of all the Negroes in America?"[185]

---

[178] Bernstein, *supra* note 93, at 120.

[179] *Id.* at 124.

[180] *Id.* at 121 (some employers dismissed black workers and others eliminated the jobs that blacks held). Initially, not all labor leaders were committed to minimum wages. Samuel Gompers, the leader of the American Federation of Labor in 1915 stated: "'[t]he history of all attempts to fix . . . wages by law, maximum or minimum, for workers generally, shows that they resulted in shackling the workers . . . .'" Daniel Hager, *Labor Leader: Wage Laws Shackle Workers*, THE DET. NEWS, May 26, 1996, at B7. After the death of Gompers, unions embraced the minimum wage. *Id.* More recently, John Sweeney, the current leader of the AFL-CIO, called the U. S. House of Representatives' passage of a minimum wage increase "'a direct and important breakthrough toward providing a better living' for 12 million American workers and their families." Jessica Lee, *House OK's 90-Cent Wage Hike*, USA TODAY, May 24, 1996, at 1A.

[181] Nor was this the only source of African American disadvantage. Wage differentials were codified in the NIRA in such a way that even when an African American employee performed more important tasks than a white employee, he would often have a lower job classification and hence a lower wage than his white counterpart. Bernstein, *supra* note 93, at 120–21.

[182] *Id.* at 130.

[183] For example, the Davis-Bacon act was largely supported by construction unions (that practically disallowed African American membership) and northern legislators. (Rep. Robert Bacon (N.Y.) was spurred to propose H.R. 17,069 because of an out-of-state contractor's successful bid to build a veteran's hospital in his district with non-union and significantly black labor.) *See id.* at 114.

[184] ZEIGER, *supra* note 146, at 174.

[185] *Id.* Even A. Philip Randolph, who advocated on behalf of African American

Exclusion of blacks and dominance by whites continued to infect the labor union movement into the 1970s. The Illinois Education Association (IEA) record demonstrates the problems that were endemic to virtually all American unions. In 1974,

> an estimated fifteen percent of the IEA's membership was comprised of minority group members, but the association had no minority officers and no minority representation on the fifty-person board of directors. The IEA's representative assembly, the 600 member "policy-forming body of the Association," had only five to ten minority members, or less than two percent.[186]

This record is appalling, despite some "progress" by 1980 as a result of the labor union's adoption of an affirmative action plan that was later struck down.[187] The "history of race . . . discrimination has left its mark on the present composition of the [entire] labor movement, particularly on the limited numbers of minorities . . . who hold leadership positions in unions."[188] The lack of minorities in leadership positions supports the conclusion that unions cannot fully represent their minority members.[189]

In the words of Karl Klare, a distinguished CLS scholar, "law [should not] be indifferent to, much less embrace, the hierarchical command structure . . . along gender, race, and class lines."[190] Instead, "[l]abor law should be framed and administered with a commitment to democratizing decisionmaking in the workplace and to redistributing power in labor markets in favor of employees."[191] While Klare directs these powerful arguments against hierarchical employers,[192] these sentiments demand application

---

laborers, has been recorded as a minimum wage supporter. *See* CARD & KRUEGER, *supra* note 17, at 7.

[186] Goldberg, *supra* note 174, at 649 (footnote omitted).

[187] *Id.* at 649–50. This history of disparate treatment is poignant in light of the fact that in 1988 African Americans constituted 10.9% of the civilian labor force, U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 380 (1990), but constituted a significantly larger percent (approximately 22.9%) of the unionized workforce. *Id.* at 419. In addition, African Americans constituted 25.9% of those represented by unions (those represented by unions would include union and nonunion individuals of the workforce establishment that is subject to union representation in collective bargaining negotiations).

[188] Goldberg, *supra* note 174, at 653.

[189] *Id.* at 654.

[190] Klare, *Workplace Democracy*, *supra* note 22, at 5.

[191] *Id.*

[192] *See id.* at 4 (stressing the need for employee independence from employer domination). Additionally, Klare forcefully disputes the "myths" of the free market. Instead, he argues for "democracy-enhancing" market reconstruction that grants larger amounts of power to labor. *See id.* at 3–39. The effect of improved workplace

to the labor movement on whose behalf Klare argues.[193] Such an application reveals the capacity of union leadership and union membership to subordinate, dominate, and exclude African Americans consistent with majoritarian preferences,[194] confirming W.E.B. DuBois' assertion that "instead of taking the part of the Negro and helping him toward physical and economic freedom, the American labor movement from the beginning has tried to achieve freedom at the expense of the Negro."[195]

### B. *Creating Outsiders in South Africa: Unions, Whites, Blacks, and "Colored" Workers*

The history of labor exclusion and hierarchy is not unique to the United States. Pre-Mandela South Africa[196] rigorously enforced a systematic oppressive policy of exclusion, subordination, and white supremacy. Under the ruling culture of apartheid,[197] the "denial of the political franchise to most of its non-

---

democracy on the status of African Americans who are currently excluded by the hierarchical union movement is problematic.

[193] Klare concedes the less than salutary history of unions when it comes to racism. *See* Klare, *Toward New Strategies*, *supra* note 14, at 266 and accompanying footnote; Karl Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157, 162–64 (1982).

[194] It has been claimed that "due to labor's huge success in the period from the 1930s to 1960s, unions lifted millions of employees and their families out of poverty and into a higher standard of living with improved working conditions and job security. As a result, the unionized sector of employment developed along its own path and over the years grew distant from the socio-economic worlds of low-wage earners and welfare recipients." Klare, *Toward New Strategies*, *supra* note 14, at 247–48. While this claim possesses a surface appeal, the evidence suggests that labor leadership and labor union members have *always* been "distant" from the concerns of African American workers. Moreover, as the early history of the labor movement indicates, unions have not always been driven to organize low income workers. To the contrary, the early craft unions focused on relatively high wage industries. *See supra* note 144 and accompanying text. Moreover, the auto industry, one of the early targets of the AFL, was a relatively high wage industry in the 1930s. *See* ZEIGER, *supra* note 146, at 8.

[195] Bernstein, *supra* note 93, at 85 (quoting W.E.B. DuBois, *The Denial of Economic Justice to Negroes,* NEW LEADER, Feb. 9, 1929, at 43, 45).

[196] On December 22, 1993, the Parliament of the Republic of South Africa approved a new constitution that abolished apartheid and established a system of multi-racial elections. D.S.K. Culhane, *No Easy Talk: South Africa and the Suppression of Political Speech* 17 FORDHAM INT'L L.J., 896 (1994) (footnotes omitted).

[197] As the term apartheid is used in this context, it refers to a system of racial separation and exclusion that preceded the "official" enactment of apartheid by the Herenigde National Party after May 26, 1948. *Id.* at 897. The system of "racial classifications determined the social, political, civil and economic rights of each South African and provided the basis for additional racially discriminatory legislation." *See* Karon M. Coleman, Comment, *South Africa: The Unfair Labor Practice and the Industrial Court*, 12 COMP. LAB. L.J. 178, 179 (1991).

white population, and . . . [its] highly codified systems of racial discrimination"[198] extended to the labor market. As black workers "began to develop skills, white miners came to fear blacks . . . just as they feared the Chinese."[199] Furthermore, like their American counterparts, white South African craft unionists demanded the segregation of blacks and their total exclusion from industrial work.[200] "From the outset, the specialization of jobs in mines confirmed the racial hierarchy."[201]

The South African government gave "legislative sanction to union demands for monopoly power [in] . . . the Mines and Works Act of 1911—the first [national] color-bar law."[202] In February of 1917, the Mine Workers Union demanded that the Chamber of Mines exclude non-white workers from semi-skilled jobs.[203] In the 1920s, after the South African Supreme Court held unconstitutional the color bar provisions of the Mines and Works Act,[204] white supremacists and the unions were angry and revolted.[205] The Labour party and the National Party, which targeted poor whites,[206] joined to defeat ruling party Smuts/Botha. With the Labour/National party overseeing what came to be called the "Pact"[207] govern-

---

[198] WALTER E. WILLIAMS, SOUTH AFRICA'S WAR AGAINST CAPITALISM xi (1989).

[199] *Id.* at 49.

[200] *Id.*

[201] Paul Lansing, *South African Changes in Industrial Relations Law: First Crack in Apartheid?*, 3 COMP. LAB. L.J. 291, 292 (1980).

[202] WILLIAMS, *supra* note 198, at 52. The color bar was part of the South African labor policy of exclusion. It precluded both blacks and "coloreds" from working in particular jobs by reserving those jobs for whites. *See* Coleman, *supra* note 197, at 181. Some color bar restrictions were ostensibly based on regulations certifying "competency" and "safety". For an article that examines changes in South African industrial relations law, see Lansing, *supra* note 201.

[203] This demand was rejected for economic reasons and also because the chamber argued that to "deprive non-white semi-skilled workers of their employment was immoral." WILLIAMS, *supra* note 198, at 53.

[204] *Id.* at 60. Despite this decision, South African Courts have a well-deserved reputation for racial derogation. In one case for instance, a [South African] appellate court held that the trial judge did not commit judicial error by taking judicial notice of the "fact" that black women submit to rape without protest. *See* A. Leon Higginbotham, Jr., *Racism in American and South African Courts: Similarities and Differences*, 65 N.Y.U. L. REV. 479, 519 (1990).

[205] Higginbotham, *supra* note 204, at 519. This period included the "Revolt on the Rand," which "was an attempt by white miners to protect their jobs against blacks." This revolt, which was crushed by the state, resulted in the deaths of 247 people. *See* William Gould, *Black Unions in South Africa: Labor Law Reform and Apartheid*, 17 STAN. J. INT'L L. 99, 101 (1981).

[206] *See* Gould, *supra* note 205, at 101. The appeal to poor whites in South Africa mirrors Derrick Bell's analysis of dirt-poor whites in the United States. *See* Derrick Bell, *After We're Gone: Prudent Speculations on America in a Post-Racial Epoch*, 34 ST. LOUIS U. L.J. 393, 404 (1990).

[207] Bell, *supra* note 206, at 404. The Pact government "started the process of substituting poor whites for unskilled blacks. . . . In 1920 there were 2.11 blacks

ment, the mine workers and others[208] demanded that the new government make lawful regulations that discriminated between white and non-white workers.[209]

Specifically, the Mine Workers Union clamored for the establishment of a minimum wage law.[210] Those in the ruling party

> who argued against statutory discrimination but [who] were also white supremacists saw [legal discrimination] as a flimsy protection for whites in the face of economic realities that would lead to its widespread contravention. The ruling party felt that, after a while, the new Wage Act [the minimum wage] would make legalized racial discrimination unnecessary since it would mandate wages exceeding black productivity, and hence the incentive for hiring blacks in those jobs would be reduced.[211]

Since "white supremacist workers saw the payment of [even] *low* wages to blacks as exploitation of the whites,"[212] the Wage Act of 1925 was perceived as one possible remedy.

The South African government opted for a dual approach that included job reservations and a minimum wage. Also, "[u]nder the provisions of the 1925 Wage Act, in industries where whites were not unionized, . . . [minimum wages] could be instituted by determinations of the Wage Board."[213] While the law ostensibly precluded outright racial discrimination, it was only applied in areas where whites faced non-white competition. As such, the Wage Act became "one of the most effective weapons in the hands of South Africa's racists"[214] and is inescapably linked to other exclusionary vehicles sponsored by both the unions and the government.[215]

---

employed for each white in manufacturing. By 1930 this had declined to 1.72 and by 1935 reached a low of 1.49." Abedian & B. Standish, *Poor Whites and the Role of the State: The Evidence*, 53 S. AFR. J. ECON. 141, 145 (1985).

[208] *See generally* WILLIAMS, *supra* note 198, at 60–61.

[209] *Id.* at 61–62.

[210] *Id.* at 62.

[211] *Id.* at 63.

[212] *Id.* at 64. Outside of the mining industry, South African blacks had dominated several important industries. The color bar and wage legislation gave whites a competitive advantage. In 1920 the black/white ratio in manufacturing was 2.1 blacks to 1 white. By 1940, this ratio fell to 1.63 blacks to 1 white. Similarly, in 1911 the South African Board of Railways work force was 93% black but only 73% by 1936. *Id.* at 63.

[213] *Id.*

[214] *Id.* Similarly, Canada, at roughly the same time enacted minimum wage law for the purpose of "preventing Japanese immigrants from displacing white workers." SOWELL, *supra* note 177, at 29 (footnote omitted).

[215] More recently, the Nationalist government passed the Industrial Conciliation Act of 1956, which replaced the Industrial Conciliation Act of 1924 and institutionalized

It has been asserted that South African unions have recently become more racially inclusive.[216] However, recent history must be understood in the context of exclusion, domination, and hierarchy, the vestiges of which have assuredly not been extirpated. Evidence indicates continuing deleterious effects of trade unionism on black employment today.[217]

### C. *A Critical Race Reformist's Perspective of Minimum Wages*

While the minimum wage has been supported as a major component of the "progressive" paradigm, with vivid claims of good intentions, morality, and even on grounds of civil rights, in reality many minimum wage proponents are perpetuating a tradition of exclusionary preferences. Contextually, the United States, like South Africa, has a history of discriminatory treatment of African American workers.[218] In South Africa, mine workers and "poor whites" encouraged the government to adopt

---

collective bargaining and dispute resolution. Coleman, *supra* note 197, at 183–84. Consistent with the hierarchical and dominant norms of South Africa, however, the new Act excluded black employees from the legal definition of employees, and blacks were therefore denied access to industrial councils and conciliation boards. *Id.* at 183. In 1972, right-wing white unions in the building trades complained to the South African Government that laws that reserved skilled jobs for whites had broken down and should be abandoned in favor of *equal-pay-for-equal-work* laws. Walter E. Williams, *Freedom to Contract: Blacks and Labor Organizations*, BLACK AMERICA AND ORGANIZED LABOR: A FAIR DEAL?, (Walter E. Williams, Loren Smith, & Wendel W. Gunn, authors, 1979), available at The Lincoln Institute, 1735 DeSales St., N.W. Washington, DC 20036 (quoting the N.Y. TIMES, Nov. 28, 1972). This, of course, did not represent the discovery of nondiscriminatory solidarity by white workers. To the contrary, "the conservative building trades made it clear they were not motivated by concern for black workers but had come to feel that legal job reservation had been so eroded . . . that it no longer protected the white worker." *Id.* In effect, these white workers sought to institutionalize a system to disadvantage their competition—non-white workers. In 1979, the government appointed the Wiehahn Commission, which recommended moving away from the racially biased labor system. One result was the passage of the Industrial Conciliation Amendment Act of 1979, which removed the dual labor system and legalized black unions. Coleman, *supra* note 197, at 185.

[216] *See, e.g.*, Stanley B. Greenberg, *Resistance and Hegemony in South Africa*, THE STATE OF APARTHEID 65 (Wilmot G. James ed., 1987). Although South Africa currently does not have a national minimum wage, "[i]n some industries a sectoral minimum wage is negotiated between trade unions and employers. These minimum wages vary widely depending on the sector of the economy." BUREAU OF INTERNATIONAL LABOR AFFAIRS, U.S. DEPARTMENT OF LABOR, FOREIGN LABOR TRENDS, SOUTH AFRICA (1994–1995).

[217] *See* Steve H. Henke, *The New Apartheid (Union Wage Rules in South Africa)*, FORBES, Apr. 24, 1995, at 64 (Trade unions have pushed wages 50% higher than wages in the Czech Republic, resulting in massive unemployment of South African blacks as well as the deportation of blacks from Mozambique).

[218] As Samuel Gompers said when testifying against Chinese workers, while support-

policies favoring whites at the expense of blacks and colored workers.[219] In the context of African American workers and U.S. labor unions, this theory of "split" or segmented labor markets "can explain a great deal about the origins of the discriminatory employment polices that developed in [both] the United States and South Africa."[220] Unions, workers, and employers have been major sources of dominance and marginalization of African American workers.[221]

A major goal of CRT scholarship is "to elucidate the ways in which those in power have socially constructed the very concept of race over time; that is, the extent to which white power has transformed certain differences in color, culture, behavior and outlook into hierarchies of privilege and subordination."[222] The historical record of American labor unions, coupled with their minimum wage advocacy as informed by a wrenching yet similar record in South Africa, vindicates and re-emphasizes Derrick Bell's observation that racial discrimination facilitates the exploitation of African Americans, denies them access to benefits and opportunities that would otherwise be available, and blames all the manifestations of exclusion bred by despair on the asserted inferiority of the victims.[223]

Far from being a countermajoritarian force for inclusive social change, labor union minimum wage advocacy both in the United States and South Africa is inseparable from a history that has enforced a majoritarianism that decisively conceives of African Americans and other minorities as inferior outsiders.[224] This commitment

---

ing European immigrants, "It's a question of whether the working men of America shall eat rats, rice, or beefsteak. I choose beefsteak." WILLIAMS, *supra* note 198, at 48.

[219] *See* Standish, *supra* note 207, at 141–64.

[220] FREDERICKSON, *supra* note 166, at 212.

[221] This Article does not attempt to argue that institutionalized discrimination is found in modern labor unions, but rather that an understanding of the history of these unions, which is fraught with discrimination, provides the proper backdrop for assessing today's minimum wage law advocacy.

[222] Anthony Cook, *Critical Race Law and Affirmative Action: The Legacy of Dr. Martin Luther King, Jr.*, 8 HARV. BLACKLETTER J. 61, 62 (1991). In addition, the lessons from the United States and South Africa underscore the averment that "Critical Race scholars know that class analysis alone cannot account for racial oppression." Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1868 (1990).

[223] Derrick Bell, *White Superiority in America: Its Legal Legacy, Its Economic Cost*, 33 VILL. L. REV. 767 (1988); *see also* DERRICK A. BELL, RACE, RACISM AND AMERICAN LAW 783 (1973) (a review of the history of the labor movement reveals that organized labor has played a major part in the massive discrimination experienced by African American workers).

[224] Although it may be coincidental, it should be noted that both the original version

to a hierarchical labor market strays dramatically from the Critical Legal Studies dream of workplace equality.[225] Indeed, it exposes as myth the claim that unions and workers are a force for egalitarianism. Minimum wages and other exclusionary devices, linked to a commitment to subordination and white supremacy, call for searching scrutiny of the effect,[226] intent, and neutrality of such laws.[227]

As the South African experience illustrates, one of the most effective vehicles for excluding non-whites is a statute or industry-wide agreement that imposes a minimum wage. Market interference in the form of minimum wages may be promoted where it is perceived that employers may employ outsiders, such as South African blacks or African Americans, instead of whites.[228] Minimum wages, then, are the assertedly neutral analog to intentional discrimination that marginalizes non-whites. The exclusionary capacity of minimum wage regimes can equal or surpass the efficacy of a direct race-based job reservation system.[229] To the extent that minimum wage supporters (union and

---

of the FLSA and the NIRA (June 16, 1933, ch. 90, 48 stat. 195) contained Labor Wage Board provisions that mirror the earlier enacted South African Wage Act of 1925.

[225] While one Critical Legal Studies commentator contends that "the hopes of the labor movement and the aspirations of this nation's oppressed minorities remain inextricably linked," Klare, *Quest for Industrial Development*, *supra* note 193, at 158, given the American labor movement's unrestrained participation in such oppression, that assertion endures as fantasy.

[226] As unions turned to the federal government in the 1920s and 1930s to legitimate and enforce an exclusionary regime through the passage of pro-union legislation, the unemployment rate of African Americans rose dramatically. Since the passage of the New Deal labor agenda, the proportion of African American unemployment to white unemployment rose from 92 blacks unemployed for every 100 whites in 1934, to 200 blacks unemployed for every 100 whites in 1954—a ratio that continues today. Bernstein, *supra* note 93, at 132. This record has been maintained despite reiterative declamations of "increased racial sensitivity" by adherents to majoritarian preferences.

[227] The inability to consider minimum wage legislation as "neutral" is reinforced by understanding that President Franklin Roosevelt "compromised minorities at every legislative turn in order to retain the support of Southern Democrats." Neylon O'Brien, *supra* note 65, at 219 (quoting Marc Linder, *Farm Workers and the Fair Labor Standards Act: Racial Discrimination in the New Deal*, 65 TEX. L. REV. 1335, 1353 (1987).

[228] This animus toward outsiders is underscored by the AFL-CIO's insistence that a minimum wage provision be included in the North American Free Trade Agreement to "protect" the United States' workers from Hispanic workers in Mexico. *See* Benjamin Rozwood & Andrew R. Walker, *Side Agreements, Sidesteps, and Sideshows: Protecting Labor from Free Trade in North America*, 34 HARV. INT'L L.J. 333, 335 n.14 (1993).

[229] That the AFL did not support minimum wages as strongly as did the CIO is consistent with the differing membership of the two unions. *See* Forsythe, *supra* note 102 and accompanying text. Since the AFL was largely composed of skilled workers, it became adept at employing membership rules that excluded African Americans, and that explicitly or implicitly required employers to enforce those exclusions. As their enforcement powers waned, the AFL, and especially the railroad unions turned to state

non-union) have tacitly internalized exclusionary preferences, their participation fortifies the institutionalization of subordination. The avowed "belief" that minimum wage statutes are moral and progressive, notwithstanding the fact that wage rate regulation has a disparate effect on African Americans, is not credible. Legal sanction[230] is required to preclude the perpetuation of morally indefensible exclusionary regimes.

From the perspective of reformists, minimum wage advocacy by unions, union members, and their supporters is consistent with the conclusion that these groups had knowledge of the disparate impact of minimum wages on African Americans. As discussed above, northern legislators seemed well aware of the preclusive value of minimum wages and other devices in protecting northern workers at the expense of southern and largely African American workers.[231]

Declarations of ignorance about the effects of minimum wages on non-whites strain credulity. American minimum wage proponents and defenders are the heirs of South African labor policy. As such, they know or should know the effects of wage regulations. Proponents of minimum wage regimes must take responsibility for the propriety of what is done, and should not hide behind assertions that they are neither aware of the corrosive

---

and federal legislation, which became excellent preclusive vehicles. The CIO, by contrast, was primarily composed of unskilled and semi-skilled workers. Accordingly, the deployment of hierarchy based on craft or trade category that reserved jobs for whites was more difficult, making the use of minimum wages desirable for this purpose. The CIO strongly embraced wage rate regulation proposals in the 1930s. Today, the combined union federation, the AFL-CIO (connected to an ideological collage of domination, subordination, and hierarchy that converges in a passionate embrace of exclusionary vehicles) vigorously supports the minimum wage as well as minimum wage increases.

[230] The need for legal sanction vindicates public choice insights. If the desire for status and economic advantage associated with the creation of exclusive or exclusionary groups can be undermined by markets, a resort to law linked to the political demands of the majority becomes exigently required. Apartheid and other state enforced exclusionary rules allow the preferences of whites to be vindicated while markets in some cases undermine these rules. For an accessible explication of public choice theory, see DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991). Indeed "[p]olitics is a structure in which persons seek to secure collectively their own privately defined objectives that cannot be efficiently secured through simple market exchanges." James M. Buchanan, *The Constitution of Economic Policy*, *in* PUBLIC CHOICE AND CONSTITUTIONAL ECONOMICS 103, 107–08 (James D. Gwartney & Richard E. Wagner eds., 1988).

[231] *See* note 183 and accompanying text. In 1954, Senator John Kennedy supported the minimum wage law as a way of protecting New England businesses from Southern competition and argued that the minimum wage reduced the South's economic advantages. *See* Bernstein, *supra* note 93, at 131 n.328.

effects of minimum wages, nor the empirical verification of these effects by economists.

In light of the historical, empirical, and culturally informed evidence, a Critical Race reformist explication of minimum wages demonstrates that "[l]egislation that regulates wages is an effective tool in a racist's arsenal,"[232] even when it lacks admitted racist intent. Such wage "regulation is effective because it enjoys the benefit of at least four powerful forces: (1) It evokes voluntary cooperation with the racist goals; (2) it gives the *appearance* of being racially *neutral*; (3) it is relatively cheap to enforce; and (4) it sometimes enjoys the political support of the people whom it is intended to victimize, as well as their benefactors."[233] Wage regulation, properly deconstructed, constitutes a form of institutionalized racism.

## V. CONCLUSION

Given the history of the American labor movement, the burden of proof on the issue of whether minimum wage laws can withstand a historically grounded, empirically validated, culturally informed Critical Race reformist investigation should remain on minimum wage defenders. This burden is not met by the contention that recent evidence supports the efficacy of minimum wages as an anti-poverty device nor by the claim that minimum wages are a beneficial program for African Americans. On the contrary, compelling evidence coupled with reasonable inferences indicate that minimum wage regimes represent a continuation of the American labor union movement's tradition of discriminatory treatment.

Wage regulation and efforts to enact still higher minimums in effect protect the unionized sector of the economy and vindicate majoritarianism. Moreover, because union wage levels exceed wages of similarly skilled non-union workers,[234] monopoly wages earned by the unionized sector increase unem-

---

[232] WILLIAMS, *supra* note 198, at 67.

[233] *Id.* (emphasis added). Martin Luther King, Jr. has been identified as a defender of the minimum wage. *See* CARD & KRUEGER, *supra* note 17, at 7. On the other hand, W.E.B. DuBois vigorously opposed the minimum wage provisions of the NRA because they reinforced the "sinister power" of the AFL. *See* Bernstein, *supra* note 93, at 124.

[234] REYNOLDS, *supra* note 144, at 73 (some studies suggest that union wage premium ranges from 16% to 30% above the earning of similarly skilled non-union workers). Indeed as U.S. government policy shifted from toleration of unions to encouragement, the union and non-union wage differential rose substantially. *Id.* at 139.

ployment,[235] and the labor market itself receives the largest share of the economic rents that the American economy generates.[236] It is thus impossible to conclude that legislative proposals raising the minimum wage rate are in the interest of African Americans. This is true even if African American workers constitute a disproportionate share of the unionized workforce, as African Americans constitute an even more disproportionate share of the unemployed. Minimum wage regimes, properly conceived,[237] are exclusionary institutions that are connected to, and illustrative of, a tradition of subordination, dominance, and hierarchy.

---

[235] *Id.* at 85–106.

[236] *See* Katz & Summers, *supra* note 10 (suggesting that capital owners receive few monopoly rents as most rents, perhaps 80–85%, went to labor).

[237] It has been decisively argued that "[t]he ways we think about social problems shape our conceptions of what is historically possible, our images of freedom and justice." Klare, *Quest for Industrial Democracy*, *supra* note 193, at 162.

# ARTICLE

# OF BANANA BILLS AND VEGGIE HATE CRIMES: THE CONSTITUTIONALITY OF AGRICULTURAL DISPARAGEMENT STATUTES

DAVID J. BEDERMAN*
SCOTT M. CHRISTENSEN**
SCOTT DEAN QUESENBERRY***

*In the wake of the 1989 controversy surrounding the report on the television show "60 Minutes" about the chemical Alar and its negative effect on the sale of apples in Washington, a number of states passed laws making it an actionable tort to unjustifiably criticize food produced in those jurisdictions. In this Article, David Bederman, Scott Christensen, and Scott Quesenberry examine the constitutionality of these agricultural disparagement statutes, first by exploring common law trade disparagement and then by highlighting different First Amendment concerns. The authors conclude that these statutes pose a major challenge not only to established common law rules of trade disparagement, but also to constitutional principles under the First Amendment.*

The television show "60 Minutes" reported in 1989 on the use of a chemical growth regulator on apples raised in Washington state.[1] This report, and a subsequent decline in apple sales, precipitated a lawsuit accusing the network, CBS, of falsely disparaging the quality of Washington apples. The incident also sparked the passage of the first of several agricultural disparagement statutes.[2] To date, twelve states have passed strikingly similar

---

*Associate Professor of Law, Emory University School of Law. Visiting Associate Professor of Law, University of Virginia School of Law (1996-97). This Article reflects developments through September 1996.

The writer is grateful for the research and advocacy assistance of numerous individuals, including Christine B. Ledvinka (Emory '94L), Jonathan D. Blum (Emory '95L), and Philip J. Bauer (Emory '96L), all of whom participated in some aspect of the briefing and argument in Action for a Clean Environment v. Georgia, 457 S.E.2d 273 (Ga. App. 1995).

Most of all, I wish to salute Ms. Phyllis Marberger, chair of Parents for Pesticide Alternatives. She taught me that the most important words that can come out of our mouths are about the food that goes into them.

**B.A., California State Polytechnic University, 1988; M.A. and Ph.D., University of California at Riverside, 1991 and 1997 (expected); J.D., New York University (expected 1997).

***A.B., Dartmouth College, 1993; J.D., Emory University, 1996.

[1] *60 Minutes: 'A' is for Apple* (CBS television broadcast, Feb. 26, 1989). For a transcript of the broadcast, see Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 937 (E.D. Wash. 1992).

[2] For background on the introduction of agricultural disparagement legislation, see

laws making it an actionable tort to criticize unjustifiably food produced in those jurisdictions. Comparable laws have been proposed in nearly a dozen other states.

These statutes represent a new trend in defamation law and its constitutional dimensions. One noteworthy point is the connection of common law dignitary torts with new statutory causes of action. These agricultural disparagement statutes were passed in response to the perceived failing of the common law of trade disparagement, which typically grants relief only when one business actor disparages the goods or services of another. Legislatures were thus called upon to fashion a statutory remedy to cover cases where consumers, journalists, or health advocates disseminated information on food safety questions. The newfangled agricultural disparagement laws thus reflect a curious mixture of interest-group politics and industry protection. While the idea that legislators can tailor-make torts is intriguing, the notion is also disturbing, since it presages a conflict with the "marketplace of ideas" and the hallowed principle of free speech.

Finally, at stake in the dispute about food safety claims is scientific certainty in an uncertain and unpredictable world. Agricultural disparagement statutes reflect one approach to finding a legal solution, which can regulate the marketplace of ideas in that gray area between science and the public good. The underlying approach of these statutes is to regulate speech by encouraging certain kinds of exchanges and punishing others. We argue here that this approach is not only profoundly misguided as a matter of policy, but also flagrantly unconstitutional as a matter of law.

---

*Agrivation*, ECONOMIST, Nov. 26, 1994, at 28; James Coates, *Colorado Bill Cuts to Core of Produce-bashing*, CHI. TRIB., Mar. 19, 1991, § C, at 1; Tom Holt, *Could Lawsuits be the Cure for Junk Science?*, 7 PRIORITIES 14 (No. 2) (1995); Jamison Prime, *Fruitfully Correct*, QUILL, Jan. 1995, at 38; Jim Wooten, *New Law Will, as Intended, Shut People Up*, ATLANTA CONSTITUTION, Apr. 30, 1993, § A, at 14.

For suggestions that model agricultural disparagement statutes were distributed and lobbied by the American Feed Industry Association, the American Crop Protection Association, and the American Farm Bureau, see Megan W. Semple, Comment, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 414 n.91 (1995–96) [hereinafter "Semple Comment"]; *WARNING: You Can be Sued for Insulting Vegetables*, USA TODAY, Mar. 27, 1996, at 1A.

These statutes have been variously called (1) "banana bills," Nicols Fox, *Maine Growers Find 'Banana Bill' Appealing*, AM. JOURNALISM REV., Mar. 1995, at 12; ME. TIMES, Mar. 30, 1995, § 1, at 7; (2) "vegetable hate crimes," Paul Rauber, *Vegetable Hate Crimes*, SIERRA: THE MAGAZINE OF THE SIERRA CLUB, Nov./Dec. 1995, at 20; (3) "vegetable disparagement laws," *Watch What You Say About My Rutabaga*, BUS. WK., June 27, 1994, at 6; and (4) "food slander laws," *Is It a Crime to Criticize Food?*, CONSUMER REP., Sept. 1996, at 7.

This Article, the authors hope, will serve as a resource for understanding better the constitutionality of these agricultural disparagement statutes. We begin, in Section I, by considering the common law of trade disparagement, which is especially relevant in those states that have not yet enacted agricultural disparagement statutes. In Section II we comment on *Auvil v. CBS "60 Minutes,"* the case that demonstrated the fundamental inapplicability of common law trade disparagement and which prompted the passage of a tailor-made tort for agricultural disparagement. In Section III, we discuss the distinguishing features of the various agricultural disparagement statutes. We intend to demonstrate generally how these laws may be attacked, using one of the worst—Georgia's agricultural disparagement statute[3]—as a model. In Section IV, we explain how the statutes violate the First Amendment by making actionable those kinds of speech regarding matters of serious public concern. We argue in Section V that even if the speech is not protected under that standard, the agriculture disparagement statutes are still unconstitutional content-based regulations. In Section VI, we explain why these statutes are unconstitutional for yet other reasons. Finally, in Section VII, we review a recent lawsuit regarding Georgia's agricultural disparagement statute and the problems with justiciability encountered in that litigation. Through this exploration, we intend to demonstrate the insurmountable constitutional problems engendered by these vegetable disparagement statutes.

## I. Common Law Trade Disparagement

In a state that does not have an agricultural disparagement statute or even a general trade disparagement law, those parties who disseminate food safety information may nevertheless be sued under the common law tort of trade disparagement. The seminal case of *Auvil v. CBS "60 Minutes"* itself serves as a good example, because the state of Washington had no statute making product disparagement a cause of action, and the plaintiffs therefore were forced to proceed under a common law theory.[4] The Ninth Circuit inferred from state court cases that

[3] Ga. Code Ann. §§ 2-16-1 to 2-16-4 (Supp. 1996).
[4] Auvil v. CBS "60 Minutes," 67 F.3d 816, 820 (9th Cir. 1995).

Washington recognized common law product disparagement causes of action and looked to the RESTATEMENT (SECOND) OF TORTS sections 623A and 651(1)(c) (1976) for the appropriate standards.[5] The court also turned to defamation cases for guidance. Since the actionability of the tort depends on disparaging speech about a product, the standard could be substantively similar to defamation of a person.[6]

Product disparagement, perhaps more commonly known as "trade libel," has always been likened to defamation because trade libel had previously been called "slander of title."[7] Product disparagement and defamation are, however, distinct torts: the former is directed at the quality of plaintiff's property while the latter is directed at the quality of plaintiff's character.[8] Product disparagement, or trade libel, is generally seen as a kind of injurious falsehood, which covers all false speech about a product that results in economic loss.[9] Product disparagement is defined as a statement that "is understood to cast doubt upon the quality of another's [property], and . . . the publisher intends the statement to cast the doubt, or . . . the recipient's understanding of it as casting . . . doubt was reasonable."[10]

The elements of a claim for product disparagement are given in RESTATEMENT (SECOND) OF TORTS section 623A, "Liability for Publication of Injurious Falsehood—General Principle," which states that:

> One who publishes a false statement harmful to the interests of another is subject to liability for pecuniary loss resulting to the other if,
>
> > (a) he intends for publication of the statement to result in harm to interests of the other having pecuniary value, or either recognizes or should recognize that it is likely to do so, and

---

[5] *Id.*

[6] *Id.*

[7] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 128, at 962 & n.4 (5th ed. 1984).

[8] *Id.*; *see also* Gee v. Pima County, 612 P.2d 1079, 1079 (Ariz. App. 1980); Wendy's of S. Jersey, Inc. v. Blanchard Management Corp., 406 A.2d 1337, 1338 (N.J. Ch. 1979) ("[p]roduct disparagement . . . involves aspersing the quality of one's property"); RESTATEMENT (SECOND) OF TORTS § 626 (1976); Semple Comment, *supra* note 2, at 418–22.

[9] *See* KEETON, *supra* note 7, at 962–63; William L. Prosser, *Injurious Falsehood: The Basis of Liability*, 59 COLUM. L. REV. 425 (1959).

[10] RESTATEMENT (SECOND) OF TORTS § 629 (1976).

> (b) he knows that the statement is false or acts in reckless disregard of its truth or falsity.[11]

Therefore, a complaint of product disparagement must allege the publication of a false statement which is harmful to the property interests of another and causes economic loss.[12] The RESTATEMENT elaborates that "publication of an injurious falsehood is a legal cause of pecuniary loss if . . . it is a substantial factor in bringing about the loss."[13] In short, to sustain a claim of product disparagement, a plaintiff must show the intentional publication of an unprivileged false statement that disparages plaintiff's property and causes special damages.[14]

A plaintiff proceeding under a common law theory of trade disparagement faces a number of obstacles. The common law unequivocally requires the plaintiff in a product disparagement suit to prove that a disparaging published statement is false.[15] Truth therefore, is an absolute defense to product disparagement.[16] A plaintiff in a disparagement action must also show that the falsehood was substantial and went to the gist of the publication.[17] Moreover, the same absolute and conditional privileges available for defamation remain available for product disparagement, though these privileges are unlikely to be particularly useful in the kinds of cases that arise under this common law tort.[18]

Publishers may benefit from the protection afforded by constitutional requirements as well, for while the common law has not resolved the level of culpability required to sustain an action for disparagement,[19] the standards articulated in *New York Times*

---

[11] *Id.* at § 623A.

[12] *See id.*

[13] *Id.* at § 632.

[14] KEETON, *supra* note 7, at 967; F. HARPER ET AL., THE LAW OF TORTS 262–75 (2d ed. 1986). *See also* Note, *The Tort of Disparagement and the Developing First Amendment*, 1987 DUKE L.J. 727, 727–28 [hereinafter "Duke Note"]; Markowitz v. Republic Nat'l Bank of N.Y., 651 F.2d 825, 828 (2d Cir. 1981).

[15] *See* System Operations, Inc. v. Scientific Games Dev. Corp., 555 F.2d 1131, 1142 (3d Cir. 1977). *See also* RESTATEMENT (SECOND) OF TORTS § 651(1)(c) (1976).

[16] RESTATEMENT (SECOND) OF TORTS § 634 (1976).

[17] *See* Gee v. Pima County, 612 P.2d 1079, 1080 (Ariz. App. 1980) (Howard, J., specially concurring) (looking past a technical falsity created by artful pleading); Bothman v. Harrington, 458 So. 2d 1163, 1168 (Fla. Dist. Ct. App. 1984) (requiring substantive falsity to establish disparagement). *But see* Bose Corp. v. Consumers Union of the United States, Inc., 508 F. Supp. 1249 (D.Mass 1981), *rev'd*, 692 F.2d 189, 194 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984) (finding statement false on the basis of a small change in wording).

[18] RESTATEMENT (SECOND) OF TORTS §§ 635, 646A, 647, 649, 650A (1976).

[19] *Id.* at § 623A.

*v. Sullivan* should arguably apply to common law product disparagement actions.[20]

The *New York Times* standards would be relevant because disparagement action could hinge on two kinds of intent: the intent to injure or the intent to use false information.[21] The courts are divided on which level is appropriate.[22] Applying *New York Times* directly, some courts require plaintiffs to show that the defendant published the disparaging statement with "actual malice,"[23] that is, with "knowledge of falsity or reckless disregard for the truth."[24] This burden is difficult for a plaintiff to bear. Indeed, if the standard is applicable to an injurious falsehood, it is almost impossible for a plaintiff to prevail.

Other courts, however, do not apply *New York Times*, instead suggesting that proof of intent to injure eliminates the need to determine whether the publisher was aware of the falsity.[25] Nevertheless, under this approach proof that the defendant intended to harm the plaintiff will still be required to establish culpability.[26] In some measure then, all courts require a high standard of care.

Even if a plaintiff does succeed in establishing liability, recovery for disparagement is limited to actual or "special" damages, for which the plaintiff also bears the burden of proof.[27] Extra

---

[20] *See* HARPER, *supra* note 14, at 278.

[21] *See* RESTATEMENT (SECOND) OF TORTS § 623A (1976). The position of the Second Restatement departs significantly from that of the First Restatement, which had suggested a strict liability standard similar to that in common law defamation imposing liability on a plaintiff who falsely disparaged a product regardless of his intent. *See* RESTATEMENT OF TORTS § 625 (1938); Prosser, *supra* note 9, at 430–31.

[22] This uncertainty is reflected in a caveat to the RESTATEMENT (SECOND) OF TORTS § 623A (1976). *See id.* at caveat (1), comments (c) and (d).

[23] New York Times v. Sullivan, 376 U.S. 254, 280 (1964). The U.S. Supreme Court, in Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984), had the opportunity to decide whether the "actual malice" standard applied to product disparagement. The Court avoided the matter by holding that the district court's finding that the plaintiff (a producer of loudspeakers) was a public figure, had not been challenged on appeal. *See Bose Corp.*, 466 U.S. at 489–90, 492.

*See also* Vincent Brannigan & Bruce Ensor, *Did Bose Speak Too Softly?: Product Critiques and the First Amendment*, 14 HOFSTRA L. REV. 571 (1986); Julie J. Scrochi, Note, *Must Peaches be Preserved at All Costs?: Questioning the Constitutional Validity of Georgia's Perishable Product Disparagement Law*, 16 GA. ST. U. L. REV. 1223, 1233–34 (1996) [hereinafter "Scrochi Note"].

[24] Gertz v. Robert Welch, Inc., 418 U.S. 323, 349 (1974). For state decisions so holding, see, e.g., Pecora v. Szabo, 418 N.E.2d 431 (Ill. App. 1981); Dairy Stores, Inc. v. Sentinel Pub. Co., 516 A.2d 220, 238 (N.J. 1986).

[25] *See, e.g.*, Teilhaber Mfg. v. Unarco Materials, 791 P.2d 1164, 1166 (Colo. App. 1989).

[26] *Id.*

[27] RESTATEMENT (SECOND) OF TORTS §§ 633, 651(1)(h) (1976).

damages may be added to this base figure.[28] While the allegedly disparaged individual may easily establish a decline in actual income, proving that the alleged disparagement is the cause of that decline is often a rather difficult task. The *Restatement* suggests that the publication must be a "substantial factor" in causing the damages, in addition to there being a "direct and immediate" relationship between the publication and the damages.[29] Some courts seem to ignore this bifurcated analysis and require only that the loss result "directly and immediately from the falsehood's effect on the conduct of third persons . . . ."[30] Courts have been reluctant to award punitive damages in disparagement actions, except in some cases where actual malice is shown.[31]

In summary, while common law suits in states without product disparagement statutes are possible, they are difficult to sustain. At base, a plaintiff would have to show that the alleged disparaging statement was false and that its publication was the cause of actual damages to the plaintiff, both of which are difficult burdens to meet in common law agricultural disparagement suits. A plaintiff may also need to show actual malice, in that the defendant knew of the falsity of the statement or had a reckless disregard for its truth, a burden that is almost impossible to carry in likely agricultural disparagement cases.[32] Consequently, while common law agricultural disparagement actions are possible, they are unlikely to bear much fruit.

## II. *AUVIL V. CBS "60 MINUTES"*

The *Auvil v. CBS "60 Minutes"* litigation dramatizes the difficulties inherent in sustaining common law disparagement actions.[33] In that case, CBS broadcast a report on the safety of daminozide, commonly known as Alar, which is a chemical sprayed on apples to regulate their growth.[34] The news magazine segment was based

---

[28] *See* Duke Note, *supra* note 14, at 752–53.

[29] RESTATEMENT (SECOND) OF TORTS §§ 632, 633 (1976).

[30] Bothman v. Harrington, 458 So. 2d 1163, 1170 (Fla. Dist. Ct. App. 1984).

[31] *See* Duke Note, *supra* note 14, at 755 (citing cases).

[32] For cases holding to this effect, see Flotech, Inc. v. E.I. DuPont de Nemours & Co., 814 F.2d 775, 782 (1st Cir. 1987); Quantum Elecs. Corp. v. Consumers Union, 881 F. Supp. 753, 763 (D.R.I. 1995); Simmons Ford, Inc. v. Consumers Union, 516 F. Supp. 742, 744 n.4 (S.D.N.Y. 1981).

[33] *See* Auvil v. CBS "60 Minutes," 67 F.3d 816 (9th Cir. 1995), *cert. denied*, 116 S.Ct. 1567 (1996). *See also* Semple Comment, *supra* note 2, at 407–11.

[34] *Auvil*, 67 F.3d at 818.

largely on a Natural Resources Defense Council ("NRDC") report, entitled "Intolerable Risk: Pesticides in Our Children's Food."[35] Both the "60 Minutes" report and the NRDC report presented the health risks and potential carcinogenic effects of Alar.[36] Following the broadcast, the Washington apple industry lost millions of dollars as consumer demand for apples fell sharply.[37] In response, a group of Washington State apple growers, representing some 4,700 growers, filed suit against CBS.[38]

The growers filed suit in November 1990 in Washington State Superior Court, alleging product disparagement against CBS, local CBS affiliates, the NRDC, and a public relations firm employed by the NRDC.[39] CBS removed to United States District Court for the Eastern District of Washington on diversity grounds, where the district court dismissed claims against the local CBS affiliates. The court then denied CBS's motion for summary judgment, in which CBS had argued that the report was not "of and concerning" the apple growers and their products.[40] In a separate order, the court also dismissed claims against the NRDC and its public relations firm.[41] After discovery, the court granted CBS's summary judgment motion on the remaining issues.[42] The Washington apple growers appealed to the U.S. Court of Appeals for the Ninth Circuit.[43]

The appeals court looked to the *Restatement (Second) of Torts* section 623A for the applicable standard in a product disparagement suit.[44] It concluded that to establish a claim of product disparagement, a plaintiff must allege that the defendant published a knowingly false statement harmful to the interests of another and intended such publication to harm the plaintiff's pecuniary interest.[45] In addition, the plaintiff must prove the falsity of the disparaging statements.[46]

---

[35] *Id.*
[36] *Id.*
[37] *Id.* at 819.
[38] *Id.*
[39] *Id.*
[40] Auvil v. CBS "60 Minutes," 800 F. Supp. 928 (E.D. Wash. 1992). For more on the "of and concerning" requirement, see *infra* notes 162–166 and accompanying text. *See also* Scrochi Note, *supra* note 22, at 1237–38.
[41] *Auvil*, 800 F. Supp. at 941.
[42] Auvil v. CBS "60 Minutes," 836 F. Supp. 740 (E.D. Wash. 1993). *See also* Scrochi Note, *supra* note 22, at 1238–39.
[43] Auvil v. CBS "60 Minutes," 67 F.3d 816 (9th Cir. 1995).
[44] *Id.* at 820 (citing RESTATEMENT (SECOND) OF TORTS § 623A (1977)).
[45] *Id.*
[46] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 651(1)(c) (1977)).

The growers argued that CBS's contentions—that daminozide causes cancer and that the risk of cancer is especially great in children—were false.[47] Indeed, the plaintiffs argued that the overall message of the broadcast was false.[48] The Ninth Circuit held however, that the growers' evidence that no studies have been conducted on humans linking ingestion of daminozide to cancer, or specifically on cancer risks to children, was insufficient to demonstrate falsity or create a genuine issue for trial.[49] The growers' only challenge consisted of a claim that studies performed on animals cannot serve as reliable indicators of the effects of suspected carcinogens in humans.[50] Finding this claim insufficient to overturn the district court's decision to grant summary judgment, the Ninth Circuit affirmed the lower courts dismissal.[51]

In holding for CBS, the court expressed concern that while summary judgment would normally be denied when a genuine issue of material fact exists (namely the "overall" message of the CBS broadcast), special factors apply in a free speech case.[52] The court explained: "Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast."[53] The court recognized that denying summary judgment (and allowing a case to go to the jury) on the basis of this uncertainty risks chilling journalistic speech and makes it difficult for journalists to predict when their work will subject them to tort liability.[54] In addition, the court found that the growers adopted an unacceptable approach that "allows disparagement plaintiffs to construct an overall message that lends itself easily to proof of falsity."[55] In particular, the growers tried to meet their burden by proving the falsity of an assertion that the studies were conclusive, instead of proving the falsity of the studies themselves.[56] The *Auvil* court concluded that scientific uncertainty over food safety risks should thus be construed in favor of openness and free speech, and should not be made actionable.

---

[47] *Id.* at 820–22.
[48] *Id.* at 822.
[49] *Id.* at 820–22.
[50] *Id.* at 821.
[51] *Id.* at 823.
[52] *Id.* at 822.
[53] *Id.*
[54] *Id.*
[55] *Id.* at 822, n.11.
[56] *Id.*

The free speech rationale of the court in *Auvil* turned on the fact that the CBS broadcast contained many diverse views and would therefore be difficult to assimilate into one overall disparaging message. The court reasoned that CBS should not be liable when the disparaging comment is embedded in such an uncertain morass of "numerous, nuanced ways" of interpreting the overall broadcast.[57] The decision might have been different had the thrust of CBS's report been to disseminate the disparaging information, without any qualification or without any opposing views.

Thus, traditional common law principles of trade disparagement proved unavailing to the plaintiffs in *Auvil*. Not surprisingly, many agribusiness and grower interests expressed a desire to achieve by statute what had eluded them under the common law: the creation of a tailor-made cause of action for agricultural disparagement.

## III. The Substance of the Agricultural Disparagement Statutes

This section explores the existing state agricultural disparagement statutes through an analytic survey.[58] After comparing the legislative purposes, causes of action, legal definitions, potential damages and other distinguishing features of the statutes, we will in the subsequent sections address the constitutional questions raised by various aspects of these enactments. The statutes discussed here[59] are from Alabama,[60] Arizona,[61] Florida,[62] Georgia,[63] Idaho,[64] Louisiana,[65] Mississippi,[66] Ohio,[67] Oklahoma,[68] South Da-

---

[57] *Id.* at 822.

[58] This list is current as of September 24, 1996.

[59] Colorado has yet to adopt an agricultural disparagement statute modeled on other states' enactments. Yet, in 1994, the Colorado legislature amended an earlier statute, Colo. Rev. Stat. Ann. § 35-31-101, in such a way as to criminalize "knowingly to make any materially false statement" regarding an agricultural product. *Id.* (West Supp. 1996).

[60] Ala. Code § 6-5-620 to -625 (Supp. 1996). Legislation is pending that would slightly amend the definition of "perishable food products" under this legislation. *See* H.B. 61, Reg. Sess. (Ala. 1996).

[61] Ariz. Rev. Stat. Ann. § 3-113 (West Supp. 1995).

[62] Fla. Stat. Ann. § 865.065 (West Supp. 1996).

[63] Ga. Code Ann. § 2-16-1 to -4 (Supp. 1996).

[64] Idaho Code § 6-2001 to -2003 (Supp. 1996).

[65] La. Rev. Stat. Ann. §§ 4501–4504 (West Supp. 1996).

[66] Miss. Code Ann. § 69-1-251 to -257 (Supp. 1994).

[67] Ohio Rev. Code Ann. § 2307.81 (Banks-Baldwin Supp. 1996).

[68] Okla. Stat. Ann. tit. 2, §§ 3010–3012 (West Supp. 1996).

kota,[69] and Texas.[70] Other state legislatures have considered or are presently considering similar bills, including California,[71] Delaware,[72] Illinois,[73] Iowa,[74] Maryland,[75] Michigan,[76] Minnesota,[77] Missouri,[78] Nebraska,[79] New Jersey,[80] North Dakota,[81] Pennsylvania,[82] South Carolina,[83] Vermont,[84] Washington,[85] Wisconsin,[86] and Wyoming.[87]

The legislative purpose of the disparagement statutes is virtually identical in all twelve states. The language used reflects a general effort on the part of the legislature to protect the agricultural and aquacultural economy of the state. To protect the perishable food economy, the legislatures created a cause of action for damages resulting from disparaging statements or dissemination of false information about the safety of the consumption of food products. In eight of the twelve statutes, the purpose is repeated nearly verbatim: "to protect the agricultural and aquacultural economy . . . by providing a cause of action for producers to recover damages for the disparagement of any perishable product or commodity."[88] Two of the remaining statutes limit the purpose to the protection of agricultural products only.[89] The Texas statute does not expressly state its purpose.[90]

The party provided with a cause of action is the same in all but three of the states. A "producer," generally defined as "the

---

[69] S.D. CODIFIED LAWS § 20-10A-1 to -4 (Michie 1995).
[70] TEX. CIV. PRAC. & REM. CODE ANN. § 96.001–.004 (West Supp. 1996).
[71] S.B. 492, Reg. Sess. (Cal. 1995); A.B. 558, Reg. Sess. (Cal. 1995).
[72] S.B. 311, Leg. Sess. (Del. 1991).
[73] S.B. 234, 89th Gen. Assem., Reg. Sess. (Ill. 1995).
[74] H.B. 106, 76th Gen. Assem., Reg. Sess. (Iowa 1995).
[75] S.B. 445, Leg. Sess. (Md. 1996).
[76] H.B. 5808, 88th Leg., Reg. Sess. (Mich. 1995).
[77] H.R. 2804, 78th Leg., Reg. Sess. (Minn. 1994).
[78] H.R. 1720, 87th Leg., 2d Reg. Sess. (Mo. 1994).
[79] L.B. 367, 94th Leg., 1st Sess. (Neb. 1995).
[80] H.R. 5159, 205th Leg., 1st Reg. Sess. (N.J. 1992).
[81] H.B. 1192, Leg. Sess. (N.D. 1995).
[82] H.B. 949, 179th Gen. Assem., Reg. Sess. (Pa. 1995).
[83] S.B. 160, Statewide Sess. (S.C. 1995); H.R. 4706 Statewide Sess. (S.C. 1994).
[84] H.B. 735, Adjourned Reg. Sess. (Vt. 1996).
[85] H.B. 1098, 54th Leg., Reg. Sess. (Wash. 1995).
[86] A.B. 702, 92d Leg., Reg. Sess. (Wis. 1995).
[87] H.R. 308, 53d Leg., Gen. Sess. (Wyo. 1995).
[88] ALA. CODE § 6-5-620 (Supp. 1996); ARIZ. REV. STAT. ANN. § 3-113(A) (West Supp. 1995); FLA. STAT. ANN. § 865.065(1) (West Supp. 1996); GA. CODE ANN. § 2-16-1 (Supp. 1996); LA. REV. STAT. ANN. § 4501 (West Supp. 1996); MISS. CODE ANN. § 69-1-251 (Supp. 1994); OHIO REV. CODE ANN. § 2307.81(A) (Banks-Baldwin Supp. 1996); S.D. CODIFIED LAWS § 20-10A-2 (Michie 1995).
[89] IDAHO CODE § 6-2001 (Supp. 1996); OKLA. STAT. ANN. tit. 2, § 3010 (West Supp. 1996).
[90] TEX. CIV. PRAC. & REM. CODE ANN. § 96.001–.004 (West Supp. 1996).

person who actually grows or produces perishable agricultural food products," is the only party permitted to file an action for disparagement of agricultural food products.[91] In the other three states however, the statutes define the eligible plaintiffs more broadly. On its face, the Alabama legislation limits eligible parties to producers, but then defines a "producer" as "any person who produces, markets or sells a perishable food product."[92] Likewise, Georgia grants a cause of action to any party in the "entire chain from grower to consumer."[93] Arizona similarly expands the list of parties to include any "producer, shipper, or an association that represents producers or shippers," broadly defined to encompass any person who ships, transports, sells or markets a perishable food product.[94]

The standard of conduct giving rise to a cause of action varies significantly among the statutes. In general, dissemination of statements to the public regarding the safety of an agricultural food product for consumption, which either include "false information" or are "disparaging," is actionable under the state codes. Five states (Louisiana, Mississippi, Ohio, South Dakota, and Texas) utilize a high standard of culpability regarding the dissemination of disparaging statements. To be liable in these states, the disseminator must either have had actual knowledge, or must have "know[n] or should have known" that false information was disseminated to the public "stating or implying perishable agricultural food products" are unsafe for human consumption.[95] In South Dakota, dissemination of materials is expanded to include information about the safety of a "generally accepted agricultural and management practice."[96] Alabama and Oklahoma, on the other hand, utilize a strict liability standard, requiring no knowledge or awareness to make a statement actionable. In these

---

[91] FLA. STAT. ANN. § 865.065(2)(c) (West Supp. 1996); IDAHO CODE § 6-2003(1) (Supp. 1996); LA. REV. STAT. ANN. § 4501 (West Supp. 1996); MISS. CODE ANN. § 69-1-255 (Supp. 1996); OHIO REV. CODE ANN. § 2307.81(A), (B)(4) (Banks-Baldwin Supp. 1996); OKLA. STAT. ANN. tit. 2, § 3012 (West Supp. 1996); S.D. CODIFIED LAWS § 20-10A-2 (Michie 1995); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(B). *See also* Semple Comment, *supra* note 2, at 413–14.

[92] ALA. CODE § 6-5-622 (Supp. 1996). *See also* H.B. 61, Reg. Sess. (Ala. 1996), which would enlarge that statute's definition of "perishable food products."

[93] GA. CODE ANN. § 2-16-2(3) (Supp. 1996).

[94] ARIZ. REV. STAT. ANN. § 3-113(A), (D)(4) (West Supp. 1995).

[95] LA. REV. STAT. ANN. § 4502(1) (West Supp. 1996); MISS. CODE ANN. § 69-1-253 (Supp. 1994); OHIO REV. CODE ANN. § 2307.81(C) (Banks-Baldwin Supp. 1996); S.D. CODIFIED LAWS § 20-10A-1(2) (Michie 1995); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(A) (West Supp. 1996).

[96] S.D. CODIFIED LAWS § 20-10A-1(2) (Michie 1995).

two states, all that is required to make disparagement actionable is the "dissemination to the public in any manner of false information" regarding the safety of a perishable food product for human consumption.[97] At the other extreme, Arizona, Georgia and Florida require that the dissemination to the public of false information regarding the safety of a perishable food product be done in a "willful or malicious" manner.[98] Under the Florida statute, the plaintiff must also show that the false disparagement occurred knowingly.[99]

The definition and impact of "false information" also differs under the various statutes. In Arizona, Florida, and Ohio, "false information" means information that is "not based upon reliable, scientific facts and reliable scientific data."[100] No particular party, however, is assigned the burden of proof concerning the truth or falsity of a statement. When information is not based on "reasonable and reliable scientific inquiry, facts or data" it is "deemed to be" false in Alabama and Georgia.[101] Whether this language creates a presumption is unclear. In Louisiana and Mississippi, information failing to meet this standard is likewise expressly presumed to be false.[102] Again, no burden of proof is assigned to either party regarding the veracity of the disparaging statement. Yet since the Alabama statute "shall be construed in pari materia with all laws relating to fraud, criminal mischief, criminal tampering with property, interruption of or impairing commerce and trade, unlawful trade practices and property damage,"[103] the procedural rules regarding those actions are imported to product disparagement cases. Under Texas law, whether the information was based upon "reasonable and reliable scientific inquiry, facts or data" does not create a presumption of falsity, but is merely something for the court to consider.[104] No burden of proof is otherwise assigned in the Texas statute.

---

[97] ALA. CODE § 6-5-621(1) (Supp. 1996); OKLA. STAT. ANN. tit. 2, § 3011(1) (West Supp. 1996).

[98] GA. CODE ANN. § 2-16-2(1) (Supp. 1996). *See also* ARIZ. REV. STAT. ANN. § 3-113(A) (West Supp. 1995); FLA. STAT. ANN. § 865.065(2)(a) (West Supp. 1996). *But see infra* note 133 and accompanying text, suggesting that this language may not, in fact, protect those parties that disseminate food safety information.

[99] *See* FLA STAT. ANN. § 865.065(2)(a) (West Supp. 1996).

[100] ARIZ. REV. STAT. ANN. § 3-113(E)(1) (West Supp. 1995); FLA. STAT. ANN. § 865.065(2)(a) (West Supp. 1996); OHIO REV. CODE ANN. § 2307.81(B)(2) (Banks-Baldwin Supp. 1996)

[101] ALA. CODE § 6-5-621(1) (Supp. 1996); GA. CODE ANN. § 2-16-2(1) (Supp. 1996).

[102] LA. REV. STAT. ANN. § 4502(1) (West Supp. 1996); MISS. CODE ANN. § 69-1-253(a) (Supp. 1994).

[103] ALA. CODE § 6-5-625 (Supp. 1996).

[104] TEX. CIV. PRAC. & REM. CODE ANN. § 96.003 (West Supp. 1996).

One state, South Dakota, does not offer a definition of "false information,"[105] and another, Idaho, establishes an entirely different set of standards. In Idaho, for a cause of action to arise, there must be "publication to a third party of a false factual statement," which is "of and concerning the plaintiff's specific perishable agricultural food product" and "clearly imputes the safety of the product."[106] Moreover, the defendant must have "intended . . . to cause harm to the plaintiff," acted "with actual malice," and caused "pecuniary loss" to the plaintiff.[107] The Idaho statute places the burden of proof squarely on the plaintiff to prove by clear and convincing evidence each element of the cause of action.[108]

The remedy provided by these statutes is compensatory damages. All but one state also leave open the possibility of punitive and/or other "appropriate relief."[109] Moreover, the Ohio and South Dakota statutes expressly grant the recovery of treble damages for the disparagement of any perishable agricultural food product made with intent to harm the producer.[110] Idaho alone limits the amount of damages to "only . . . actual pecuniary damages."[111] Arizona and, in some cases, Ohio, also provide for the award of court costs and attorney's fees to the prevailing party.[112]

While many of these statutory provisions are standard, a few unique features appear in some of the legislation. For example, Alabama denies the defense of lack of intent and lack of awareness of the act charged.[113] In addition, both the Idaho and Oklahoma statutes expressly state that the product disparagement cause of action does not preempt any other existing source of

---

[105] S.D. CODIFIED LAWS § 20-10A-1 (Michie 1996).

[106] IDAHO CODE § 6-2002(1)(a), (b) (Supp. 1996).

[107] *Id.* § 6-2002(1)(c)–(e).

[108] *Id.* § 6-2003(2).

[109] ALA. CODE § 6-5-622 (Supp. 1996); ARIZ. REV. STAT. ANN. § 3-113(A) (West Supp. 1995); FLA. STAT. ANN. § 865.065(3) (West Supp. 1996); GA. CODE ANN. § 2-16-3 (Supp. 1996); LA. REV. STAT. ANN. § 3:4503 (West Supp. 1996); MISS. CODE ANN. § 69-1-255 (Supp. 1994); OHIO REV. CODE ANN. § 2307.81(C) (Banks-Baldwin, WESTLAW through 1996 portion of the 121st G.A.); OKLA. STAT. ANN. tit. 2, § 3012; S.D. CODIFIED LAWS § 20-10A-2 (Michie 1995); TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(B) (West Supp. 1996).

[110] *See* OHIO REV. CODE ANN. § 2307.81(E) (Banks-Baldwin, WESTLAW through 1996 portion of 121st G.A.); S.D. CODIFIED LAWS § 20-10A-3 (Michie 1995).

[111] IDAHO CODE § 6-2003(3) (Supp. 1996).

[112] ARIZ. REV. STAT. ANN. § 3-113(C) (West Supp. 1995); OHIO REV. CODE ANN. § 2307.81(C) (Banks-Baldwin, WESTLAW through 1996 portion of 121st G.A.).

[113] ALA. CODE § 6-5-623 (Supp. 1996).

relief for the damaged party.[114] Idaho also requires that the statement must be "clearly directed at a particular plaintiff's product."[115] As a result, a factual statement regarding a generic group of products does not give rise to a cause of action in Idaho. Texas similarly precludes a cause of action for statements regarding the organic or inorganic method of production for perishable agricultural food products.[116] With regard to the litigants, Ohio's statute provides for the certification of producer and grower associations into class actions.[117] Finally, and perhaps most shocking, Colorado makes it a *felony* "to intentionally make false or misleading statements as to the market conditions for farm products . . . ."[118]

A remarkable amount of similarity exists among the agricultural product disparagement statutes. Only Idaho produced an original piece of legislation dealing with the issue—most probably as a result of the submission of a draft bill to the Idaho Attorney General's office,[119] which prompted a memorandum regarding the constitutionality of the proposed legislation. The Idaho Product Disparagement Act later passed under the guidance of the state Attorney General. In contrast, the other statutes glaringly reveal the absence of constitutional considerations in drafting the legislation.

## IV. Food-Related Speech as Matters of Public Concern

Agricultural disparagement statutes violate both the First Amendment of the United States Constitution and many state constitutions by making actionable the very speech protected by these documents. Underpinning the protection of free speech is Justice Holmes classic "marketplace of ideas" statement.[120] "Freedoms of

---

[114] Idaho Code § 6-2003(6) (Supp. 1996); Okla. Stat. Ann. tit. 2, § 3012 (West Supp. 1996).

[115] Idaho Code § 6-2003(4) (Supp. 1996).

[116] Tex. Civ. Prac. & Rem. Code Ann. § 96.004(1)–(3) (West Supp. 1996).

[117] *See* Ohio Rev. Code Ann. § 2307.81(D) (Banks-Baldwin, WESTLAW through 1996 portion of 121st G.A.).

[118] Colo. Rev. Stat. Ann. § 12-16-115(1)(c) (West Supp. 1996). It should be noted though, that this provision antedates Colorado's agricultural disparagement statute, *id.* § 35-31-101, and may not directly be implicated in speech unrelated to commerce. Section 35-31-104 itself, however, allows for imprisonment of up to one year. *Id.*

[119] Opinion Letter from the Office of the Attorney General to the Hon. Herb Carlson, Idaho State Senate, regarding House Bill 593; Product Disparagement [hereinafter "Idaho AG Opinion"] (Feb. 28, 1992) (on file with the Harvard Journal on Legislation).

[120] Milkovich v. Lorain Journal Co., 497 U.S. 1, 18 (1990) ("[T]he ultimate good

expression require 'breathing space'" to have fair competition of ideas within a free and open society.[121] Occasionally, the need to protect the competition of ideas will require the courts to "protect some falsehood in order to protect speech that matters."[122] Yet some states fail to provide this protection when they heavily regulate the "marketplace of ideas" through the newly enacted agricultural disparagement statutes.

Most of these agricultural disparagement laws are fundamentally flawed because they fall short in meeting two basic requirements of the First Amendment.[123] First, they violate the First Amendment by making actionable speech that is protected. Second, they do not provide for "fault," a constitutionally necessary requirement in product disparagement cases.

Actions for product disparagement may not be brought for statements disseminated to further public safety and knowledge. Speech concerning issues of grave public concern are protected by a standard of intentional falsity or reckless disregard for the truth. The U.S. Supreme Court in *New York Times Co. v. Sullivan*[124] considered state defamation laws in the context of the First Amendment right to free speech. The Supreme Court held that a public official must demonstrate "that the [defamatory] statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."[125] Three years later, the Supreme Court extended this standard beyond public officials to all "public figures" who sought recovery for libel.[126]

The Supreme Court further expanded the *New York Times* standard to protect matters of public concern in *Rosenbloom v. Metro-*

---

desired is better reached by free trade in ideas . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market." (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting))). *See also* Leathers v. Medlock, 499 U.S. 439, 448–49 (1991); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board, 502 U.S. 105, 116 (1991) (noting that content-based restrictions on speech may distort the marketplace and even drive ideas or viewpoints from the marketplace).

[121] Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986) (quoting New York Times v. Sullivan, 376 U.S. at 272 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963))).

[122] Gertz v. Robert Welch, Inc., 418 U.S. at 341.

[123] Only Idaho's statute is probably immune from constitutional attack on all counts, in large measure due to the intervention of the Idaho Attorney General. *See supra* note 103.

[124] 376 U.S. 254 (1964).

[125] *Id.* at 279–80.

[126] *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162–65 (1967).

*media, Inc.*[127] In that case, a Metromedia radio station reported Mr. Rosenbloom's arrest on charges of possession of obscene literature, and the subsequent seizure of allegedly obscene materials. Some early reports did not qualify that the materials were only allegedly obscene. After the materials were found not to be obscene, Mr. Rosenbloom brought a defamation action against Metromedia. The Court stated, "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous,"[128] and unambiguously upheld Metromedia's right to report the events.

Food safety is a matter of grave public concern. Yet the U.S. Supreme Court's jurisprudence of First Amendment protections has been extended beyond the confines of political or social issues. The Court recognized in *Bates v. State Bar of Arizona*[129] the First Amendment protection of speech that informs consumers of services and products. In *Bates*, the Court held that commercial speech in the form of advertising by attorneys served the public welfare by creating a more informed public with regard to consumer issues.[130] The protection of commercial speech by the Constitution "is based on the informational function of advertising."[131] The level of protection accorded to commercial speech nevertheless is less than that accorded to other forms of constitutionally guaranteed expression.[132]

Litigating the constitutionality of agricultural disparagement statutes should not, however, require a determination of how First Amendment protections of commercial speech are violated. Most likely, the individuals or groups sued under these laws will not be commercial entities; rather, they will be not-for-profit organizations that provide information to the public on matters involving food safety. If so, they should be accorded the highest

---

[127] 403 U.S. 29 (1971).

[128] *Id.* at 43–44. *See also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964) (stating that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned").

[129] Bates v. State Bar of Arizona, 433 U.S. 350, 364 (1977).

[130] *Id.* at 382

[131] Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York, 447 U.S. 557, 563 (1980) (citing First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978)).

[132] *See Central Hudson*, 447 U.S. at 563 (citing Ohralik v. Ohio State Bar Assn., 436 U.S. 447, 456–57 (1978)).

level of constitutional protection as expressed in *New York Times v. Sullivan.*

After expanding the application of the *New York Times v. Sullivan* standard in *Rosenbloom*, however, the Supreme Court in *Gertz v. Robert Welch Inc.*,[133] limited the application of the standard to "public figures." The Court in *Gertz* determined that private individuals should not be forced to prove the *New York Times* standard even in matters of public concern.[134] Between "public figure" and "private individuals," the Court in *Gertz* established that an individual, by becoming involved in a "particular public controversy . . . becomes a public figure for a limited range of issues."[135]

Even so, the Supreme Court has noted that "[l]ike every other case in which this Court has found Constitutional limits to state defamation laws, *Gertz* involved expression on a matter of undoubted public concern" and that such speech "is 'at the heart of the First Amendment's protection'."[136] This reasoning resulted in a curious disjunction in defamation law. This disjunction, however, probably will not impede challenges to agricultural disparagement laws for three reasons. First, a handful of state courts have held that non-public figure plaintiffs must show actual malice as to the dissemination of information of public concern.[137] Of these minority-rule jurisdictions, Louisiana[138] and Ohio[139] have agricultural disparagement statutes. In these states, the defense of an agricultural disparagement action should be facilitated because the kind of speech involved is unquestionably of public concern, and therefore, the higher actual malice standard will apply. Indeed, the argument could be made that the statutes in Louisiana and Ohio violate their own state's free expression jurisprudence by imposing liability without a showing of actual malice on issues of public concern.

Second, even in majority-rule jurisdictions (those that followed *Gertz* and adopted a simple negligence standard for defa-

---

[133] 418 U.S. 323 (1974).

[134] *Id.* at 352.

[135] *Id.* at 351.

[136] Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756, 759 (1985) (quoting First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 776 (1978)).

[137] *See* Mount Juneau Enters. v. Juneau Empire, 891 P.2d 829, 837 (Alaska 1995); Romero v. Thomson Newspapers (Wisconsin), Inc., 648 So. 2d 866, 869–70 (La. 1995).

[138] *See* LA. REV. STAT. ANN. §§ 4501–4504 (West Supp. 1995).

[139] *See* OHIO REV. CODE ANN. § 2307.81 (1996) (Banks-Baldwin, WESTLAW through 1996 portion of 121st G.A.).

mation cases brought by non-public figures concerning information that is of public concern),[140] a sentiment remains that certain kinds of speech will be protected by the actual malice standard. For example, the New Jersey Supreme Court in *Turf Lawmower Repair, Inc. v. Bergen Record Corp.*,[141] while applying the lower negligence standard for speech involving non-public figures, held that the actual malice requirement applied to businesses that "intrinsically implicate important public interests, [such as] a matter of public health,"[142] thus preserving its earlier ruling in *Dairy Stores*. Only actions brought by "businesses involved with an everyday product or service, whose practices do not constitute consumer fraud, impinge on the health and safety of New Jersey's citizenry, or comprise activity within a highly-regulated industry" are to be governed by the lower negligence standard.[143]

Finally, even in the majority-rule states that do not follow other states' views that food safety speech is presumptively to be accorded actual malice protection, the *New York Times v. Sullivan* standard could arguably still apply. The *New York Times* standard applies to limited public figures,[144] and any potential plaintiff under these statutes would likely qualify as such a public figure. In determining when an individual becomes a limited public figure, the Supreme Court has established two general criteria. Both are met by food producers, processors, marketers and sellers—the class of potential plaintiffs under the agricultural disparagement laws. First, limited public figures "invite attention and comment" in a particular public controversy "in order to influence the resolution of the issues involved."[145] Because food producers, processors, marketers and sellers voluntarily enter "the market for the purpose of selling a product or service from which profits may be derived," they invite attention as contemplated by the Supreme Court in *Gertz*.[146] Second, the Court ruled that limited public figures generally have greater

---

[140] *See* Turf Lawnmower Repair, Inc. v. Bergen Record Corp., 655 A.2d 417, 423–24 & n.1 (N.J. 1995), *cert. denied*, 116 S.Ct. 752 (1996) (indicating that 42 jurisdictions have adopted the rule that negligence is the standard in defamation cases brought against media defendants involving a matter of public concern, but where the plaintiff is not a public figure).

[141] *Id.*

[142] *Id.* at 427.

[143] *Id.* at 435.

[144] *See Gertz*, 418 U.S. at 351; J.F. Straw v. Chase Revel, Inc., 813 F.2d 356, 360 (11th Cir. 1987) (citing *Gertz*).

[145] *Gertz*, 418 U.S. at 345.

[146] *Dairy Stores*, 465 A.2d at 960.

access to self-help, through "channels of effective communication," than do private individuals.[147] Food producers, processors, marketers, and sellers can advertise and thus have greater access to effective communication than do private individuals.[148]

Because most of the potential plaintiffs under these statutes are limited public figures, they must meet the *New York Times* standard of showing that the dissemination of food safety information was "actually malicious." Since most of the agricultural disparagement statutes do not provide for this standard,[149] those laws are constitutionally deficient.[150] Failing to recognize this "actual malice" standard, agricultural disparagement statutes fall short of the requirement of *New York Times*, *Rosenbloom*, and *Gertz* and therefore should be held unconstitutional.

Furthermore, many of these statutes are unconstitutional because they make speech actionable without fault.[151] Even if a

---

[147] *Gertz*, 418 U.S. at 344.

[148] *Dairy Stores*, 465 A.2d at 960. *See also* Semple Comment, *supra* note 2, at 433–35 (suggesting that while food cooperatives and producing associations would be considered limited public figures under this analysis, individual farmers would not).

[149] Arguably, Idaho has the only statute that explicitly requires actual malice. *See* IDAHO CODE § 6-2002(1)(d) (Supp. 1996) (defining disparagement as a statement made "with actual malice"). It is also possible that Arizona's law mentioning "malicious public dissemination," ARIZ. REV. STAT. ANN. § 3-113(A) (West Supp. 1995), and the Texas statute's reference to the defendant "know[ing] the information is false," TEX. CIV. PRAC. & REM. CODE ANN. § 96.002(a)(2) (West Supp. 1996), might also be interpreted to insulate these statutes from this attack. *See also* Scrochi Note, *supra* note 23, at 1241; Semple Comment, *supra* note 2, at 436 n.269.

[150] Yet simply because a state's agricultural disparagement statute may refer to "malicious dissemination" of false information does not necessarily mean that it recognizes the *New York Times* standard. An agriculture disparagement statute may not explicitly provide for the "actual malice" standard because of the addition of the word "malicious" in the law. *See, e.g.*, GA. CODE ANN. § 2-16-2(1) (Supp. 1996). "Malicious" could refer to the common law requirement that the plaintiff must demonstrate the statement was deliberately calculated to injure. *See, e.g.*, Williams v. Trust Co. of Ga., 230 S.E.2d 45, 50 (Ga. 1976). *See also J.F. Straw*, 813 F.2d at 360 (sitting in diversity, the court held jury instructions on punitive damages insufficient because they did not distinguish between "legal malice" and "actual malice"). This malicious intent standard has, for example, long been part of the Georgia common law on product disparagement. Taggart v. Savannah Gas Co., 175 S.E. 491, 492 (Ga. 1934) ("[T]he plaintiff could not recover for sayings unfavorable to the appliance, without proving, among other things, that the words were used with malicious intent, and that he sustained special damage thereby."). Thus, including the word "malicious" in GA. CODE ANN. § 2-16-2(1), and other similar statutes, *see supra* note 98 and accompanying text, arguably could be merely a codification of the common law requirement and not a recognition of the constitutional standard of "actual malice." *See also* Scrochi Note, *supra* note 23, at 1243–44 (discussing Straw v. Chase Revel, Inc., 813 F.2d 356 (11th Cir.), *cert. denied*, 484 U.S. 856 (1987) (sitting in diversity, deciding that Georgia law distinguished between common law malice and actual malice)).

[151] Five of the 11 statutes do apply a negligence, or fault, standard to the dissemination of statements. *See supra* notes 95–96 and accompanying text. Two states—Alabama and Oklahoma—have "no fault" statutes, which make actionable speech that the

court were to find that no potential plaintiff under an agricultural disparagement statute would be deemed a limited public figure (thus making the *New York Times v. Sullivan* test inapplicable), the statutes would still be unconstitutional under *Gertz*. In *Gertz*, the Supreme Court defined the minimum constitutional requirements for a statute creating a cause of action for disparagement. *Gertz* allows the states to establish their own standard of liability for statements about private individuals, "so long as they do not impose liability without fault."[152] Some of the agricultural disparagement statutes are unconstitutional because they fail to meet even this minimal test, by permitting liability absent a finding of fault, which is in violation of the First Amendment.

Some of these statutes, moreover, define disparagement as including "the willful or malicious dissemination . . . of false information."[153] Many statutes define false information as information that "is not based upon reasonable and reliable scientific inquiry, facts, or data."[154] Yet just because speech is false does not mean it triggers civil liability.[155] The *Gertz* Court refused to extend liability for statements that are found to be merely false, but without fault.[156] Failure to include a fault requirement places a statute in fundamental and fatal conflict with the First Amendment.

## V. Disparagement Laws as Content-Based Regulations of Speech

Even if speech were deemed unprotected under the "actual malice" standard of *New York Times* or the "no-fault" principle of *Gertz*, regulating speech in a content-based manner remains unconstitutional under the rationale enunciated by the Supreme Court in *R.A.V. v. City of St. Paul, Minnesota*.[157] The Court in *R.A.V.* struck down a statute on its face because it was impermissibly content-based and "prohibit[ed] otherwise permitted speech solely on the basis of the subjects the speech addresse[d]."[158] In

---

defendant neither knew nor should have known to be false. *See supra* note 97 and accompanying text.

[152] 418 U.S. at 347.

[153] *See, e.g.*, GA. CODE ANN. § 2-16-2(1) (Supp. 1996).

[154] *Id.*

[155] *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).

[156] 418 U.S. at 347 n.10.

[157] 505 U.S. 377 (1992). In *R.A.V.*, a juvenile was charged with violating a criminal ordinance banning bias-motivated disorderly conduct.

[158] *Id.* at 381.

the case of "fighting words," which were at issue in *R.A.V.*, "[t]he government may not regulate use based on hostility—or favoritism—towards the underlying message expressed."[159] Analogously, the Court explained that the government may prohibit libel, yet "it may not make the further content discrimination of proscribing *only* libel critical of the government."[160]

Writing for the Court in *R.A.V.*, Justice Scalia began with the premise that content-based regulations of speech are presumptively invalid.[161] Exceptions to this presumption exist, but, according to Scalia, the Court has consistently narrowed these exceptional categories. Simply because a narrow category (or "mode") of speech is legitimately proscribed by a valid statute does not mean that this category lacks constitutional protection. In short, constitutionally proscribable speech may be constitutionally protected as well. Some categories of speech may be constitutionally barred in limited contexts without licensing their use as "vehicles for content discrimination unrelated to their distinctively proscribable content."[162]

Justice Scalia offered three examples in support of his proposition that statutes discriminating against speech based on content are more acceptable when proscribing an entire class of speech than when singling out a particular viewpoint for disfavored treatment. First, a state may prohibit only obscenity that is the most pruriently repulsive, but may not solely proscribe obscenity containing "offensive *political* messages."[163] Second, Congress can criminalize violent threats directed toward the President, but may not criminalize only those threats that mention his policy on some issue. Third, a state may regulate price advertising in a particular industry and not in other industries for fear of fraud, but may not proscribe only advertising which demeans men.[164]

Similarly, while a state may certainly create disparagement, defamation, and libel statutes, the Constitution prohibits it from creating tort remedies restricted to agricultural products, especially when the statute's causes of action are more draconian than for other dignitary torts. As noted, many agricultural dis-

---

[159] *Id.* at 386.
[160] *Id.* at 384.
[161] *Id.* at 382.
[162] *Id.* at 383–84.
[163] *Id.* at 388.
[164] *Id.* at 388–89.

paragement statutes were designed to assist agribusiness plaintiffs by relaxing the burdens of proof allocated in defamation litigation, dropping the common law "of and concerning" requirement, and allowing for the recovery of punitive damages.

States may legitimately enact statutes that create a general cause of action for disparagement, but statutes enacted to privilege agricultural products against critical speech are unconstitutional. Because the agricultural disparagement statutes create a new category of libel based on the content of the allegedly disparaging comments, *R.A.V.* instructs that these laws must be struck down. States may not proscribe libel or disparagement of particular products,[165] unduly privileging those commodities against otherwise lawful speech.[166]

## VI. Other Grounds Making Disparagement Statutes Unconstitutional

Even if agricultural disparagement statutes are not found to be facially void, they remain unconstitutionally vague, requiring judicial interpretation to cure their ambiguities. Because of the vague language of many of these laws, the standard to which food safety journalists or advocates are held is uncertain. Moreover, the burden of proof seems to be placed on the speaker in many of these enactments. The uncertainty resulting from the language of the statutes and the unprecedented standard of "reasonable and reliable scientific inquiry, facts, or data"—used in many of the laws—create a chilling effect on speech. In addi-

---

[165]This limitation suggests another surprising source for a constitutional challenge against agricultural disparagement statutes. Using the dormant Commerce Clause, the Supreme Court has generally struck down state statutes when they directly regulate or discriminate against interstate commerce, or when they favor in-state economic interests over out-of-state interests, usually without any further inquiry. *See* Brown-Forman Distillers Corp. v. New York State Liquor Auth., 476 U.S. 573, 579 (1986) (citing three other authorities). If a statute has only an indirect effect on interstate commerce, then the Court examines the legitimacy of the state's interest and the balance between the local benefits and the burden on interstate commerce. *Id.*

Arguing that an agricultural disparagement law directly discriminates against interstate commerce would probably be difficult. Ohio's statute seems to be alone in protecting only Ohio produce from criticism. *See* Ohio Rev. Code Ann. § 2307.81(B)(3) (Banks-Baldwin 1996). Most of the other statutes were drafted in such a way that out-of-state produce interests could still sue under the laws. Nevertheless, all of these laws could arguably have an indirect effect on interstate commerce—by insulating certain commodities from criticism—and should be declared unconstitutional because the state purpose in enacting these laws is not legitimate.

[166]*See also* Scrochi Note, *supra* note 23 at 1243–44.

tion, many of the statutes lack an "of and concerning" clause mandated by the Constitution to protect those parties disseminating food safety information. Finally, the provisions for punitive damages, aside from chilling speech, fail to meet the standards announced by the U.S. Supreme Court in similar cases. The cumulative effect of these deficiencies is to render most of these statutes unenforceable and thus unconstitutional.

### A. *Failure of Notice and Vagueness*

First, it is unclear whether "malice," as used in many of these laws, is supposed to describe the act of dissemination or the state of mind of the speaker disseminating the information. The U.S. Supreme Court has ruled that every statute must provide fair notice to those persons to whom it is directed, to avoid discriminatory enforcement.[167] In *Gentile v. State Bar of Nevada*, the Supreme Court voided a rule of professional ethics, which banned pre-trial comments that could influence the pending case's outcome, because it did not provide attorneys notice of when the rule applied. The Court stated, "[t]he prohibition against vague regulations of speech is based in part on the need to eliminate the impermissible risk of discriminatory enforcement."[168]

Many of the agricultural disparagement laws suffer from the same constitutional defect. The operation of "willful or malicious" and the uncertain application of the "reasonable or reliable scientific inquiry, facts, or data" standard[169] do not adequately define what conduct will be actionable under such statutes. Georgia's law, for instance, states in part that "'[d]isparagement' means the willful or malicious dissemination to the public in any manner of false information . . . ."[170] This language is unclear as to whether the act of dissemination must be willful or malicious, or whether the speaker's knowledge of the falsity of the information must also be willful or malicious.[171] Moreover, "reasonable and reliable scientific inquiry" is not under-

---

[167] *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1051 (1991) (citing Kolender v. Lawson, 461 U.S. 352, 357–58, 361 (1983) and Smith v. Goguen, 415 U.S. 566, 572–73 (1974)).

[168] *Id.* at 1051.

[169] *See, e.g.*, ARIZ. REV. STAT. ANN. § 3-113(A) (1995); FLA. STAT. ch. 865.065(2)(a) (1994); GA. CODE ANN. § 2-16-2(1) (Supp. 1996).

[170] GA. CODE ANN. § 2-16-2(1) (Supp. 1996).

[171] *See also supra* note 137 and accompanying text.

stood consistently from community to community or even between individuals because the "reasonable and reliable" rhetoric is insufficient to identify any specific standard of investigation.[172] Thus, no notice is provided regarding what kinds of speech will subject food safety writers to civil liability.

### B. *Burdens of Proof*

Many agricultural disparagement statutes appear unconstitutionally to place the burden of proof on the speaker to show that what the speaker said or wrote about food safety was true. Many of the laws could reasonably be read to require potential defendants to provide the "reasonable and reliable scientific inquiry, facts, or data,"[173] which formed the basis of their speech or writing. By placing the burden of proof on the speaker to prove the truth of what was said or written, the speaker's free speech rights are violated. In *Philadelphia Newspapers, Inc., v. Hepps*, the U.S. Supreme Court unambiguously stated "[w]e believe that the common laws rule on falsity—that the defendant must bear the burden of proving truth—must similarly fall here to a constitutional requirement that the plaintiff bear the burden of showing *falsity, as well as fault*, before recovering damages."[174] Many of the agricultural disparagement laws make no such provision[175] and hence should be reformed to reflect the requirements of free speech as found in the First Amendment.

### C. *Expression of Opinions*

The "reasonable and reliable" scientific inquiry test, used in many of the agricultural disparagement laws, chills the voicing of opinions and makes no provision for honest expression. The Supreme Court in *Milkovich v. Lorain Journal Co.*[176] reviewed the protections available to assertions of opinion. The *Milkovich* Court explained that "a statement of opinion relating to matters

---

[172] *See generally* Martin H. Redish, *Product Health Claims and the First Amendment: Scientific Expression and the Twilight Zone of Commercial Speech*, 43 VAND. L. REV. 1433, 1434–35 (1990).

[173] *See, e.g.*, GA. CODE ANN. § 2-16-2(1) (Supp. 1996).

[174] 475 U.S. at 776 (emphasis added).

[175] *See supra* note 97 and accompanying text. *See also* Scrochi Note, *supra* note 23, at 1241.

[176] 497 U.S. 1 (1990).

of public concern which does not contain a provably false factual connotation will receive full constitutional protection."[177] The Supreme Court has noted what many of the agricultural disparagement statutes gloss over—that the truth or falsity of speech is occasionally indiscernible.[178] The "reasonable and reliable scientific inquiry" test for falsity does not allow for the occasional failure of "reasonable and reliable" science to reach a consensus. Because of this deficiency in the statutes and in the scientific community, food safety advocates will not know to what standard they will be held. Thus, their speech is chilled.

### D. *The Lack of an "Of and Concerning" Requirement*

Many agricultural disparagement statutes are also unconstitutional because they eliminate the common law "of and concerning" requirement.[179] The function of the "of and concerning" requirement is to prevent lawsuits by "those who merely complain of nonspecific statements that they believe cause them some hurt," thereby allowing only those claims brought by persons "who are the direct object of criticism."[180] Although the "of and concerning" requirement has been given uneven application by some courts, including most notably the *Auvil* court,[181] some required nexus of injury between the class of plaintiffs and the injurious disparagement must be shown.[182] In this respect, the "of and concerning" element in a cause of action is a First Amendment requirement.[183]

---

[177] 497 U.S. at 20 (explaining the significance of the Court's opinion in *Hepps*).

[178] *Hepps*, 475 U.S. at 776.

[179] Only Idaho's statute expressly incorporates an "of and concerning" requirement by requiring that the disparaging statement be clearly directed at a particular plaintiff's product, rather than a generic group of products. *See* IDAHO CODE § 6-2003(4) (1996). Because the remaining laws recognize such a broad class of plaintiffs, they would need to incorporate an express "of and concerning" element to avoid being struck down.

[180] Blatty v. New York Times Co., 728 P.2d 1177, 1183 (Cal. 1986).

[181] *See Auvil*, 800 F. Supp. 928, 935–36 (E.D. Wash. 1992) (noting that "of and concerning" requirement "does not mesh neatly with disparagement theory" and holding that large group of Washington apple growers could sue for disparagement).

[182] *See, e.g.*, Golden North Airways, Inc. v. Tanana Publ'g Co., 218 F.2d 612, 618 (9th Cir. 1954) (stating that plaintiffs in a large group are unlikely to recover in a disparagement case because it would be more difficult to prove that a communication "refer[s] to any particular member of the group").

[183] *See* Rosenblatt v. Baer, 383 U.S. 75, 82 (1966) ("To the extent the trial judge authorized the jury to award respondent a recovery without regard to evidence that the asserted implication of the column was made specifically of and concerning him, we hold that the instruction was erroneous.") (citing to New York Times v. Sullivan, 376 U.S. 254 (1964)). In addition to being a constitutional requirement, the common law

Since agricultural disparagement statutes lack an "of and concerning" clause, almost anyone involved in the "chain from grower to consumer"[184] could sue for a generalized statement made by a journalist or food safety advocate. The larger the scope of a statement regarding food safety, the more likely a public concern is implicated and the less likely a personal or individual harm occurs. The agricultural disparagement statutes, lacking an "of and concerning" clause, are constitutionally deficient.

### E. *Punitive Damages*

Finally, because many of the laws provide for punitive damages,[185] they violate the *New York Times* standard. Georgia's provision, for example, which allows punitive damages to be recovered by "[a]ny person who produces, markets, or sells" perishable food products,[186] directly conflicts with the First Amendment protections for freedom of speech. The U.S. Supreme Court in *Gertz* held that a plaintiff could collect punitive damages only after proving that the defendant acted with "actual malice," the standard announced in *New York Times v. Sullivan*.[187] This standard for recovery of punitive damages by plaintiffs must be read into agricultural disparagement statutes before they can be constitutionally valid. "Actual malice" is, after all, the standard that public figures must attain before they can recover even compensatory damages. It only makes sense to require that if agricultural plaintiffs receive more than compensatory damages (punitive awards), they meet the higher standard of proof.

## VII. *Action for a Clean Environment v. Georgia*

Thus far, this Article has reviewed the possible constitutional objections to agricultural disparagement statutes. What remains

---

of many states, including Georgia, has always included an "of and concerning" requirement. *See* Triangle Publications, Inc. v. Chumley, 317 S.E.2d 534, 537 (Ga. 1984) (referring to Minday v. Constitution Publ'g Co., 182 S.E. 53 (Ga. 1935)). Although the authors are mindful that legislatures are capable of altering the common law, they should do so in an unambiguous fashion. In any event, this object may not be accomplished in violation of state or federal constitutions. *See also* Semple Comment, *supra* note 2, at 429–30.

[184] GA. CODE ANN. § 2-16-2(3) (Supp. 1996).

[185] *See supra* note 109 and accompanying text.

[186] GA. CODE ANN. § 2-16-3 (Supp. 1996).

[187] *Gertz*, 418 U.S. at 349. *See also* Semple Comment, *supra* note 2, at 426–27.

to be considered is in what posture these objections can be raised by food safety advocates or media outlets. The most obvious, and least problematic, situation is one in which a suit is filed under one of these laws, and these constitutional arguments are raised by way of defense. Such an "as-applied" attack on the statute would solve such problems as justiciability, standing, and the standard of review. Yet waiting to be sued under one of these statutes will mean that speech will be chilled in the interim, as individuals and groups ponder whether their speech will be civilly actionable.

Two of the authors mounted a preemptive, facial attack against Georgia's agricultural disparagement statute.[188] It did not succeed; the action was barred on justiciability grounds, as will presently be discussed. We discovered that most of the successful facial challenges are cases in which the statute in question criminalizes some speech. With criminal statutes, no question exists regarding the identity of the potential plaintiff, namely the state itself.[189] In civil actions, however, the state is not clearly a potential plaintiff. The state created the remedy and must have a legitimate reason for doing so. While the state has a stake in enforcing the statute, it is not obviously a potential party, unlike the case of a criminal statute. The state would have to meet the criterion for being a plaintiff in an agricultural disparagement action. This nuance is problematic, because states may enact statutes and then attempt to evade accountability for chilling free speech, since private parties other than the state are the only appropriate potential plaintiffs.

We brought a suit in Georgia challenging the constitutionality of that state's agricultural disparagement statute. The plaintiffs, two grass-roots food safety groups—Action for A Clean Environment and Parents for Pesticide Alternatives—sought a declaratory judgment as to the constitutionality of the Georgia law. The traditional object of a declaratory judgment action is "to permit determination of a controversy before obligations are repudiated or rights are violated."[190] Action under Georgia's Declaratory Judgment Act[191] was particularly appropriate since a

---

[188] *See* Action for a Clean Env't v. Georgia, 457 S.E.2d 273 (Ga. App. 1995).

[189] For this reason, a facial attack against COLO. REV. STAT. ANN. § 12-16-115(1)(c) (West 1996), which makes it a felony to "intentionally make false or misleading statements as to the market conditions for farm products," would appear to be ripe for consideration. *See supra* text accompanying note 118.

[190] *See, e.g.*, Rowan v. Herring, 105 S.E.2d 29, 32 (Ga. 1958).

[191] GA. CODE ANN. § 9-4-1 to -10 (1982). Georgia's Declaratory Judgment Act is substantively identical to this kind of statute in most other jurisdictions.

question of right was at issue.[192] The plaintiffs' speech was chilled by the prohibition of content-based speech about "perishable food products or commodities."[193] The plaintiffs were unsure of the limits imposed on their constitutional right to free speech, and sought a declaratory judgment to clarify those rights.

We chose the State of Georgia as the defendant since we believed both that the state was in the best position to defend the constitutionality of the statute, and that this approach was the most forthright and appropriate means of proceeding. The Georgia Court of Appeals ruled however, that the State of Georgia was not a proper defendant in the case,[194] even though (1) the agricultural disparagement cause of action, created by the state, chilled freedom of expression, and (2) the state could have been considered a potential plaintiff under the statute. The combination of these two factors should have led the court to conclude that the state was a permissible—indeed, the best—party to defend the facial constitutionality of the statute.

### A. *States as Defendants in Facial Attacks*

The state should be a proper defendant in a declaratory judgment action against the enforcement of a statute that violates First Amendment protections. Parties challenging the constitutionality of an agricultural disparagement statute, and the state defending the statute, would clearly have adverse legal interests.[195] The defending state's interest is protecting those who market, sell, or produce agricultural and aquacultural products from disparaging speech.[196] This interest directly clashes with the constitutionally guaranteed right to speak about food safety issues.

---

[192] *See, e.g.*, Total Vending Serv., Inc. v. Gwinnett County, 264 S.E.2d 574, 576 (Ga. App. 1980).

[193] GA. CODE ANN. § 2-16-3 (Supp. 1996).

[194] *See Action for a Clean Env't*, 457 S.E.2d at 274.

[195] To have a justiciable controversy under the Declaratory Judgment Act in Georgia, the parties must have adverse interests in the case's outcome. *See, e.g.*, *Total Vending*, 264 S.E.2d at 576; Pangle v. Gossett, 404 S.E.2d 561 (Ga. 1991); Cheeks v. Miller, 425 S.E.2d 278 (Ga. 1993).

[196] Georgia's statute, for example, contains a section entitled "Legislative findings, determinations, and declaration," which declares: "The General Assembly finds, determines, and declares that the production of agricultural and aquacultural food products and commodities constitutes an important and significant portion of the state economy and that *it is imperative to protect the vitality of the agricultural and aquacultural economy for the citizens of this state by providing a cause of action* for producers, marketers, or sellers to recover damages for the disparagement of any perishable product or commodity." GA. CODE ANN. § 2-16-1 (1996) (emphasis added).

Statutes that chill speech are constitutionally suspect and subject to facial attack. The Supreme Court of the United States has recognized that First Amendment protections of the freedom of speech are important and deserving of heightened protection. "These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society."[197] Repeated suits against advocates for food safety are unnecessary for the statute effectively to chill speech; the mere enactment of the statute and the possibility that a person may be sued under it has a chilling effect. As the Supreme Court noted in *NAACP v. Button*, "[t]he threat of sanctions may deter . . . [First Amendment] exercise almost as potently as the actual application of sanctions."[198] To fulfill the agricultural disparagement statutes purpose of protecting the agricultural economy by restricting criticism, sanctions need never be imposed. The fear of substantial punitive and compensatory damages chills the speech of the people concerned about the quality of food. Facial attacks on statutes—and other government actions—that chill speech have long been recognized by the Supreme Court of the United States.[199]

This limitation on the content of speech requires state courts effectively to silence critics of agricultural or aquacultural products and farming methods. Thus, state action here comes not only through the state directly suing under the statute, but also through the actions of others that are attributable to the state and through enforcement by the state courts. Moreover, the state deprives citizens of their First Amendment rights through the threat of suit, even though the state need never sue under an agricultural disparagement statute. Instead, it may simply rely on the threat that other parties could sue. This reliance does not absolve a state of responsibility for denying its citizens the ability to express their opinions on matters of grave public concern. Even if the state relies on others to deny a right, that denial is still "fairly attributable to the state."[200]

---

[197] NAACP v. Button, 371 U.S. 415, 433 (1963).

[198] *Id.* at 433.

[199] *See, e.g.*, Members of the City Council of Los Angeles v. Taxpayers For Vincent, 466 U.S. 789, 804 (1984) (citing Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 65, 72 (1983); Consolidated Edison Co. v. Public Service Comm'n, 447 U.S. 530, 535–36 (1980); Carey v. Brown, 447 U.S. 455, 462–63 (1980); Young v. American Mini Theatres, Inc., 427 U.S. 50, 63–65, 67–68 (1976) (plurality opinion); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972)).

[200] Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982) (holding that state action existed based on involvement of state officials in prejudgment attachment

Due to the potential enforcement of this law through state courts, the state could become the organ for suppressing free speech as guaranteed by the Constitution of the United States. The Supreme Court has long recognized the proposition "[t]hat the action of state courts and of judicial officers in their official capacities is to be regarded as action of the state within the meaning of the Fourteenth Amendment."[201] Thus, the states should be the proper defendants in declaratory judgment actions against the agricultural disparagement statutes.

### B. *States as Potential Plaintiffs Under the Statutes*

Under the class of plaintiffs described in many of the agricultural disparagement statutes, the state is itself a potential plaintiff. For a state to be a plaintiff under these laws, the state must not only be a "person,"[202] but also have a cause of action within the contemplated classes covered under the statute. The potential class of plaintiffs is extremely broad under many of the agricultural disparagement statutes. The Georgia statute, for example, grants a cause of action for disparagement to a person "who produces, markets, or sells a perishable food product or commodity."[203]

State governments serve in all of the requisite capacities—marketer, producer, and seller—and thus could bring a complaint. First, many states are intimately involved in the marketing of perishable agricultural products.[204] The role of state governments in marketing

---

process in which debtor's property was taken). *See also, e.g.*, Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 486 (1988) ("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found."); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (finding state action where private restaurant has "symbiotic relationship" with governmental entity).

[201] Shelley v. Kraemer, 334 U.S. 1, 14 (1948).

[202] Just because a state or government entity is nowhere mentioned in the statutes as part of the potential class of plaintiffs does not exclude the possibility that a state could sue if it is otherwise qualified. States have traditionally been considered "persons" under similar statutes. The U.S. Supreme Court, in Ohio v. Helvering, 292 U.S. 360 (1934), addressed the issue of whether a state could be considered a "person." The Court noted that "[w]hether the word 'person' or 'corporation' includes a state or the United States depends upon the connection in which the word is found." *Id.* at 370. The Court then continued by enumerating situations where states have been considered "persons" for purposes of suing under a law: when punishing the false making or fraudulent alteration of a public record; under a statute defining negotiable notes as made by a "person"; and as a person or corporation under the Bankruptcy Act. *Id.* at 370. *See also* Georgia v. Evans, 316 U.S. 159, 162 (1942) (holding that Georgia was a "person" under the Sherman Anti-Trust Act).

[203] GA. CODE ANN. § 2-16-3 (Supp. 1996).

[204] The Constitution of the State of Georgia, for example, establishes this interest by

perishable agricultural products often does not stop with the creation and implementation of marketing strategies and advertising campaigns. Many states also market perishable agricultural products through the state-owned system of farmers' markets.[205] Some states potentially could become plaintiffs in an agricultural disparagement suit not only as a marketer, but also as a producer[206] and seller.[207] Therefore, many state governmental agencies and

---

allowing the state to levy taxes payable to Agricultural Commodities Commissions with the express purpose of marketing Georgia's agricultural products. GA. CONST. art. VII, § 3, ¶ II(b)(1) (1983).

To fulfill this constitutional mandate, the General Assembly enacted the "Georgia Agricultural Commodities Promotion Act." GA. CODE ANN. § 2-8-1 to -79 (1990). The statute provides for the creation of various Agricultural Commodities Commissions. *Id.* § 2-8-13. Each commission is an instrumentality of the State of Georgia and has the power to "complain and defend in all courts." *Id.* § 2-8-15. The Commissioner of Agriculture, in consultation with the commodities commission, has the power to "issue, administer and enforce the provisions of marketing orders regulating producer marketing or the handling of agricultural commodities within th[e] state." *Id.* § 2-8-21 (a).

Under the provisions of these marketing plans, the state, in the form of the Agricultural Commodities Commission for that particular product, is "authorized to prepare, issue, administer, and enforce plans for promoting the sale of any agricultural commodity." *Id.* § 2-8-22(a)(3). Thus, the State of Georgia, through the various Agricultural Commodities Commissions, promotes and markets Georgia's agricultural products and has the power to sue in civil courts. Therefore, the State of Georgia could be a plaintiff under the agricultural disparagement statute.

[205] Georgia's legislation was "intended to promote the handling, packing, transporting, storage, distribution, inspection, and sale of agricultural products . . . ." GA. CODE ANN. § 2-10-51 (1990).

Georgia law also gives the Commissioner of Agriculture the power, duty and responsibility to "[a]ssist and advise in the organization and the operation of cooperatives and other associations in order to improve relations and services among producers, distributors, and consumers." *Id.* § 2-10-53(5).

[206] The State of Georgia, for example, actively produces and sells perishable agricultural products through a variety of public institutions, including the experiment stations of the College of Agriculture of the University of Georgia. GA. CODE ANN. § 2-4-4(9) (1990). These actions could be sufficient to allow the state to sue because the legislature granted the state broad powers to sue under civil causes of action. The legislature provided that:

> The Attorney General, as the head of the Department of Law and the chief legal officer of the state, is authorized to file and prosecute civil recovery actions in the name of the state against any person, firm, or corporation which violates any statute while dealing with the state or any official, employee, department, agency, board, bureau, commission, institution, or authority thereof, which violation results in loss, damage, or injury to the state or to any of its departments, adjuncts, or taxpayers.

*Id.* § 45-15-12. Under this grant of authority, the attorney general can sue in the name of the State of Georgia to recover civil damages. Georgia's agriculture disparagement statute created such a civil cause of action.

[207] Of course, states are involved in a wide range of activities that bring them into the market as sellers. One example from Georgia is most likely applicable to every state in the Union—milk for school lunches. The State of Georgia promotes the sale of perishable agricultural products by requiring the local public school systems in the state to produce, sell, and serve meals. GA. COMP. R. & REGS. r. 160-5-6(3)(a)(3), (3)(b)(2) (1990). Specifically, the State of Georgia requires that "[a]t a minimum, unflavored whole, unflavored lowfat and unflavored skim milk are available throughout the breakfast and lunch periods as a part of the approved meal program." *Id.* r.

instrumentalities are certainly a firm link in "the entire chain from grower to consumer."[208]

Because the State of Georgia was within the class of potential plaintiffs authorized to sue under the agricultural disparagement statute, it should have been found to be a proper defendant in this facial attack on the constitutionality of the law. It was not, however.[209] The lesson of the *Action for a Clean Environment* litigation was that facial attacks on laws that infringe free speech, no matter how obviously unconstitutional, may not succeed. Absent a demand for retraction by some supposedly aggrieved agricultural producer, marketer, or seller, a court will likely find that no concrete controversy exists to adjudicate. Those parties that would seek an authoritative determination regarding the constitutionality of agricultural disparagement statutes will likely have to wait until a journalist or food safety advocate is sued under such a law.

## VIII. Some Conclusions

Recently, a report published by an environmental watchdog organization, the Environmental Working Group, identified twelve of the most popular fruits and vegetables consumed in the United States as posing extraordinary risks of pesticide ingestion.[210] Publication of the report inspired activists in Arizona to encourage the state or farming interests to sue them under Arizona's agricultural disparagement statute.[211]

More important, public debate has raged about human health consequences of consuming beef from cows ailing from bovine spongiform encephalopathy (BSE), or "mad cow disease." In May 1996, a Texas cattleman filed the first agricultural disparagement statutory action in this country when he sued Oprah

---

160-5-6(3)(c)(2). Undoubtedly, the primary purpose of rules requiring the availability of wholesome food and milk at Georgia's public schools serves a compelling state interest. Little doubt exists, however, that these rules place both the local school boards and the State of Georgia in the "chain from grower to consumer," and make them a potential plaintiff—as marketers and sellers—against food safety advocates questioning the safety of the milk supply.

[208] Ga. Code Ann. § 2-16-2(3) (Supp. 1996).

[209] *See Action for a Clean Env't*, 457 S.E.2d at 274.

[210] Richard Wiles et al., Environmental Working Group, A Shopper's Guide to Pesticides in Produce (1995).

[211] *See* Steve Yozwiak, *Produce-Residue Report Released: 'Veggie Hate-Crimes' Law Stalked by Chemical Critics*, Ariz. Republic, Nov. 21, 1995, at A1, A8.

Winfrey, her syndicated television show, and one of her guests who claimed that a large portion of American herds were infected with BSE.[212] While Oprah Winfrey allowed an unedited rebuttal to air later on her program,[213] and the Texas Attorney General ostensibly declined the opportunity to sue on behalf of the state, this litigation may well prove to be the first test case of the constitutionality of these laws.

We have tried to suggest here that the new breed of agricultural disparagement statutes poses a major challenge not only to established common law rules of trade disparagement, but also to constitutional principles under the First Amendment. It is no surprise that agribusiness concerns would try to craft a tailor-made tort of agricultural disparagement. The common law places so many restrictions on commercial disparagement as to make recovery extremely difficult and unlikely, save in the most outrageous cases where one commercial entity disparaged the goods or services of another vendor. In many respects, the common law anticipated the constitutionalization of defamation law, originating with the *New York Times v. Sullivan* decision.

Agricultural disparagement statutes represent a legislative attempt to insulate an economic sector from criticism. In this respect, they may be strikingly successful in chilling the speech of anyone concerned about the food we eat. The freedom of speech, always precious, becomes ever more so as the agricultural industries use previously untried methods as varied as exotic pesticides, growth hormones, radiation, and genetic engineering on our food supply. Scientists and consumer advocates must be able to express their legitimate concerns. The agricultural disparagement statutes quell just that type of speech. At bottom, these restrictions on speech about the quality and safety of our food are dangerous and unconstitutional.

---

[212] *See Is It a Crime to Criticize Food?*, *supra* note 2, at 7. The style of the complaint was Engler v. Winfrey, No. 82347-D (320th District Ct., Potter County, Texas, filed May 23, 1996). The statutory cause of action, based on the Texas Disparagement Statute, TEX. CIV. PRAC. & REM. CODE ANN. § 96.001–.004 (West 1995), appears in ¶¶ 9 & 10 of the Complaint. The remainder of the counts are premised on (1) negligence, (2) slander and defamation, and (3) intentional infliction of emotional distress.

[213] *Mad Cows and Oprah*, EARTH ISLAND J., Summer 1996, at 34.

# POLICY ESSAY

# OSHA AND THE POLITICS OF REFORM: AN ANALYSIS OF OSHA REFORM INITIATIVES BEFORE THE 104TH CONGRESS

KENNETH A. KOVACH*
NANCY GREER HAMILTON**
THOMAS M. ALSTON***
JUDITH A. SULLIVAN****

*The Occupational Safety and Health Act has raised interesting and important issues about government regulation of business enterprises since its passage in 1970. The balance between worker safety and employer autonomy has proved a difficult one to strike and has led to numerous reform efforts. In this Article, the authors provide a brief survey of current OSHA reform legislation in the House and Senate, and then present supporting and dissenting views of specific initiatives along with analyses of the political interests underlying their inclusion in the bills. The authors conclude that the current OSHA reform proposals are too focused on maintaining business profitability at the expense of worker protection, and they offer support for efforts at finding creative alternatives to dismantling OSHA in this era of federal budget reductions.*

Until 1970, no federal legislation ensured the freedom of American workers to work in a safe and healthy work environment or obligated their employers to protect them on the job. That year, the Occupational Safety and Health Act created new rights for American workers and accountability for their employers, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources."[1]

With memorable vision, Congress also created the Occupational Safety and Health Administration (OSHA). This agency has saved numerous American lives, cutting U.S. workplace fatalities by one-half every year.[2]

---

* Professor of Human Resource Management and Industrial Relations at George Mason University and founder of a consulting firm with more than 50 national and international clients.

** Senior analyst with KLH Associates, Inc. in Alexandria, Virginia.

*** Manager of the call-servicing division at AT&T.

**** Specialist in blood-banking, with extensive experience in transfusion medicine.

[1] 29 U.S.C. § 651(b).

[2] Linda Chavez-Thompson, Summary of Testimony of Linda Chavez-Thompson, Executive Vice President, American Federation of Labor and Congress of Industrial

Now critics say OSHA has lost sight of its original purpose to protect workers and has become a ponderous bureaucracy, more concerned with paperwork and government rules than safety and health.[3] Business owners protest the inordinate burden of over 4,000 abstruse and often contradictory regulations that OSHA imposes, while supporters reference an impressive and falling workplace fatality rate (since OSHA's inception, a drop from seventeen to eight deaths per 100,000 workers). Even with several hundred billion corporate dollars directed toward compliance, the Bureau of Labor Statistics identified a fifteen percent increase in workplace injuries since 1972. From inside OSHA itself, inspectors complain about spending their time measuring the height of railings and generating mounds of paper with their written violations; fifty percent of the time they cite companies for incorrectly written forms.[4] Given the intensity of these conflicting interests, the stage for reform has been set.

## I. Focus on Reform Legislative Similarities

Nancy Landon Kassebaum (R.-Kan.) introduced the Occupational Safety and Health Reform and Reinvention Act[5] (S. 1423) to the U.S. Senate in early 1995, followed five months later by Thomas Cass Ballenger's (R.-N.C.) House bill, the Safety and Health Improvement and Regulatory Reform Act[6] (H.R. 1834). Their choice of titles—with one significant, shared word—represents more than a simple redundancy. It signifies their desired outcome: reform.

H.R. 1834 appears more contentious than the moderate tone of S. 1423. The latter bill seems less polemical, not because it resolves the issues more clearly or persuasively, but because it does not address the more difficult issues that H.R. 1834 pursues. The remainder of both bills are similar enough that the differences can surely be resolved in conference.

The bills share these initiatives:

---

Workers, Before the U.S. Senate Comm. on Labor and Human Resources on S. 1423, the Occupational Safety and Health Reform and Reinvention Act (Nov. 29, 1995) (unpublished manuscript, on file with the *Harvard Journal on Legislation*).

[3] *See* 141 Cong. Rec. E1261 (daily ed. June 15, 1995) (statement of Rep. Ballenger).

[4] Phillip K. Howard, The Death of Common Sense: How Law Is Suffocating America 13–14 (1994).

[5] S. 1423, 104th Cong., 1st Sess. (1995).

[6] H.R. 1834, 104th Cong., 1st Sess. (1995).

*Labor-Management Committees.* With an amendment to the National Labor Relations Act (NLRA), groups of employees could form and meet to discuss safety issues in the workplace.

*Random Inspection Exemptions.* "Small" farms and businesses would escape these no-notice inspections by demonstrating that their firm's lost workday injury rate (LWDI) was less than their own industry's average. H.R. 1834 defines "small" as less than fifty workers; S. 1423 uses less than ten employees as the limit.

*Voluntary Compliance by Certification.* Companies could hire an outside source to verify their compliance and self-regulation efforts. Satisfactory certification by this third party would subsequently lead to the company's exemption from later inspections.

*Self-Disclosure Privilege.* Firms would receive a legal advantage against having to disclose the results of their safety and health audits.

*Substitute Protective Devices.* Companies could replace OSHA-mandated protection with equivalent worker protection devices.

*Violation Reductions.* Violations would be reduced to warnings if no serious injury or death results. H.R. 1834 permits issuance of a warning and time for the company to abate the hazard, before finally issuing a citation.

*Penalty Limitations.* Financial penalties would only apply to serious violations. S. 1423 reduces the penalty for administrative reasons, e.g., posting and paperwork violations, to $100, and H.R. 1834 demands evidence of fraudulent intent before imposing a fine.

*Program Codifications.* This institutionalizes two programs: the Voluntary Protection Program (VPP), which promotes and rewards safe and healthy companies by excusing them from customary OSHA inspections; and the consultation program, which financially supports state compliance programs that support small businesses.

*Inclusion of Federal Employees.* OSHA coverage extends to federal government workers.

### A. *Brief Overview of S. 1423*

Three provisions of S. 1423 distinguish it from its sibling in the House. The first removes inspection quotas from inspectors' job duties. The second permits OSHA inspectors to replace in-

vestigative trips with telephone or facsimile inquiries when employees report a health or safety violation. The final provision delineates two conditions to reduce a violation's negative financial impact on a company: evidence of a strong health and safety program for employees or inspection by a certified third-party safety and health consultant.

### B. *Brief Overview of H.R. 1834*

Representative Ballenger heads the House Education and Labor Committee, contributing experience as a manufacturer in his home state of North Carolina and a long history of antipathy toward federal regulators.[7] His pro-business House version, assembled by a cadre of conservative lawmakers, stipulates additional initiatives from the Senate version:

*Notification Restrictions.* Workers would first have to report unhealthy or unsafe conditions to their management, giving the firm time to rectify the condition. Self-correction eliminates the requirement to notify or involve OSHA, if the company remedies the situation within thirty days.

*Dissolution of the National Institute for Occupational Safety and Health (NIOSH).* NIOSH currently uses epidemiology, laboratory and engineering research methodologies to examine on-the-job hazards, assess their importance and establish standards for hazard levels. Their research results have provided OSHA with validated standards, but H.R. 1834 would dismantle NIOSH.

*Prevention of Double Regulation.* This provision exempts employers regulated by OSHA from any federal regulations that are potentially in conflict.

*Research-Based Standards.* Present and future standards would rely on risk-assessment studies and cost-benefit analyses.

*Standard-Based Penalties and General Duty Clause Removal.* In industries where no standard or regulation exists for a particular hazard, the general duty clause could no longer impose penalties. Until the government identifies unhealthy levels, firms could not be fined for hazards associated with them.

*Budget Reallocations.* Over a three-year time period, fully fifty percent of OSHA's budget would shift its focus from en-

---

[7] David Maraniss & Michael Weisskopf, *OSHA's Enemies Find Themselves in High Places*, WASH. POST, July 24, 1995, at A1.

forcement to non-enforcement programs, e.g., education and consultation. In S. 1423, only fifteen percent of OSHA's budget underwrites those activities.

*Violations Clarified.* New definitions differentiate between "willful" and "repeat" violations with concomitant fee increases for serious violations.

*Drug Testing Permitted.* Employers could conduct drug tests on certain job groups if they had a reasonable expectation of endangerment to any employee's health or safety from alcohol/drug abuse or exposure.

*Abolishment of the Mine Safety and Health Administration (MSHA).* OSHA would absorb the MSHA. Certain types of mine inspections would be reduced to once annually instead of the currently required four.

*Paperwork Reductions.* If a company met two conditions, it would not have to maintain records or report an incident to OSHA. The company would notify OSHA only if an incident required medical treatment and at least one day lost or restricted work.

## II. Allies and Adversaries

Congress has both strong supporters and opponents of these bills, with alliances basically forming along party lines. Republicans and industry representatives hail both bills and consider the initiatives a positive role change for OSHA—from enforcement to consultation. "Americans will be better served in a climate where people in Government, and in business, can work together to solve problems in a spirit of cooperation, rather than in an atmosphere strictly of threats, intimidation, and punitive measures."[8] The GOP supports this shift in philosophy for OSHA since it reflects the party's belief in reductions in both government intervention and control of big business. Advocates regard the proposed shift as a return for OSHA to "safety and health, rather than on collecting penalties,"[9] providing "incentives for the private sector to act more responsibly."[10]

Various business organizations, the American Federation of Labor and the Congress of Industrial Organizations (AFL-CIO),

[8] 141 Cong. Rec. S17345 (daily ed. Nov. 18, 1995) (statement of Sen. Gregg).
[9] Ballenger, *supra* note 3, at E1261–63.
[10] Gregg, *supra* note 8.

and occupational-safety experts also advocate passage of the bills. Two membership groups represent industries that would receive considerable advantages if the bills passed: the National Association of Manufacturers and the National Grocers' Association.[11] Both groups particularly commend the bills for streamlining what they feel are excessive OSHA regulations.

Opponents look beyond the idealism espoused in the two bills and contemplate the GOP's underlying political motivations. Democrats roundly condemn these pro-business initiatives that seem to grin through the mask of reform and contain thinly veiled corporate reprisals directed against a landmark regulatory agency whose powers many GOP would gladly curtail. Departing from her organization's stand on the two bills, Linda Chavez-Thompson, Executive Vice President of the AFL-CIO, testified before the Committee on Labor and Human Resources that "the effect of both of these legislative proposals would be fundamentally the same—to weaken OSHA enforcement and limit workers' rights resulting in more workplace injuries, illnesses, and deaths, and less safety and health protection for workers."[12] Foreseeing diminution of its ability to protect the health and safety of American workers, OSHA added its criticisms of the bills.[13]

Representative Major R. Owens (N.Y.), the ranking minority member of Ballenger's panel that produced H.R. 1834, nominated a new ironic title for Rep. Ballenger's bill, the "Death and Injury Enhancement Act (DIE) of 1995."[14] The Chemical Manufacturers' Association proffered a somewhat less acerbic denouncement of the more radical initiatives of H.R. 1834 as "over-reaching in its quest to curb worker safety and health protections."[15]

---

[11] Joyce Barrett, *UFCW Criticizes Proposed OSHA Reform*, SUPERMARKET NEWS, Jan. 22, 1996, at 28; R.C. Gombar & Arthur G. Sapper, *Inside the OSHA Reform Bills*, 57 OCCUPATIONAL HAZARDS 9, 27–32 (1995).

[12] Chavez-Thompson, *supra* note 2.

[13] *See OSHA Report Criticizes Reform Bills*, 57 OCCUPATIONAL HAZARDS 10, 18–19 (1995).

[14] 141 CONG. REC. H6,382–83 (daily ed. June 27, 1995) (statement of Rep. Owens).

[15] *Industry Groups Divided on OSHA Reform Ideas*, 57 OCCUPATIONAL HAZARDS 10, 15–16 (1995).

## III. Critique of Specific Provisions

### A. *Labor-Management Committees*

Congressional architects working to modify the NLRA acknowledge that labor-management safety groups have enhanced the potency of health and safety programs. Both of these bills address the importance of labor-management committees, and they seek to institutionalize and codify the VPP, a program where employers demonstrate a commitment to worker health and safety, as well as employee participation.[16]

The AFL-CIO, however, fears the bias that could emerge in union or non-union companies if employers determined the scope of employee participation and chose only those workers considered pro-management. The committee's composition could therefore slant its results to favor management. Employers imposing excessive restrictions on workers in this program would be "taking away the rights of workers to have independent representation on safety and health and other matters in the workplace."[17]

### B. *Random Inspection Exemptions*

This provision creates a connection between small businesses' maintaining a good safety record and the permission to avoid inspections. It hinges on the LWDI, a recognized measure of workplace safety that represents the number of injuries or lost workdays related to a common exposure base of 100 workers employed full-time for fifty 40-hour weeks per year. Small businesses would receive an incentive to keep their safety records clean, "because the exemptions from inspection would be based on those records."[18] If a small company maintained a LWDI rate lower than its industry's national average, it would escape the threat of random safety inspections. The author of the Senate bill asserts that the time and effort OSHA currently devotes to

---

[16] Nancy Landon Kassebaum, Floor Statement on OSHA Reform Act (Nov. 17, 1995) (unpublished manuscript, on file with author).

[17] Chavez-Thompson, *supra* note 2, at 11.

[18] Frank Swoboda, *GOP Bills on OSHA Face Veto by Clinton*, Wash. Post, Feb. 20, 1996, at C1.

those inspections would then be available to deal with serious offenders.[19]

Critics cite the thirty-nine percent average workforce injury rate found within the meatpacking industry[20] as an example of the shameful LWDI that other meatpacking companies would have as their standard, since an exemption for any plant with thirty-eight percent workforce injuries would qualify. "If exemptions are granted for average performance there will be no incentive to do more."[21] Occupational safety and health experts state that small businesses with less than fifty workers are the source of a large number of workplace injuries and accidents,[22] a fact that calls into question the logic behind this initiative rewarding small businesses for lack of progress.

Charles Norwood (R-Ga.), a dentist before taking his seat in the House during the last election, developed his dislike of OSHA over ten years ago and worked with Ballenger to design H.R. 1834. When OSHA sought to ensure the health and safety of employees and patients risking exposure to blood-borne pathogens (e.g., the AIDS virus), he inserted an "OSHA surcharge" on his patient's bills. This fee amounted to approximately $10.00 per visit to cover the costs he incurred for gloves and laundry.[23]

### C. *Voluntary Compliance by Certification*

Proponents of this initiative claim that a certified, third-party health and safety expert's evaluation of the workplace could substitute for an OSHA inspection. With satisfactory results from the consultant, this surrogate OSHA inspection would then exempt the company from an actual OSHA inspection. Supporters contend that consultants minimize on-site inspection bias, provide more subject-matter expertise, spare dwindling government resources and furnish positive incentives to employers who handle health and safety issues satisfactorily.[24] Dissenters predict five unpleasant consequences to third-party certification. They

---

[19] *See* Kassebaum, *supra* note 16.

[20] *See* Barrett, *supra* note 11.

[21] Chavez-Thompson, *supra* note 2, at 14.

[22] S.G. Minter, *Safety in Transition*, 57 OCCUPATIONAL HAZARDS 12, 38–41 (1995).

[23] Colman McCarthy, *Lifeline for the Miners*, WASH. POST, Aug. 12, 1995, at A21.

[24] *See* Ballenger, *supra* note 3; Nancy Landon Kassebaum, Summary of OSHA Reform and Reinvention Act, S.1423 (Nov. 1996) (unpublished manuscript, on file with author).

look for employers to shift their inspection responsibilities to paid consultants and direct their attention to filing exemption petitions with OSHA. Yet, employers would pay the consultants, so the consultants would be accountable only to the employers, not to OSHA. The reliability and validity of third-party inspectors' findings would be further suspect without established standards for judging worksites. Their reports would increase OSHA's paperwork morass, not lessen it. Finally, critics object to employees (or their representatives) not having the right to contribute to their company's on-site assessment or even to read the final certification report.[25]

### D. *Self-Disclosure Privilege*

Current OSHA inspections rely on an employer's subpoenaed audits and surveys, but supporters find no incentive in that policy for employers to conduct and disclose results of their self-safety audits. Granting this legal privilege would prevent employers from having to reveal the results of their self-safety audits and, therefore, allow them to identify the situation, abate the hazard and avert the possibility of receiving an OSHA fine.[26]

The AFL-CIO maintains that claims made in a self-safety audit would forever escape OSHA review[27] and that the combination of third-party certification and legal privilege gives dishonest employers an unjustified immunity from inspections. Without these audits and surveys, OSHA cannot efficiently use their limited government resources to effectively target their inspections; companies should be more than willing to provide this information if they have nothing to hide.

---

[25] *See, e.g.*, Chavez-Thompson, *supra* note 2, at 15; Thomas R. Donahue, Testimony of Thomas R. Donahue, Secretary-Treasurer, American Federation of Labor and Congress of Industrial Organizations, Before the U.S. House of Representatives Committee on Economic and Educational Opportunities, Subcommittee on Workforce Protections of H.R. 1834, the Safety and Health Improvements and Regulatory Reform Act of 1995 (June 20, 1995) (unpublished manuscript, on file with the *Harvard Journal on Legislation*).

[26] Gombar & Sapper, *supra* note 11.

[27] Donahue, *supra* note 25.

### E. *Substitute Protective Devices*

Proponents mention the increased flexibility for employers to develop alternative, innovative worker protections that would arise from this measure, citing a safer working environment with lowered overhead as the positive outcome. Others speculate that the adequacy of protective devices would become the issue in OSHA enforcement proceedings, prolonging the process and complicating the judge's already difficult job, since "the requirements of standards would be open to challenge and interpretation in every OSHA enforcement proceeding, with determinations of the adequacy of protections made by judges instead of trained safety and health personnel."[28]

### F. *Violation Reductions*

Representative John A. Boehner (R-Ohio), a former plastics salesman and now the House Republican Conference leader, has said, "[m]ost employers would describe OSHA as the Gestapo of the federal government."[29] This sentiment represents the typical criticism leveled by many small companies since OSHA's inception, a sentiment that is reinforced by the hefty fines resulting from what companies regard as non-serious violations arising from voluminous regulations. This provision proposes to issue violations "fairer to employers."[30]

For non-serious violations or when the employer moves with speed and in good faith to ameliorate a job hazard, S. 1423 permits the inspector to reduce a warning to a citation. H.R. 1834 expands that concept with a "Right to Fix" provision, allowing non-fatal or non-serious injuries first to receive a warning, granting management an opportunity to rectify the hazard. If the situation remained uncorrected, however, an inspector could then issue a citation. Advocates claim this would "aim penalties at just the right sort of violations—those that actually cause

---

[28] Chavez-Thompson, *supra* note 2, at 20.

[29] Stephen Barr, *Cuts Frustrate OSHA Plans to Improve Worker Safety*, WASH. POST, Feb. 19, 1996, at A1; Michael Weisskopf and David Maraniss, *The Hill May Be a Health Hazard for Safety Agency; Shift in Political Forces Brings GOP Push to Weaken OSHA*, WASH. POST, July 23, 1995, at A1.

[30] 141 CONG. REC. H7,075–76 (daily ed. July 18, 1995) (statement of Rep. Ballenger).

death or serious injury"[31] and permit OSHA to direct its enforcement resources more effectively.

Skeptics doubt that either bill's preventive intentions would actually motivate employers to self-monitor, given that employers could wait for issuance of their first warning to identify areas for correction and avoid a financial penalty.[32] They discern a vengeful, pro-business influence in these bills and an abandonment of the fundamental principle embodied in the original OSHA, "that injuries and deaths should be prevented by compliance with standards, rather than be discouraged by damages or penalties after an injury or death occurs."[33] H.R. 1834 could often require double inspections, "sending employers the message that they will not be punished until they are caught, not once but twice, by OSHA. Therefore, many employers will not comply."[34] Some fear the worst, charging that "[w]orkers would have to be killed, seriously injured, or exposed to continuous danger before OSHA could enforce the law."[35]

### G. *Program Codifications*

No other initiative more closely represents the heart of these reform efforts than this proposal to refocus OSHA from an enforcement agency to a consultant agency where companies "agree on common rules that are good for business and for health and safety."[36] The codification of the VPP and consultation program aims to institutionalize progressive programs and streamline efforts already begun within OSHA. Participants in OSHA's VPP exempt themselves from programmed OSHA inspections by demonstrating commitment to worker health and safety. Both models seek to assist small businesses to detect and eradicate hazards without the threat of judgment or forfeit,[37] publicizing and rewarding businesses that voluntarily comply.

The AFL-CIO notes an alarming correlation within industries that have seen little change in their workers' overall death and injury rates since 1970: their compliance has been largely vol-

---

[31] Gombar & Sapper, *supra* note 11, at 30.
[32] *See* Chavez-Thompson, *supra* note 2.
[33] Gombar & Sapper, *supra* note 11, at 28.
[34] Owens, *supra* note 14, at H6,386.
[35] Sarah Anderson, *OSHA Under Siege*, PROGRESSIVE, Dec. 1995, at 26.
[36] Minter, *supra* note 22, at 40.
[37] Kassebaum, *supra* note 24.

untary and they have largely escaped OSHA inspections.[38] This observed correlation leads the AFL-CIO to doubt that employers will truly exhibit concern for workers until the government controls or interferes, voluntary attempts fail and the government invokes a viable and compelling program of enforcement.[39] In a study by the Associated Press that reviewed 778,000 OSHA inspections, lack of inspections since 1990 correlated with seventy-five percent of the worksites where workers suffered serious accidents in 1994 and early 1995.[40]

Corporations have already begun to reduce funds and staff devoted to health and safety priorities in response to Congressional discussions on weakening job-safety regulations and enforcement. A recent survey of safety and health professionals quotes over one-third of the respondents expecting their budgets and staffs to decline in those same areas, highlighting the fact that, without regulatory enforcement, businesses reduce their priority on safety.[41]

### H. *Long-Distance Substitution for On-Site Inspection (S. 1423)*

Businesses have historically feared a visit from an OSHA inspector, and this initiative takes advantage of current technology to reduce the number of inspection trips, even though current staffing levels put the likelihood of an inspection at once every eighty-seven years.[42] Contact to assess the validity of employee complaints would be through facsimile machines and long-distance telephone conversations. Critics observe that this practice would definitely benefit employers bent on concealing certain aspects of a situation that would be more readily apparent during a visit to the physical location.[43]

---

[38] Donahue, *supra* note 25, at 13.

[39] *Id.*

[40] Earl Eldridge, *Study Links Job Deaths to OSHA Failure*, USA TODAY, Sept. 5, 1995, at 1B.

[41] Donahue, *supra* note 25.

[42] Owens, *supra* note 14.

[43] *See* 142 CONG. REC. S2418 (daily ed. Mar. 20, 1996) (statement of Sen. Pell).

### I. *Employee Notification Restrictions (H.R. 1834)*

The Ballenger bill prevents employees from informing the Labor Department directly when they experience or observe a health or safety violation on the job. Instead, workers would first be required to inform their employers. Proponents view this initiative as granting firms an opportunity to ameliorate unsafe conditions without the threat of OSHA interference. They further note that it would also reduce the suspected reporting abuses of angry employees and curtail union efforts to influence the collective-bargaining process.[44] Employers would only be required to notify OSHA if they were unable to take care of the hazard themselves within thirty days.

Unions argue that most workers would not report problems to management, particularly in non-union firms, fearing they might lose their jobs. Others also assail this provision, namely Democrats,[45] labor,[46] industry groups,[47] and OSHA itself,[48] predicting it would unnecessarily expose workers reporting safety infractions to possible retaliation from employers.

### J. *Dissolution of NIOSH*

NIOSH's detractors view this measure as a solution to its inefficiency, political bias, insufficient standard development, and over-sized budget equal to almost one-half the amount that OSHA controls.[49] As to the research tasks that NIOSH now fulfills for OSHA, Rep. Ballenger stated while introducing his bill to the House that "although not specifically referenced in this legislative language, it is assumed that NIOSH research activities will be transferred to another governmental agency."[50]

Occupational health and safety experts disagree with this initiative, quoting the significant contribution that NIOSH's risk assessments and investigations make to developing new and existing standards (see next section). Those same experts also fear

---

[44] *See* Gombar & Sapper, *supra* note 11; 141 CONG. REC. H8138 (daily ed. Aug. 1, 1995) (statement of Rep. Norwood).
[45] *See* Owens, *supra* note 14.
[46] *See* Donahue, *supra* note 25.
[47] *Supra* note 15.
[48] *Supra* note 13.
[49] *See* Gombar & Sapper, *supra* note 11.
[50] Ballenger, *supra* note 3.

that NIOSH's demise would end the collection and analysis of health and safety data using the critical capabilities that NIOSH supplies.[51] Without NIOSH, "occupational safety and health research would be left to special interest groups that might not be as impartial."[52]

### K. *Research-Based Standards*

Ballenger's bill contains an ironic contradiction. While it endorses "standard-setting on the basis of risk and sound scientific data, rather than on political process,"[53] it also moves to eradicate the agency that rigorously studies and develops those standards, NIOSH (see previous section).

Before the November elections, former Senator Bob Dole (R-Kan.) was asked his opinion on eliminating fines for OSHA's paperwork violations that have no direct effect on workplace safety and health. He offered support for this specific initiative, but side-stepped the actual question asked. He commented, "[r]egulatory agencies like OSHA need to conduct cost-benefit analyses of their regulations and pursue alternatives to outdated regulatory approaches. Common-sense reforms will restore fairness and predictability to government rules and enable us to achieve equal or superior levels of protection for American workers at a lower cost."[54]

The AFL-CIO objects to basing standards on risk assessment and cost-benefit analysis, citing three primary concerns. The first involves what it views as the priority placed on cost, not safety and health.[55] The second criticizes what it considers to be imprecise, easily manipulated calculations to derive standards. Finally, the AFL-CIO raises the issues of equity, fairness and workers' rights that it believes this provision ignores.

---

[51] *Supra* note 13.
[52] Minter, *supra* note 22, at 40.
[53] *Id.* at 39.
[54] *Issue: Workplace Safety*, ARIZ. REPUBLIC, Oct. 28, 1996, at A9.
[55] Donahue, *supra* note 25.

### L. *General Duty Clause Removal and Standard-Based Penalties*

The original clause created an accountability (i.e., a general duty) for management to maintain a safe and healthy workplace, and "in those cases where there was clear recognition by employers of a hazard which posed serious risk of injury or illness, employers should have a legal obligation to protect workers from exposure."[56] It recognized that discovering a serious workplace hazard where a standard had not yet been developed was inevitable but would not obviate any employer from fulfilling the obligation created in the clause. Over time, critics of the clause observed OSHA inspectors expanding its interpretation and now view the clause as too subjective and permitting excessive discretion when OSHA imposes penalties.

Supporters of removing the general duty clause cite overzealous interpretation of the clause, as well as violation citations that appear unrelated to a specific, existing standard or regulation, as justification to eliminate its penalties. They regard the clause's removal as a way to relieve certain biased, arbitrary aspects and rely on other provisions to emphasize more explicit standard development, such as risk assessment and cost-benefit analysis. United Parcel Service (UPS), the biggest corporate spender on politics,[57] faced more than $40,000 in OSHA fines, but eluded payment following a general duty clause violation by protesting that it did not violate a "specific" standard.[58]

Opponents of this provision defend the general duty clause as the primary incentive for employers to protect workers from not-yet-regulated hazards (e.g., cumulative trauma disorders, biochemical hazards produced in cutting-edge research companies, etc.). "You need to have something that lets you deal with the unknown situations because there are more of them than the known situations."[59] Pharmaceutical companies function within an industry where standards for hazard levels have not kept pace with the speed with which new products and exposures are developed. The list opposing removal of the general duty clause

---

[56] *Id.*
[57] John Greenwald, *Hauling UPS's Freight*, TIME, Jan. 29, 1996, at 59.
[58] Maraniss & Weisskopf, *supra* note 7.
[59] Minter, *supra* note 22.

includes Democrats,[60] labor,[61] occupational safety and health experts,[62] some industry groups[63] and OSHA.[64]

### M. *Budget Reallocation*

Following a three-year phase-in, one-half of OSHA's funding would shift to education and consultation, paralleling the change in focus from the current inspection-penalty enforcement policy. Supporters applaud this positive budgetary shift, contending, "Better to educate many employers . . . than to spend precious resources prosecuting the few who could be inspected and cited."[65] Opponents assert that cutting OSHA's budget and then directing fifty percent of the remaining budget to voluntary compliance activities "decimates the government's workplace safety and health regulatory and enforcement efforts" and "addresses business' desire to have less oversight of their affairs."[66]

### N. *Abolishment of MSHA*

This initiative dissolves MSHA, turning its tasks over to OSHA, abolishes the five-member Federal Mine Safety and Health Review Commission and repeals the 1977 Federal Mine Safety and Health Act. Advocates regard this as a budget-driven necessity. They see it as another way to streamline federal authority and eradicate an excessively powerful agency.[67]

Opponents consider MSHA a regulatory success and quote a sevenfold drop in mine fatalities since 1968 as proof.[68] Fearing for miners' safety, Democrats[69] and labor[70] object to this provision, observing that it would cut annual mine inspections from four to one and drop completely the requirement for two surface mine inspections annually. They criticize this proposal for placing mines under the same voluntary compliance initiatives as

---

[60] *See* Owens, *supra* note 14.
[61] *See* Donahue, *supra* note 25.
[62] *See* Minter, *supra* note 22.
[63] *Supra* note 15.
[64] *Supra* note 13.
[65] Gombar & Sapper, *supra* note 11.
[66] Donahue, *supra* note 25.
[67] *See* Gombar & Sapper, *supra* note 11.
[68] *See* Maraniss & Weisskopf, *supra* note 7.
[69] *See* 141 Cong. Rec. H6383 (daily ed. June 27, 1995) (statement of Rep. Wise).
[70] *See* Donahue, *supra* note 25.

other companies under H.R. 1834. It additionally destroys the surprise factor of no-notice inspections by overruling a mine inspector's right to inspect a mine without a warrant. Additionally, inspectors would be prohibited from closing an unsafe mine for uncorrected hazards; if the mine's violations were ultimately abated, then the owners would not be obligated to pay a penalty.[71]

### O. *Paperwork Reductions*

This initiative proposes a shift from generating paperwork to concentrating on more serious offenses in the workplace. It reduces the records and reports associated with injuries and illnesses to only those requiring medical treatment and at least one or more days of lost or restricted work. Injuries from repetitive-motion tasks would escape reporting with the passage of this initiative, even though over time they could have serious ramifications.

For other conditions, there would no longer be the accumulation of clues, a "paper-trail" of reports, that leads to recognizing and solving hazards in the workplace.[72] When President Clinton was asked whether he favored fines for OSHA paperwork violations that have no direct effect on workplace safety and health, he answered by explaining the benefit of collecting the report data:

> OSHA does not favor total elimination of fines for paperwork violations because the agency needs to retain discretion to penalize employers who under report injuries and illnesses. Without accurate data, OSHA would be unable to determine the nature of workplace problems, would not know where to target inspections, and would be unable to evaluate the effectiveness of its interventions.[73]

The iron and steel lobby receives credit for persuading Ballenger's legislative masterminds to eliminate this recordkeeping requirement; OSHA has often tried to target their industries for work-related illnesses, such as hearing loss, because their plants are so prominently associated with excessive noise levels.[74]

---

[71] McCarthy, *supra* note 23.
[72] Donahue, *supra* note 25.
[73] *Supra* note 54.
[74] Maraniss & Weisskopf, *supra* note 7.

### P. *Legislative Update*

Neither the Senate bill nor its sibling in the House has seen debate; they are both out of committee. S. 1423's outcome remains unknown, and H.R. 1834 will probably not resurface in 1996. President Clinton refuses to support either of these attempts at OSHA reform, promising that he will also veto other similar GOP initiatives that may arise during his tenure.[75]

## CONCLUSION

The authors believe that these bills put the health and safety of American workers at risk. Both bills drastically change the original intent of the OSH Act from protecting American workers' health and safety, to protecting American business's profit and loss. We view with dismay the response of many businesses after the 104th Congress proposed these OSHA reforms; eager to reduce their operating costs, many businesses cut or eliminated their health and safety programs, sensing little threat or punishment could emerge from OSHA if Congress reforms the agency.

Labor scholars call these bills "the most serious effort to rewrite the rules of the American workplace in the postwar era."[76] Many employers who will escape random inspections and penalties can thank the lobbying efforts and substantial campaign contributions of wealthy corporations also seeking to avoid the unwelcome visits of OSHA's green-and-yellow-jacketed inspectors. H.R. 1834, bearing more obvious imprints from special interest groups, "would shrink the size of OSHA's investigative staff, shift the emphasis to consultation, eliminate separate research and mine-safety operations, and curtail the agency's powers to penalize workplaces that fail to meet federal health and safety standards."[77]

If goodwill were universal among employers, many of the recommendations expressed in these bills would approach plausibility. However, reality is such that in the guise of cutting costs, eliminating red tape and empowering employers, these bills will actually load the pockets of management at the expense

---

[75] Swoboda, *supra* note 18.
[76] Weisskopf & Maraniss, *supra* note 29.
[77] *Id.*

of their workers' health and safety. Workers will risk exposure to increased, unregulated hazards, see their rights to file complaints with OSHA attenuated by management, and, in an unknown number of cases, be forced into silence about violations by fear of reprisal.

Big business has much to gain from the passage of these bills, but American workers have more to lose. Beneath these bills' idealistic rhetoric are the serious economic issues that attend OSHA reform. The year Representative Ballenger was re-elected and the year before he presented H.R. 1834 to Congress, he raised more than one-third of his political action committee (PAC) donations from companies actively lobbying for labor law and OSHA changes. That year, UPS became the number-one contributing PAC in the U.S. (over $2.6 million), and gave $10,000 to Ballenger's election campaign. UPS also holds first place in one of OSHA's records, though not a positive one: more UPS workers have complained to OSHA than any other employer, producing 2786 violations and $4.6 million in financial penalties since 1972. Their workers' continuing vulnerability to workplace injuries requires UPS to pay an average daily bill of $1 million in workers' compensation claims.[78]

Both large and small, corrupt and ethical, safe and unsafe businesses must digest volumes of OSHA regulations. Many firms cannot distill the regulations that apply to them, and more cannot readily afford a staff person or attorney to keep them compliant. Frustrated by the regulations' contorted language, employers resort to common sense in creating a safe workplace for their employees. The authors do not believe that a worker's health and safety should have to rely on a well-meaning but possibly confused employer, nor require an attorney's interpretation to comprehend; instead, each regulation should be fully understandable by everyone involved, especially the employees exposed to risks on the job. The authors contend that voluntary compliance cannot succeed without first simplifying standards and educating employers and workers. Anything less would jeopardize too many American workers' lives.

If small businesses receive an incentive to keep their LWDI below their industry's average, how would that not risk establishing a bad average as the standard for an industry? An average only reflects the data it represents, and if the LWDI average is

[78] Maraniss & Weisskopf, *supra* note 7.

high, the potency of the incentive to improve evaporates. If companies aim for the average level, how can we ever expect any noticeable improvement?

H.R. 1834 possesses unsettling contradictions. This bill demands that standards and inspections be based on risk assessment and cost-benefit studies, but how can that be accomplished if the agency designed to perform those studies—NIOSH—is suspended by the very same bill?

The general duty clause represents the only mechanism currently available to penalize companies who fail to protect their workers from new health and safety hazards. Rather than trying to clarify the clause's features or tighten its scope, H.R. 1834 deletes the clause's application in those areas with no developed standards. No penalty could be assessed if no standard already exists for a particular hazard. This ultimately exposes American workers to risk, but leaves companies immune from blame. Again, how can new standards be developed if the agency designed to perform those studies—NIOSH—is suspended by the very same bill?

Fully sixty percent of all new occupational illnesses consist of work-related disorders like back strain and carpal tunnel syndrome, with an annual cost to businesses in worker-compensation claims and lost time estimated at $100 billion annually.[79] U.S. offices are largely unregulated and cause complex ailments that are less well understood than acknowledged environmental menaces in the blue-collar trades.[80] The problems arising from pounding a too-high keyboard and peering into a glaring, flickering computer monitor are no less compelling for the millions of American workers affected. Passage of the initiative to remove the general duty clause would eradicate the possibility of imposing tough ergonomic standards on work-related disorders, since it removes the only extant tool to deal with health problems caused by unregulated risks like cumulative trauma disorders, carpal tunnel syndrome, and back strain.

Exhibiting his insensitivity for the problems caused by repetitive motion, Ballenger said during debate on the floor of the House, "no one ever died of ergonomics."[81] By election time,

---

[79] Frank Swoboda, *OSHA to Defy House Ban with New Workplace Rules*, WASH. POST, Mar. 20, 1995, at A1.

[80] Liz Spayd, *Is Your Office Out to Get You?: In the Soft, New World of Work, a Different Kind of Danger Lurks*, WASH. POST, May 14, 1995, at C1.

[81] *Id.*

however, OSHA had regained its ability to develop standards to prevent repetitive-stress injuries and other ergonomic problems and escaped the "riders" that Congress created to eliminate those standards completely.[82]

Recently, some welfare recipients and "dead-beat dads" have had their state lottery winnings limited because computers contained their names in multiple databases, such as welfare or nonpayment-of-child-support lists. Those lists were cross-matched with lottery winners before disbursement, and the individuals' winnings subsequently seized by the state. This contingency method uses available technology that the authors believe should be applied in the case of willful or repeat violators of OSHA regulations. A company's prequalification for federal contracts over, for example, $10,000, would be contingent upon their proof of a safe record. As to the increased costs involved in tracking bidders' safety records, those costs pale next to the legal costs incurred when a contractor experiences a serious accident or death. The authors believe that debarment for unsafe records would make it unprofitable for unsafe employers to remain unsafe and seek government contracts . . . but highly profitable for the rest.

At present, Joseph Dear, the Labor Department assistant secretary heading OSHA, has programs in place to revitalize the agency before the passage of any restrictive legislation.[83] In response to S. 1423's proposal to eliminate inspection quotas, Mr. Dear has already made a significant change in how inspectors are judged within the agency: their advancement no longer relies upon the number of inspections accomplished or the citations generated.[84]

Mr. Dear, responding to the *de facto* deregulation of Washington's regulatory agencies, exemplifies the creativity that can arise from within a federal agency facing difficult times. The authors commend such efforts and submit that any legislation to reform OSHA should incorporate, complement and strengthen the strategies developed under his leadership rather than subvert his efforts, as H.R. 1834 and S. 1432 appear to do.

---

[82] Cindy Skrzycki, *Rock Blunts Scissors, and Agencies Withstand Cutters*, WASH. POST, Oct. 18, 1996, at F1.

[83] *See* Barr, *supra* note 29; Cindy Skrzycki, *The Regulators: Survival of the Agencies—. . . And When the Dust Cleared, The Citadel Still Stood*, WASH. POST, May 3, 1996, at B1.

[84] Barr, *supra* note 29.

Coming out of an era of "big government" best remembered for big budgets, red tape and over-priced hammers, we have entered an era of federal austerity that will undoubtedly be remembered for its job layoffs, government shut-downs, and agency down-sizings. With less money and fewer people to run the government, creativity and ingenuity must work overtime to compensate in the way that Joseph Dear has done improving OSHA. Congress should heartily support OSHA's burgeoning attempts at reform and remove the sacrificial lamb of American workers' health and safety from the altar of federal budget reductions.

# STATUTE

# SEEDING THE BROWNFIELDS: A PROPOSED STATUTE LIMITING ENVIRONMENTAL LIABILITY FOR PROSPECTIVE PURCHASERS

BRIAN C. WALSH*

*Under current federal environmental law, companies looking for sites on which to build industrial facilities face strong disincentives to selecting previously developed urban industrial sites, or brownfields. Companies selecting these sites expose themselves to the possibility of significant liability for cleanup of environmental hazards on the site, and face a high degree of uncertainty over whether any cleanup they attempt is sufficient for the purposes of federal and state environmental law. The result is that many urban industrial sites remain abandoned while companies build on previously undeveloped land.*

*In this Note, Mr. Walsh proposes model legislation creating a voluntary cleanup program for brownfields. The proposed statute permits prospective purchasers of brownfield property to enter into an agreement with the federal Environmental Protection Agency, or relevant state agency, to satisfactorily cleanup environmental hazards on the land while eliminating the possibility of future liability for cleanup.*

## INTRODUCTION

A company seeking to build a factory, a distribution center, or any other facility that requires purchasing real property will often have to choose between older, urban sites that have previously been used for industrial purposes and newer sites, often in suburban or rural locations, that are relatively unspoiled.[1] Urban property is frequently located near a large work force, or at least is accessible to public transportation; it may offer convenient access to nearby suppliers and transportation networks; and it may come with a tax break if the city government seeks

---

*Law Clerk to the Honorable Pasco M. Bowman, United States Court of Appeals for the Eighth Circuit, Kansas City, Mo.; A.B., Duke University, 1993; J.D., Harvard Law School, 1996. The author wishes to thank Professor Vicki Been of New York University Law School for her advice and assistance. The opinions expressed herein are solely those of the author.

[1] Many businesses find themselves in the situation this introduction describes. For anecdotal reports, see for example Tom Daykin, *The Greening of Brown Fields*, MILWAUKEE J.-SENTINEL, May 8, 1995, at D14; Keith Schneider, *Rules Easing for Urban Toxic Cleanups*, N.Y. TIMES, Sept. 20, 1993, at A12; William Tucker, *Superfund Sparks Industrial Flight*, INSIGHT ON THE NEWS, WASH. TIMES, Nov. 29, 1993, at 6.

to attract new industries. Depending on the situation, suburban or rural sites may be equally convenient, and they can be less expensive if demand is low. One thing is undeniable, however: a business that purchases previously undeveloped land can usually be certain that the land has not been contaminated by hazardous substances.

The possibility that a previous landowner has contaminated a parcel of land can, and often does, influence the decision of a firm choosing between an urban site and an underdeveloped site. Even if an urban parcel is otherwise preferable, the sweeping nature of environmental liability, the general nervousness of attorneys and bankers when faced with environmental issues, and the uncertainty surrounding the entire situation may cause a firm to take the cautious approach and build on a raw parcel. As a consequence, many businesses decide to locate new facilities in uncontaminated suburban or rural locations (which, because they are often undeveloped at the time, are called "greenfields") rather than on property formerly used for industrial or commercial purposes, often in urban locations (known as "brownfields"), resulting in the "brownfields" problem.[2]

This Note explores the relationship between environmental liability and economic development, particularly in the context of the prospective purchaser of contaminated property. Part I describes the general workings of environmental liability, using the federal CERCLA statute as an example. Part II examines the brownfields problem, especially the obstacles faced by prospective purchasers and lenders seeking to minimize exposure to liability. Part III discusses recent proposals in Congress and recent EPA action to counter the brownfields dilemma. Part IV examines the important features of legislative solutions to the brownfields problem. Finally, Part V proposes statutory language designed to promote the re-use of contaminated property while at the same time ensuring its cleanup.

---

[2] Another creative, but less colorful, term for brownfields is TOADS (Temporarily Obsolete Abandoned Derelict Sites). *See* Terry J. Tondro, *Reclaiming Brownfields To Save Greenfields: Shifting the Environmental Risks of Acquiring and Reusing Contaminated Land*, 27 CONN. L. REV. 789, 790 n.2 (1995).

## I. AN OVERVIEW OF ENVIRONMENTAL LIABILITY

The primary source of environmental liability in the United States is the federal Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA).[3] A number of states have mini-CERCLA laws which impose obligations similar to the federal law.[4] Other states have taken their own approaches to environmental liability,[5] but many of the basic principles of CERCLA liability remain relevant to liability in those states.[6] This Note will therefore discuss environmental liability by using the CERCLA model as an example.

### A. *Liability of Owners and Operators*

Section 107(a) of CERCLA imposes liability on four categories of actors in connection with the release of a hazardous substance:[7] owners, operators, generators, and transporters (known collectively as potentially responsible parties or PRPs).[8] Because the generator and transporter categories will almost always exclude a prospective purchaser who has not previously had any contact with a parcel of land,[9] the main source of concern for a

---

[3] Pub. L. No. 96-510, 94 Stat. 2767 (codified as amended at 42 U.S.C. §§ 9601–9675 (1994)). CERCLA is known as the Superfund law because it established the Hazardous Substance Superfund to provide public funding for cleanups. *See* 42 U.S.C. § 9611 (1994).

[4] *See, e.g.*, FLA. STAT. ANN. §§ 376.30–.319 (West 1988 & Supp. 1996); IOWA CODE ANN. §§ 455B.381–.399 (West 1990 & Supp. 1996); LA. REV. STAT. ANN. §§ 30:2271–:2277 (West 1989 & Supp. 1996); N.H. REV. STAT. ANN. §§ 147-B:1 to :15 (1990 & Supp. 1995); N.C. GEN. STAT. §§ 130A-310 to -310.23 (1995); PA. STAT. ANN. tit. 35, §§ 6020.101–.1305 (1993 & Supp. 1996); R.I. GEN. LAWS §§ 23-19.14-6 to -7 (Supp. 1995).

CERCLA expressly states that it does not preempt state law. *See* 42 U.S.C. § 9614(a) (1994). Multiple recovery of the same costs, however, is not permitted. *See id.* § 9614(b).

[5] *See, e.g.*, N.Y. ENVTL. CONSERV. LAW §§ 27-1313(4) (McKinney 1984) (requiring commissioner to determine liability based on "applicable principles of statutory or common law liability"); TENN. CODE ANN. § 68-212-207(a)–(b) (Supp. 1995) (using fault-based and equitable factors to apportion liability); UTAH CODE ANN. § 19-6-310(2)(g) (1995) (explicitly rejecting joint-and-several liability).

[6] In any case, state law certainly does not preempt federal law. U.S. CONST. art. VI. Liability under CERCLA thus remains an issue for prospective purchasers regardless of applicable state law.

[7] Under CERCLA, "release" includes "spilling, leaking, pumping, pouring, emitting," and the like, with certain specific exceptions. *See* 42 U.S.C. § 9601(22) (1994). "Hazardous substance" is defined primarily by reference to five other federal statutes. *See id.* § 9601(14).

[8] *See id.* § 9607(a)(1)–(4).

[9] The generator category includes

prospective purchaser is the liability imposed on owners and operators.[10] Liability includes "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe"[11] and "any other necessary costs of response incurred by any other person."[12] In addition, a PRP may be held liable for damage to natural resources and for the costs of health studies.[13]

Since the enactment of CERCLA in 1980, the federal courts have expanded the reach of environmental liability far beyond what appears on the face of the statute. The relevant language of section 107(a) imposes liability on PRPs without specifying the nature of the liability.[14] Courts have supplied the answer by

---

> any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances.

*Id.* § 9607(a)(3). Transporters include "any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person." *Id.* § 9607(a)(4). "Facility" is defined broadly to encompass any building or area where a hazardous substance is deposited or located. *See id.* § 9601(9).

[10] The potentially responsible owners and operators are "the owner and operator of a vessel or a facility," *id.* § 9607(a)(1), and "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of," *id.* § 9607(a)(2). The use of "and" rather than "or" in § 107(a)(1) is apparently a drafting error. *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1554 n.3 (11th Cir. 1990). The Clinton Administration's 1994 CERCLA reauthorization bill would have corrected the error. *See* H.R. REP. No. 582, 103d Cong., 2d Sess. 181 (1994).

Section 101(20)(A)(ii) defines "owner or operator" rather unhelpfully as "in the case of an onshore facility or an offshore facility, any person owning or operating such facility." 42 U.S.C. § 9601(20)(A)(ii) (1994). The only relevant exception, the security interest exception, is discussed *infra* in part I.C.

[11] 42 U.S.C. § 9607(a)(4)(A) (1994).

[12] *Id.* § 9607(a)(4)(B). The costs identified in subsections (A) and (B) must be consistent with the National Contingency Plan of the Environmental Protection Agency (EPA). *Id.* § 9607(a)(4)(A)–(B). The National Contingency Plan is codified beginning at 40 C.F.R. § 300.1 (1995).

[13] 42 U.S.C. § 9607(a)(4)(C)–(D) (1994).

[14] The passage of CERCLA in 1980 was prompted in significant part by the much-publicized disaster at Love Canal in New York. *See* Ellen J. Gerber, *Industrial Property Transfer Liability: Reality v. Necessity*, 40 CLEV. ST. L. REV. 177, 178 (1992); Julia A. Solo, Comment, *Urban Decay and the Role of Superfund: Legal Barriers to Redevelopment and Prospects for Change*, 43 BUFF. L. REV. 285, 290 (1995). As a result of Congress' desire to react to the Love Canal situation quickly and to demonstrate its concern for the environment, it drafted and passed CERCLA rather hastily and left significant issues unresolved. *See id.* at 291; New York v. Shore Realty Corp., 759 F.2d 1032, 1039–40, 1042 n.13 (2d Cir. 1985) (describing history of bills that became CERCLA and noting the elimination of language providing for strict joint-and-several liability).

holding that liability is strict,[15] joint and several,[16] and retroactive, encompassing activities before CERCLA was enacted.[17] Any prospective purchaser of contaminated land therefore must be prepared to assume liability for all past disposals and releases of hazardous waste on that property. Such liability could greatly exceed the value of the property and might even exceed the purchaser's net worth.[18]

### B. *The Insufficiency of Statutory Defenses*

CERCLA provides three affirmative defenses in section 107(b), none of which is of significant value to a prospective purchaser under ordinary circumstances. To escape liability, a PRP must prove by a preponderance of the evidence that a release of a hazardous substance was caused solely by an act of God, an act of war, or the actions of an unrelated third party.[19]

The act-of-God defense[20] refers to "'exceptional' natural phenomena" and is interpreted narrowly.[21] This narrow interpretation detracts from the usefulness of the defense. First, foreseeable natural acts will fall outside of the act-of-God defense.[22]

---

[15] *See, e.g., Shore Realty*, 759 F.2d at 1042, 1044–45; United States v. Monsanto Co., 858 F.2d 160, 167 (4th Cir. 1988); 3550 Stevens Creek Assocs. v. Barclays Bank of Cal., 915 F.2d 1355, 1357 (9th Cir. 1990). CERCLA itself provides some guidance on the issue of strict liability by referring in § 101(32) to the standard of liability imposed by the Clean Water Act, which courts have found to be strict liability. *See* 42 U.S.C. § 9601(32) (1994); *see also Shore Realty*, 759 F.2d at 1042; *Monsanto*, 858 F.2d at 167 n.11.

[16] *See, e.g., Shore Realty*, 759 F.2d at 1042 n.13 (dictum); *Monsanto*, 858 F.2d at 171–72 (applying federal common law, finding harm indivisible, and placing burden on defendants to justify apportionment); United States v. Chem-Dyne Corp., 572 F. Supp. 802, 809–10 (S.D. Ohio 1983) (same); United States v. Shell Oil Co., 841 F. Supp. 962, 968 (C.D. Cal. 1993) ("Among responsible parties . . . liability is joint and several.").

[17] *See, e.g., Monsanto*, 858 F.2d at 173–74 (finding no due process violation in holding parties retroactively liable under CERCLA); United States v. Northeastern Pharm. & Chem. Co., 810 F.2d 726, 732–34 (8th Cir. 1986) (relying on past-tense verbs in § 107 and finding no due process violation).

[18] Cleanup of the most severely contaminated sites—which no rational prospective purchaser would buy under current law—can cost many millions of dollars. *See* United States v. Cannons Eng'g Corp., 720 F. Supp. 1027, 1045 (D. Mass. 1989) (estimating costs at more than $58 million), *aff'd*, 899 F.2d 79 (1st Cir. 1990); United States v. Rohm & Haas Co., 721 F. Supp. 666, 671–72 (D.N.J. 1989) (estimating costs at $65 million but anticipating possibility of costs in excess of $94 million).

[19] *See* 42 U.S.C. § 9607(b) (1994). Section 107(a) makes it clear that the § 107(b) defenses are the only defenses available to a PRP. *Id.* § 9607(a).

[20] *See id.* § 9607(b)(1).

[21] United States v. Stringfellow, 661 F. Supp. 1053, 1061 (C.D. Cal. 1987).

[22] *See id.* (rejecting defendant's claim that heavy rainfall was an act of God).

Moreover, given the difficulty of proving that an act of God was the sole cause of a release, a prospective purchaser is unlikely to buy a contaminated parcel with the hope of later establishing the defense and avoiding liability.

The act-of-war defense[23] is similarly unhelpful. Although the issue rarely has been litigated,[24] the defense has been narrowly construed to require extraordinary government involvement in the operation of the facility.[25] Again, this defense might be helpful in case of a future wartime difficulty, but it is not likely to assure a prospective purchaser that existing contamination is beyond the reach of CERCLA.

The so-called innocent-landowner defense appears at first blush to offer better protection to PRPs. In general, the defense protects a PRP from liability resulting from the actions of a third party, other than one whose actions occur in connection with a contractual relationship with the PRP, if the PRP exercised due care with respect to the hazardous substance and took precautions against foreseeable acts or omissions of the third party.[26] The definition of "contractual relationship," however, creates difficulties for a prospective purchaser. It includes land contracts and deeds unless "[a]t the time the defendant acquired the facility the defendant did not know and had no reason to know that any hazardous substance which is the subject of the release or threatened release was disposed of on, in, or at the facility."[27] And to show that it had "no reason to know" of contamination, the PRP must demonstrate that at the time of purchase it undertook "all appropriate inquiry into the previous ownership and uses of the property consistent with good commercial or customary practice in an effort to minimize liability."[28] The defense,

---

[23] *See* 42 U.S.C. § 9607(b)(2) (1994).

[24] One federal court in 1993 was unable to find any cases clearly defining the act-of-war defense. *See* United States v. Shell Oil Co., 841 F. Supp. 962, 970 (C.D. Cal. 1993).

[25] *See id.* at 971 (stating that the defense "contemplates 'a confrontation of organized forces, acts of state, massive violence, and overwhelming influence that are unlikely to be found in the domestic Superfund context'" (quoting 4 WILLIAM H. RODGERS, JR., ENVIRONMENTAL LAW: HAZARDOUS WASTES AND SUBSTANCES § 8.13(C)(3)(c) (1992))). The court in *Shell Oil* rejected the defense even though the PRPs produced and disposed of the hazardous waste under a wartime contract with the federal government and faced a potential government takeover or criminal prosecution if they failed to comply. 841 F. Supp. at 966.

[26] *See* 42 U.S.C. § 9607(b)(3) (1994).

[27] *Id.* § 9601(35)(A)(i). Other exceptions exist for governments acquiring land by escheat, involuntary transfer, or eminent domain and for parties receiving property by inheritance. *See id.* § 9601(35)(A)(ii)–(iii).

[28] *Id.* § 9601(35)(B). A price discount, among other factors, is considered evidence of knowledge of contamination. *See id.*

therefore, covers only truly surprising discoveries of contamination and is expressly inapplicable to the type of prospective purchaser that is the subject of this Note—the purchaser that seeks to clean up known contamination while limiting its liability. Protection against liability for unknown and unknowable contamination is a valuable statutory right, but it is inapplicable to the type of transaction posited here.

### C. *Lender Liability as a Complicating Factor*

A prospective purchaser that cannot afford to purchase a piece of property with cash will also have to confront the issue of lender liability. In addition, depending on the situation, even a cash purchaser may encounter trouble if it has a line of credit, an inventory financing facility, or another sort of loan arrangement that involves a lender in the operation of its business.

The definition of "owner or operator" in section 101(20) expressly excludes "a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility."[29] In *United States v. Fleet Factors Corp.*,[30] however, the Eleventh Circuit held that a lender may be liable for contamination caused by its borrower "if [the lender's] involvement with the management of the facility is sufficiently broad to support the inference that it could affect hazardous waste disposal decisions if it so chose."[31] The *Fleet Factors* court's narrow view of the secured creditor exemption[32] caused significant upheaval in the financial community.[33]

---

[29] *Id.* § 9601(20)(A).

[30] 901 F.2d 1550 (11th Cir. 1990).

[31] *Id.* at 1558.

[32] The facts in *Fleet Factors* were actually fairly egregious. Among other things, Fleet required the borrower to seek approval before shipping goods, determined when employees would be laid off, processed employment and tax forms, and hired an apparently incompetent contractor to dispose of fixtures and equipment after repossessing its collateral. *Id.* at 1559. Even so, the court's language in *Fleet Factors* is broad enough to cover a lender that exercises much less pervasive control over a borrower's affairs.

[33] *See* Kelley v. EPA, 15 F.3d 1100, 1104 (D.C. Cir. 1994) ("considerable discomfort in financial circles"); *Superfund Program: Hearings on H.R. 3800 Before the Subcomm. on Transp. and Hazardous Materials of the House Comm. on Energy and Commerce*, 103d Cong., pt. 3, at 620, 627 (1994) [hereinafter *H.R. 3800 Hearings*] (prepared statement of Am. Bankers Ass'n noting "shock waves" from *Fleet Factors*); *Debate About Brownfields Benefits*, ENVTL. LIAB. REP., June 1, 1995, at 17 (noting tighter credit risk procedures); Ron Suskind, *Fleet Financial To Broaden Requirement of Environmental Liability Insurance*, WALL ST. J., June 24, 1992, at A2.

In response, the EPA promulgated a rule to clarify the scope of the exemption, allowing lenders to investigate, monitor, and inspect facilities; engage in workout activities; and foreclose on collateral if they seek diligently to divest themselves of it.[34] In 1994, however, the D.C. Circuit vacated the rule, holding that the EPA did not have the authority to define liability for a class of defendants.[35] The EPA and the Justice Department continue to follow the provisions of the vacated rule as a matter of enforcement policy, but the rule no longer has the force of law.[36] As a result of the administrative and judicial confusion over the issue of lender liability, lenders continue to be wary of loans involving contaminated or potentially contaminated property.[37]

## II. The Brownfields Problem: The Effects of Environmental Liability

The magnitude and uncertainty of environmental liability are significant factors contributing to the brownfields phenomenon. As a result of the problem, as many as 450,000 brownfield sites nationwide remain vacant or underutilized.[38] Looming environmental liability is not the only factor contributing to the brownfields problem; other significant factors include perceptions of crime, tax rates, municipal services, and possibly racism.[39] But the possibility of being held liable for the environmental mistakes of others, when combined with the difficulties involved in

---

[34] *See* EPA Final Rule on Lender Liability Under CERCLA, 57 Fed. Reg. 18, 344 (1992). *See generally* Stephen P. Schott, *Lender Liability Under CERCLA—Past, Present and Future*, 11 UCLA J. Envtl. L. & Pol'y 77 (1992); Amy T. Phillips, *EPA's Lender Liability Rule: A Sweetheart Deal for Bankers?*, 22 Env't Rep. (BNA) 1158 (Aug. 23, 1991).

[35] *Kelley*, 15 F.3d at 1107–08. In denying rehearing, the court reaffirmed that liability is an issue for the courts, not the EPA, to determine. *See* 25 F.3d at 1089–92.

[36] *See* EPA Policy on CERCLA Enforcement Against Lenders and Government Entities That Acquire Property Involuntarily, 60 Fed. Reg. 63,517 (issued Nov. 30, 1995).

[37] *See, e.g.*, *H.R. 3800 Hearings*, *supra* note 33, at 628 (discussing the effects of a return to the *Fleet Factors* regime). *See also supra* notes 30–33 and accompanying text; *infra* notes 53, 56–57 and accompanying text.

[38] *See* Office of Technology Assessment, State of the States on Brownfields: Programs for Cleanup and Reuse of Contaminated Sites 2 (1995) [hereinafter OTA Report].

[39] *See* James Boyd & Molly K. Macauley, *The Impact of Environmental Liability on Industrial Real Estate Development*, Resources, Winter 1994, at 19, 20; Barbara Ruben, *Fields of Dreams?: Revitalizing Industrial Brownfields*, Envtl. Action Mag., Winter 1995, at 12.

attempting to limit liability, undoubtedly colors the locational preferences of businesses.

The liability scheme described in Part I skews the market for brownfield properties by affecting the incentives of all the players in a potential sale: buyer, lender, and seller.

### A. *Effects on the Prospective Purchaser*

A prospective purchaser faces several obstacles—in addition to the obvious difficulty of assuming liability for cleanup of a piece of land—that contribute to the undesirability of purchasing brownfield property. An initial environmental audit, known as a Phase I assessment, can cost between $500 and $5000.[40] If a Phase I reveals that contamination is likely, additional Phase II and III assessments may be necessary, at greater expense, to determine how best to clean up the property.[41]

Assuming the purchaser decides to buy the land and clean it up, it will most likely have some difficulty obtaining financing for the purchase.[42] But after overcoming that obstacle, the purchaser will still face several difficulties with regard to cleanup: uncertain cleanup standards, long delays, expenses and uncertainty in recovering costs from other PRPs, and a lack of finality.

Neither CERCLA nor the EPA's accompanying regulations specifies a consistent standard for determining what constitutes a sufficient cleanup of contaminated property.[43] As a result, any estimate of cleanup costs is necessarily imprecise, and a purchaser must assume the risk that an agency official overseeing a cleanup may require significantly more expensive procedures than the purchaser estimated.

Delay is also a significant problem, considering that a prospective purchaser may be able to begin construction and opera-

---

[40] *See H.R. 3800 Hearings*, *supra* note 33, at 621–22 (statement of Am. Bankers Ass'n); OTA REPORT, *supra* note 38, at 18.

[41] For example, Phase II assessments range in cost from $50,000 to $70,000. OTA REPORT, *supra* note 38, at 18.

[42] *See infra* Part II.B.

[43] *See H.R. 3800 Hearings*, *supra* note 33, at 189 (statement of Carol M. Browner, EPA Administrator); JAMES BOYD ET AL., THE IMPACT OF UNCERTAIN ENVIRONMENTAL LIABILITY ON INDUSTRIAL REAL ESTATE DEVELOPMENT: DEVELOPING A FRAMEWORK FOR ANALYSIS 10–11 (Resources for the Future Discussion Paper No. 94-03 REV, 1994); E. Lynn Grayson & Stephen A.K. Palmer, *The Brownfields Phenomenon: An Analysis of Environmental, Economic, and Community Concerns*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,337 (July 1995).

tions on a greenfield parcel almost immediately. Assessing and cleaning up contaminated land is a slow process that may be complicated by unpredictable factors such as the weather, government shutdowns, and understaffed agencies.[44] To the extent that delay makes a brownfield parcel unattractive, unpredictable delay is even worse.

Furthermore, the recovery of costs from other PRPs may prove difficult. Once the purchaser has completed a cleanup, it may bring a cost recovery action under section 107(a)(4)(B) of CERCLA or, if litigation has been involved, a contribution action under section 113(f) against other PRPs.[45] The standard of liability in a cost recovery or contribution action, however, is unclear.[46] And the costs of pursuing the litigation will only increase the total cleanup cost; one recent study estimated that transaction costs constitute between nineteen and twenty-seven percent of all cleanup costs.[47]

Lastly, the issue of finality compounds the brownfields problem. Without specific assurance as to what constitutes a cleaned-up site, a purchaser cannot be sure that the EPA or a state agency will not demand further action in light of new statutory or regulatory requirements or new scientific evidence as to the harm caused by a particular substance.[48]

All of these factors help to stack the deck against the purchase of a brownfield property, but perhaps the most significant element of each factor is uncertainty. A recent empirical study

---

[44] *See* Grayson & Palmer, *supra* note 43; Tondro, *supra* note 2, at 802–03.

[45] *See* 42 U.S.C. §§ 9607(a)(4)(B), 9613(f) (1994).

[46] Section 113(f)(1) states that in a contribution action, costs are to be allocated "using such equitable factors as the court determines are appropriate." 42 U.S.C. § 9613(f)(1) (1994). *See, e.g.*, FMC Corp. v. Aero Indus., Inc., 998 F.2d 842, 847 (10th Cir. 1993) (court must "balance the equities in light of the totality of the circumstances"); Environmental Transp. Sys., Inc. v. ENSCO, Inc., 969 F.2d 503, 509 (7th Cir. 1992) (court is not required "to consider any particular list of factors").

The standard of liability in a § 107(a)(4)(B) cost recovery action is similarly confused. *See, e.g.*, Amcast Indus. Corp. v. Detrex Corp., 2 F.3d 746, 748 (7th Cir. 1993) (defendant may counterclaim for costs "due to the plaintiff's own conduct"); General Elec. Co. v. Litton Indus. Automation Sys., Inc., 920 F.2d 1415, 1420–21 & n.8 (8th Cir. 1990) (allowing plaintiff full recovery without acknowledging possibility of apportionment).

[47] *See H.R. 3800 Hearings*, *supra* note 33, at 190. Costs related to identifying other PRPs are recoverable in a cost recovery action, but litigation-related legal fees are not. *See* Key Tronic Corp. v. United States, 114 S. Ct. 1960, 1966–68 (1994).

[48] *See* Grayson & Palmer, *supra* note 43; Tondro, *supra* note 2, at 807–08. *See generally* Frederick W. Addison III, *Reopener Liability Under Section 122 of CERCLA: "From Here to Eternity,"* 45 Sw. L.J. 1081 (1991); William W. Buzbee, *Remembering Repose: Voluntary Contamination Cleanup Approvals, Incentives, and the Costs of Interminable Liability*, 80 MINN. L. REV. 35 (1995).

confirmed that "uncertainty associated with environmental liability has the *potential* to interfere with sales of brownfield property."[49] Because free market bargaining should lead to price adjustments to compensate a brownfield buyer for the cost of cleanup, the authors recognized that the buyer should, in theory, be indifferent to environmental liability.[50] The authors concluded, however, that uncertainty associated with environmental regulation makes a perfect market solution difficult or impossible in many situations and contributes to the difficulty of redeveloping brownfields.[51]

### B. *Effects on the Prospective Lender*

The uncertainty of the liability assumed by a purchaser of a brownfield property will necessarily affect a lender's assessment of the risk involved in a loan, which will tend to make financing of brownfields either more expensive or unavailable.[52] A lender considering loaning money for the purchase of a brownfield will have several concerns: whether the property will be sufficiently valuable as collateral for the loan, whether unexpectedly large cleanup costs may damage the borrower's business and thus impair other loans held by the bank, and whether the bank itself may become liable for contamination as a result of its involvement in the borrower's financial and environmental affairs. Predictably, lenders have been reluctant to loan money in brownfield situations.[53]

Decisions such as *Fleet Factors* have compounded the difficulty. Because *Fleet Factors* premises lender liability on the lender's capacity to affect the borrower's decisions about hazardous waste,[54]

---

[49] Boyd & Macauley, *supra* note 39, at 20. The authors emphasized "potential" because of their recognition that non-environmental factors often contribute to the undesirability of brownfields and their understanding that the costs of greenfield development are greater than many people often assume. *Id. See also* BOYD ET AL., *supra* note 43, at 9–30 (analyzing in greater detail the difficulties posed by risk aversion, adverse selection, moral hazard, and imperfect detection of contamination).

[50] *See* Boyd & Macauley, *supra* note 39, at 20–21.

[51] *See id.* at 21, 23.

[52] *See* OTA REPORT, *supra* note 38, at 8.

[53] For example, a 1990 poll revealed that 43% of community banks had stopped making loans to certain categories of higher-risk businesses. A survey the next year discovered that 62.5% of banks had declined loan applicants because of the risk of liability. *See H.R. 3800 Hearings*, *supra* note 33, at 623–24 (statement of Am. Bankers Ass'n).

[54] *See* United States v. Fleet Factors Corp., 901 F.2d 1550, 1558 (11th Cir. 1990). *See also supra* notes 30–33 and accompanying text.

a lender encounters a Catch-22: if the lender attempts to prevent the borrower from getting into environmental difficulty, it risks becoming liable for any release that results; but if the lender maintains a "hands-off" attitude, it places its collateral at greater risk because the borrower is more likely to contaminate the property. Foreclosure is also more risky in the wake of *Fleet Factors*'s weakening of the secured creditor exception; in many situations, a bank will abandon property rather than foreclose on it and potentially assume the costs of cleaning it up.[55] The more difficulty lenders have in recovering their collateral through foreclosure, the tighter credit terms will be.

As a result of the risks posed by lender liability, some lenders have simply stopped making loans to certain industries or in areas containing industrial properties, a policy known as "greenlining" or "brownlining."[56] Although the number of lenders actually identified as PRPs under CERCLA is quite small,[57] banks are reacting with extreme caution to the possibility of liability. The constricting of credit undoubtedly contributes to the channeling of development away from brownfields.

### C. *Effects on the Prospective Seller*

The forces described above combine to depress the demand for brownfield sites, but environmental liability may also depress the supply of such properties offered for sale. A property owner with contaminated land has little incentive to put the land on the market, where a prospective purchaser is likely to discover the contamination and perhaps report it to the government. Espe-

---

[55] *See Administration of the Federal Superfund Program: Hearings before the Subcomm. on Investigations and Oversight, House Comm. on Public Works and Transp.*, 102d Cong., 528–29 (1992) [hereinafter *Oversight Hearings*] (statement of Charles E. Waterman, South Holland & Sav. Bank). Participants in one conference mentioned that banks will often abandon property rather than foreclose if cleanup costs, back taxes, and needed repairs exceed 40% to 50% of the uncontaminated value of the land. *See* Tondro, *supra* note 2, at 808. The EPA's lender liability rule attempted to create a safe harbor for certain foreclosure activities, but the rule was vacated by the D.C. Circuit, as noted above. *See* Kelley v. EPA, 15 F.3d 1100, 1104, 1109 (D.C. Cir. 1994).

[56] *See* James T. O'Reilly, *Environmental Racism, Site Cleanup and Inner City Jobs: Indiana's Urban In-Fill Incentives*, 11 YALE J. ON REG. 43, 54–55 (1994); Grayson & Palmer, *supra* note 43.

[57] *See Oversight Hearings*, *supra* note 55, at 534 (recognizing that only 31 banks had been named PRPs as of 1991).

cially if the parcel is valuable to the current owner as it is, the threat of liability favors keeping the land off the market.[58]

## III. Recent Federal Approaches to the Prospective Purchaser Problem

Congress and the EPA have been active recently in seeking to make brownfield properties more attractive to prospective purchasers. This Part discusses federal bills in the 103d and 104th Congresses and the EPA's "Brownfields Action Agenda."

### A. *Congressional Action*

The Clinton Administration's 1994 CERCLA reauthorization proposal, the Superfund Reform Act of 1994, was embodied in H.R. 3800 and S. 1834.[59] Although the bills were not enacted into law, they demonstrate current thinking in Congress with regard to brownfields. The Clinton administration's proposal included provisions intended to make brownfields more attractive to prospective purchasers. The bills defined "bona fide prospective purchaser" to include persons who (1) acquire property after active disposal of hazardous substances is complete; (2) make "all appropriate inquiry" into ownership and uses of the facility; (3) provide legally required notices with respect to releases; (4) exercise "appropriate care with respect to hazardous substances" on the property; (5) cooperate with response actions; and (6) have no affiliation with a PRP.[60] A bona fide prospective purchaser of a piece of property would not be liable under CERCLA as an owner or operator[61] and would not be required to clean up the property.[62] In a situation in which a prospective purchaser was released from liability but cleanup costs remained

---

[58] *See* Boyd et al., *supra* note 43, at 25–27; R. Michael Sweeney, *Brownfields Restoration and Voluntary Cleanup Legislation*, 2 Envtl. Law. 101, 110 n.48 (1995).

[59] H.R. 3800, 103d Cong., (1994); S. 1834, 103d Cong., (1994). This section discusses these bills as they passed the House Committee on Energy and Commerce and the Senate Committee on Environment and Public Works, respectively. *See* H.R. Rep. No. 103-582 (1994); S. Rep. No. 103-349 (1994). At this stage, the bills were identical in all relevant respects.

[60] *See* H.R. 3800 § 605(9).

[61] *See id.* § 403(a)(7).

[62] *See* S. Rep. No. 349 at 94.

unrecovered by the EPA, the United States would have a lien on the property for the amount of unrecovered costs.[63] The value of the lien, however, would not exceed the increase in fair market value of the property resulting from the cleanup.[64] Bills in the 104th Congress proposed substantially similar amendments to CERCLA.[65]

The congressional immunity-and-lien approach is similar in effect to the approach taken by most state voluntary cleanup programs, which generally require the participant to bear the cost of cleanup and to seek to recover costs from other PRPs. In each case, a prospective purchaser will, in the end, bear that portion of the cleanup costs which is not recoverable from other parties. The primary distinction is that under the congressional model, the United States must bear the loss until the purchaser decides to resell the property—assuming the EPA decides to clean up the site at all.[66] This outcome is, of course, beneficial to the prospective purchaser, but it may also harm the ability of the EPA to pursue polluters: as the Superfund spends more cash and accumulates more liens, the government will be less able to undertake cleanups of the most seriously contaminated sites across the country. The existence of a lien on a piece of property may also result in a "lock-in" effect, causing the purchaser to hold on to the property longer than it otherwise would. Although the primary brownfield problem would be solved because the parcel would be cleaned up and in productive use, any disincentive to the resale of the land could create inefficiencies in the future.

The federal government has no voluntary cleanup program of its own.[67] As a result, the recent congressional proposals would have created an anomalous situation: a current property owner who was not involved with the disposal of hazardous substances on the property would have to jump through all the ordinary CERCLA hoops, but without assurance that future liability would

---

[63] *See* H.R. 3800 § 403(b).

[64] *See id.*

[65] *See, e.g.*, H.R. 2178, 104th Cong. § 4 (1995); Reform of Superfund Act of 1995, H.R. 2500, 104th Cong. § 305 (1995); Accelerated Cleanup and Environmental Restoration Act of 1995, S. 1285, 104th Cong. § 306 (1995).

[66] Between 1980 and 1994, the EPA cleaned up only about 220 sites. *See H.R. 3800 Hearings, supra* note 33, at 189. Approximately 1250 sites remain on its National Priorities List of the most severely contaminated sites. *See* 40 C.F.R. pt. 300, app. B (1995). As a result, small-scale sites that could be easily and inexpensively cleaned up in a voluntary program likely would be forgotten in an immunity-and-lien program.

[67] The Clinton Administration proposed a federal voluntary program in its 1994 bill, but the program was deleted in committee. *See* H.R. REP. No. 103-582, at 98 (1994).

not attach. A purchaser of the same property, on the other hand, could avoid cleanup costs entirely, perhaps subject to a partial recovery by the EPA on the later sale of the land.

Congress's recent proposals seek to pursue an important goal, moving brownfield land back to productive use. But by deferring the owner's liability and potentially hampering the enforcement ability of the EPA, these proposals threaten the primary goal of CERCLA (cleaning up land) and its basic structure (holding property owners liable in the first instance for contamination). The success of state voluntary cleanup programs proves that neither of these consequences need result with an effective brownfield cleanup program.[68]

### B. *EPA Action*

In January 1995, the EPA released its "Brownfields Action Agenda."[69] As part of its program to attack the brownfields problem, the EPA announced plans to remove some 25,000 sites from its tracking system; fund fifty brownfields pilot programs in 1995 and 1996; and clarify the liability of parties such as municipalities, owners of property atop contaminated aquifers, and lenders against property containing underground storage tanks.[70] One of the most significant elements of the agenda was the development of a guidance document on prospective purchaser agreements.[71]

The guidance document made its appearance in June 1995.[72] It identifies the circumstances under which the EPA will enter into an agreement and a covenant not to sue with a prospective purchaser and provides a model agreement for EPA officials to use.[73] The 1995 document supersedes and broadens an earlier guidance document issued in 1989.[74] Although the EPA entered

---

[68] *See infra* note 119 and accompanying text.

[69] EPA, The Brownfields Action Agenda (Jan. 25, 1995).

[70] *See id.*

[71] *See id.*

[72] *See* EPA Guidance on Agreements with Prospective Purchasers of Contaminated Property and Model Prospective Purchaser Agreement, 60 Fed. Reg. 34,792 (issued June 21, 1995) [hereinafter 1995 Guidance].

[73] *See id.*

[74] *See* EPA Guidance on Landowner Liability Under Section 107(a) of CERCLA, De Minimis Settlements under Section 122(g)(1)(B) of CERCLA, and Settlements with Prospective Purchasers of Contaminated Property, 54 Fed. Reg. 34,235 (issued June 6, 1989) [hereinafter 1989 Guidance]. For a thorough analysis of the 1989 Guidance, see

into only twelve agreements under the old guidance between 1989 and 1993 and only a few more thereafter,[75] experts have predicted that the new guidance will produce many more agreements.[76]

Under the 1995 guidance document, five criteria must be met before the EPA will consider entering into a prospective purchaser agreement: (1) an EPA enforcement action must be ongoing or anticipated at the site; (2) the EPA must receive a substantial direct benefit or a smaller direct benefit in combination with a substantial community benefit; (3) operation of the facility or new development must not aggravate contamination or interfere with response actions; (4) operation or new development must not pose health risks to individuals or the community; and (5) the prospective purchaser must be financially viable.[77] The guidance memorandum also instructs EPA officials to evaluate the nature of the consideration received by the EPA and to involve the community in the settlement process.[78] The memorandum's model settlement agreement would release a prospective purchaser from civil liability to the United States (and to the state, if it is a party to the agreement) related to "existing contamination," defined to include all contaminants on the property as of the effective date of the agreement.[79] The agreement carves out several types of liability, including criminal liability, liability for releases caused by the prospective purchaser, and natural resource damages.[80] Liability protection would extend to subsequent transferees of the property.[81] The agreement also includes a statement that the prospective purchaser "is entitled to protection from contribution actions or claims" under section 113(f)(2) of CERCLA, but the nature of that protection is unclear.[82]

---

Howard M. Shanker & Laurent R. Hourclé, *Prospective Purchaser Agreements*, 25 Envtl. L. Rep. (Envtl. L. Inst.) 10,035 (Jan. 1995).

[75] *See* Shanker & Hourclé, *supra* note 74.

[76] *See Debate About Brownfields Benefits*, *supra* note 33 (citing attorney's prediction of 100 agreements within 12 months).

[77] *See* 1995 Guidance, *supra* note 72, at 34,793–94. For a more detailed analysis of these requirements, see Steven D. Schell, *EPA Continues Administrative Reform of Superfund with New Guidance on Prospective Purchaser Agreements*, 2 ENVTL. LAW. 445, 451–56 (1996).

[78] *See* 1995 Guidance, *supra* note 72, at 37,494–95.

[79] *See id.* at 34,795, 34,797. Nondisclosed contamination is therefore included, placing the burden on the EPA to investigate the site carefully before entering into an agreement.

[80] *See id.* at 34,797.

[81] *See id.* at 34,797–98.

[82] *See id.* at 34,798. If this language purports to be a declaration that the prospective

While the new EPA guidance for prospective purchaser agreements creates better incentives than the 1989 guidance memorandum for cleaning up contaminated property,[83] it will not necessarily have a significant impact on the brownfields problem. First, the number of sites at which the EPA contemplates taking action is small in comparison to the overall scope of the brownfields problem.[84] Second, because the guidance memorandum does not have the force of law,[85] a prospective purchaser entering negotiations with the EPA cannot be sure what type of agreement it may eventually obtain or how long the approval process may take. Finally, because of the concerns identified above,[86] the scope of the liability protection provided by the covenant not to sue is unclear; a prospective purchaser that thought it had resolved all liability questions might find itself forced to defend against cost recovery or contribution actions brought by third parties.[87] If the EPA truly wants to provide significant and useful protection to prospective purchasers, it should encourage Congress to provide for substantive, enforceable provisions in CERCLA itself.[88]

---

purchaser is not liable for contribution to third parties, then Kelley v. EPA, 15 F.3d 1100, 1107 (D.C. Cir. 1994) (EPA cannot define the liability of a party), creates a significant obstacle. If the EPA cannot define liability in a rulemaking proceeding, clearly it cannot define liability in a contract to which the affected entities are not even parties. Alternatively, the "protection" language may suggest that the United States will indemnify the prospective purchaser against such suits. If this is the case, it is surprising that the guidance memorandum contains no discussion of such a significant provision.

[83] The 1995 Guidance is broader than the 1989 Guidance in several respects: it allows for an agreement when EPA action is ongoing at the site and not merely when action is anticipated; it considers indirect benefits to the EPA; and it takes a broader view of acceptable consideration. *Compare* 1989 Guidance, *supra* note 74, at 34,241–42 *with* 1995 Guidance, *supra* note 72, at 34,793–95.

[84] *Compare supra* note 66 (1250 sites on National Priorities List) *with supra* note 38 and accompanying text (450,000 brownfield sites nationwide).

[85] *See* 1995 Guidance, *supra* note 72, at 34,795 (memorandum is "intended solely as guidance for employees of [EPA] and creates no substantive rights in any persons").

[86] *See supra* note 82 and accompanying text.

[87] In an ordinary situation, third-party suits would be unlikely, because the prospective purchaser would perform the cleanup work itself and no other party would have a damage claim. But by considering indirect community benefits and cash consideration, the 1995 Guidance allows a prospective purchaser to reach an agreement without actually cleaning up the site. *See* 1995 Guidance, *supra* note 72, at 34,794, 34,796. Under these circumstances, a third party that bears the cost of the cleanup may have a cost recovery or contribution action under § 107(a)(4)(B) or § 113(f) against the purchaser as an owner or operator. *See supra* notes 45–47 and accompanying text.

[88] *Cf. Kelley*, 15 F.3d at 1109 ("Before turning to this rulemaking, EPA sought congressional relief and was rebuffed. We see no alternative but that EPA try again.").

## IV. Solutions to the Brownfields Problem: Maximizing Commerce and Cleanup

Because Congress has not yet amended CERCLA to address the brownfields phenomenon and because of the inadequacies of the EPA's approach, many prospective purchasers still face the uncertainty of potential future liability. This Part examines both private solutions and current state voluntary cleanup programs in order to delineate the factors that constitute a successful program.

### A. *Private Solutions*

Under the right circumstances, it may be possible for a buyer and seller to handle a brownfield transaction by allocating responsibility contractually between themselves. If the purchaser, with the assistance of environmental experts, can estimate the amount of money that would be required to clean up the property, the purchaser may be able to negotiate a compensating price discount with the current owner.[89] Alternatively, the purchaser might choose to pay full price, absorb the cost of cleanup, and then sue the responsible parties for cost recovery or contribution under section 107(a)(4)(B) or 113(f) of CERCLA.[90]

In an uncomplicated situation with little contamination, this sort of solution may be feasible—indeed, this probably would be the type of deal made if no contamination were discovered in a preliminary assessment. Once the situation becomes more complicated, however, the uncertainty factors and the skittishness of lenders will come into play and tip the balance in favor of selecting a "safe" greenfield.

---

[89] In a situation where the purchaser is unable to estimate costs accurately, the seller may be willing to indemnify the purchaser for cleanup costs. CERCLA forbids agreements that purport to transfer liability from one party to another but permits indemnity and hold-harmless agreements. *See* 42 U.S.C. § 9607(e)(1) (1994). This provision prevents PRPs from avoiding cleanup liability in the first instance, but allows them to attempt to recover expenses from another party according to a contractual agreement. *See* AM Int'l, Inc. v. International Forging Equip. Corp., 982 F.2d 989, 994–95 (6th Cir. 1993); United States v. Hardage, 985 F.2d 1427, 1433 (10th Cir. 1993). From the purchaser's perspective, an indemnity agreement is less than ideal because it requires the purchaser to assume the risk of the seller's inability to pay.

[90] 42 U.S.C. §§ 9607(a)(4)(B), 9613(f) (1994); *see supra* notes 45–47 and accompanying text.

### B. *Voluntary Cleanup Programs*

From the purchaser's perspective, the ideal solution would be a negotiated agreement with the EPA and the relevant state authority in which the purchaser would agree to perform specified cleanup activities and the federal and state governments would agree not to seek further damages from the purchaser. After performing the cleanup, the purchaser would have the right to pursue the responsible parties to recover its costs.[91] This Part considers state attempts to create this type of solution to their brownfields problems and then examines several factors necessary for such a program to be successful.

#### 1. Existing Programs and Their Shortcomings

An analysis of the voluntary cleanup programs states have established in recent years[92] is helpful in identifying the components necessary for effective legislation. As an example, consider Texas's recently enacted Voluntary Cleanup Program.[93] An entity that wants to participate in the program submits an application and a fee of $1,000 to the executive director of the Texas Natural Resource Conservation Commission.[94] If the executive director approves the application, the participant and the executive director negotiate an agreement specifying work plans and technical standards for the cleanup.[95] A plan may provide for only a partial cleanup if it meets certain conditions intended to ensure that remaining contamination is not dangerous or worsened.[96] If the

---

[91] Of course, if the seller of the property actually bears the costs of cleanup, either directly or indirectly, the seller should have the right of contribution.

[92] At least 24 states have voluntary cleanup programs, *see* Buzbee, *supra* note 48, at 118–19, at least nine of which have been established since 1994, *see* OTA REPORT, *supra* note 38, at 13 & n.33.

For examples of relevant statutes with provisions for prospective purchasers, *see* ARIZ. REV. STAT. ANN. § 49-285.01 (West Supp. 1996); ARK. CODE ANN. § 8-7-523 (Michie Supp. 1995); ILL. ANN. STAT. ch. 415, § 5/22.2b (Smith-Hurd Supp. 1995); ME. REV. STAT. ANN. tit. 38, § 343-E (West Supp. 1995); MICH. COMP. LAWS ANN. § 324.20133 (West Supp. 1996); MINN. STAT. ANN. § 115B.175 (West Supp. 1996); MO. ANN. STAT. §§ 260.565–.575, 447.700–.718 (West Supp. 1996); MONT. CODE ANN. §§ 75-10-730 to -738 (1995); OR. REV. STAT. § 465.327 (1995); R.I. GEN. LAWS §§ 23-19.14-1 to -19 (Supp. 1995); VT. STAT. ANN. tit. 10, § 6615a (Supp. 1996); VA. CODE ANN. §§ 10.1-1429.1 to -1429.3 (Michie Supp. 1996); WIS. STAT. ANN. § 144.765 (West Supp. 1995).

[93] *See* TEX. HEALTH & SAFETY CODE ANN. § 361.601–.613 (West Supp. 1996).

[94] *See id.* § 361.604.

[95] *See id.* § 361.606.

[96] *See id.* § 361.608(d).

cleanup is completed successfully, the executive director issues a certificate of completion that is recorded in the real property records.[97] The certificate protects the participant, any subsequent purchaser, and any subsequent lender from liability to the state for releases occurring before the certificate was issued, unless the party is otherwise a responsible party for the release.[98]

Voluntary cleanup programs such as Texas's provide brownfield owners with significant advantages over the otherwise prevailing system of enforcement-driven activity. A voluntary program helps to clarify the degree of cleanup required, may eliminate some of the traditional delays involved with cleanups, and provides a degree of protection against further liability.[99] Indeed, lenders seem to be favorably inclined towards lending against properties certified in a voluntary program.[100]

Voluntary programs, however, cannot by themselves solve the brownfields problem. One significant problem with voluntary programs is that, because they operate at the state level, they cannot provide assurance that the federal EPA will not pursue the owner for further cleanup. Many state programs avoid the bulk of this difficulty by expressly excluding from consideration any site targeted by the EPA.[101] In other situations, the landowner must rely on federal-state comity,[102] the small scale of the contamination, or the federal government's sense of public relations and assume that the EPA will not attack property which has already received a clean bill of health from a state government.[103]

Another significant difficulty for a prospective purchaser is that some state programs are designed for the current owner of a site rather than a purchaser.[104] A purchaser that must take title

---

[97] *See id.* § 361.609.

[98] *See id.* § 361.610.

[99] *See* OTA REPORT, *supra* note 38, at 13.

[100] *See id.*; *H.R. 3800 Hearings*, *supra* note 33, at 630.

[101] *See, e.g.*, MONT. CODE ANN. § 75-10-732(1)(a) (1995); TEX. HEALTH & SAFETY CODE ANN. § 361.605(a)(1) (West Supp. 1996); VT. STAT. ANN. tit. 10, § 6615a(f)(2)(A) (Supp. 1996).

[102] *See* O'Reilly, *supra* note 56, at 58–59 (referring to comity with respect to Indiana's program).

[103] Another possibility is an express agreement between the EPA and the state agency that the EPA will not pursue action at a state-certified site except in emergency situations. Minnesota, Illinois, Indiana, and Wisconsin have recently entered this type of agreement with the EPA. *See* OTA REPORT, *supra* note 38, at 19; DEPARTMENT OF ENV'T, CITY OF CHICAGO, BROWNFIELDS FORUM: FINAL REPORT AND ACTION PLAN 86 (1995); Mary Dieter, *Chemical Cleanup a Success Story: Clarksville Site Called a Model*, COURIER-J. (Louisville), Dec. 5, 1995, at 1A.

[104] *See, e.g.*, COLO. REV. STAT. ANN. § 25-16-303(3)(a) (West Supp. 1995); *cf.* N.J. ADMIN. CODE tit. 7, §§ 26C-1.3, 26C-2.2 (1995) (using term "any person" rather than

to a brownfield—and thus become a PRP—before even applying to a voluntary cleanup program is likely to take a serious look at other, nonpolluted land.[105] Other potential problems with voluntary programs are a lack of incentives to encourage the agency to move the process along swiftly, confusion as to the scope of protection from liability, and broad retention of power by the state to revoke the liability protection.[106]

### 2. Keys to a Successful Voluntary Cleanup Program

If a voluntary cleanup program is to make a significant dent in the brownfields problem, it must at least be clear, specific, final, and speedy.[107] This subsection examines these requirements in further detail.

A successful program to attack the brownfields problem must be clearly applicable to a prospective purchaser, allowing it to apply for the program and reach an agreement before it is required to step into the chain of title and become a PRP.[108] Any uncertainty as to the applicability of a program will encourage purchasers, and especially their risk-averse lenders, to look elsewhere. The program also must outline clearly the actions required by the applicant, the costs of participating in the program, and the advantages (primarily protection from future liability) to be gained from successful participation.

---

"responsible party" to describe eligible participants for voluntary program); WIS. STAT. ANN. § 144.765(2)(a) (West Supp. 1995) (program applicable only to prospective purchasers).

[105] Another option in this situation is for the prospective purchaser and the current owner to agree that the owner will participate in the program, complete the cleanup, and then sell the land to the purchaser. This scenario raises two difficulties. To the extent that the purchaser participates actively in overseeing the cleanup, it risks becoming liable as an "operator"—like a lender—in case something goes wrong. In addition, some state programs are unclear as to whether the participant's liability protection is transferable to successors in title. *See, e.g.*, R.I. GEN. LAWS § 23-19.14-10 (Supp. 1995) (making protection transferable at discretion of state).

[106] *See, e.g.*, MICH. COMP. LAWS ANN. § 324.20132(8) (West Supp. 1996) (allowing reopener provisions in settlement agreements "that in the discretion of the department are necessary and appropriate to assure protection of the public health, safety, welfare, and the environment"); *cf.* 42 U.S.C. § 9622(f)(6)(C) (1994) (same); TEX. HEALTH & SAFETY CODE ANN. § 361.607(a) (West Supp. 1996) (allowing executive director to terminate cleanup agreement before completion on 15 days notice).

[107] *Cf.* Sweeney, *supra* note 58, at 157–65 (identifying, *inter alia*, flexible cleanup standards, public participation, lender protection, written liability protection running with the land, and protection from federal liability as elements of successful voluntary cleanup programs).

[108] Ideally, a program would allow the purchaser to complete the cleanup (with the owner's permission) before completing the purchase. If the purchaser requires financing for cleanup activities, however, it may have no collateral to offer until it buys the land.

Specificity is also important to the success of a voluntary program, especially in the terms of the liability protection, as a vague statute can expose a participant to significant risk. For example, in the Texas program, a certificate of completion protects the participant "from all liability to the state" for cleanup of the affected area and also protects future owners and lenders "from all liability," without mentioning the state.[109] This statutory structure raises two important issues: the effect of a suit brought by a third party for contribution and the nature of the liability of a lender that has a mortgage on the property while the cleanup is in progress. Texas's drafting choices may be intentional—after all, if the participant and its lender are in fact responsible for contamination, they should remain liable to other PRPs for contribution—but the purpose of the distinction is unclear on the face of the statute. Other liability issues that should be addressed include natural resource damages, criminal liability, and common-law liability for trespass, nuisance, or conduct of an ultrahazardous activity. Depending on the jurisdiction's environmental and nuisance laws, it also may be helpful to specify the evidentiary effects of an application to the program.[110] Finally, lawmakers should consider specifically allowing a purchaser who participates in a voluntary program to transfer liability protection and contribution rights to the preceding owner if that owner bears the financial burden of the cleanup.

Finality should be another significant goal of a voluntary cleanup program. Texas's program, for example, allows exceptions to the liability protection in three situations: releases caused by the participant; fraud, misrepresentation, or nondisclosure of material information; or a change in land use that increases risks to health or the environment.[111] Other finality issues include the effect of later changes in the law, liability for contamination that is undiscovered by the participant at the time of cleanup,[112] new

---

[109] TEX. HEALTH & SAFETY CODE ANN. § 361.610(a), (c) (West Supp. 1996); *see also* R.I. GEN. LAWS §§ 23-19.14-10, -12 (Supp. 1995) (providing vague release of liability to state but clear protection against liability to third parties).

[110] *See, e.g.*, OR. REV. STAT. § 465.325(4)(b)–(c) (1995) (specifying that an agreement to perform removal or remedial action is not considered an admission of liability for any purpose).

[111] *See* TEX. HEALTH & SAFETY CODE ANN. § 361.610(a)–(c) (West Supp. 1996).

[112] *Compare* WIS. STAT. ANN. § 144.765(2)(b) (West Supp. 1995) (exempting purchaser from liability because of change in law or unanticipated extent of contamination) *with* MO. ANN. STAT. § 447.714(4)(1) (Vernon Supp. 1996) (making purchaser liable for undisclosed contamination). One commentator would require the EPA or state agency to absorb part of the cost of any cleanup required by a change in law or

scientific knowledge about the hazards of substances, and later actions undertaken in extraordinary or emergency situations.

Finally, if a program is to make brownfields attractive, it must attempt to approximate the time frame in which a prospective purchaser could develop a competing greenfield property. Some states have imposed time limits on processing applications,[113] but some also allow exceptions when the agency becomes busy.[114] One possible compromise would be to set a deadline, subject to moderate extension by the state agency, after which an application would be deemed approved if the agency takes no action.[115] The speed of the cleanup itself is largely within the control of the participant, provided the final result is consistent with the plan approved by the state. The relative delay in the cleanup and approval process that a particular purchaser will be willing to tolerate will depend on a number of factors, including the urgency of its need for a new facility, the price differential between brownfields and greenfields, and the delays that may be involved in greenfield development (such as zoning approvals). Even without exact data on how much delay purchasers will tolerate, a cleanup program would likely be more successful to the extent that the program can accelerate the process while still protecting against fraud and environmental harm.

On the other hand, certain features are probably not necessary to a successful voluntary cleanup program. A recent trend among the states involves flexibility as to the level of cleanup required for a parcel, depending on the use to which it is to be put; a

---

undiscovered contamination. *See* Buzbee, *supra* note 48, at 102–03. While it may be appropriate to shift part of the cleanup burden to the general public if the law changes (presumably at the behest of the public), this would not be an equitable solution to the problem of undiscovered contamination. All purchasers of land today take the risk of undiscovered contamination unless they can assert the innocent purchaser defense. *See supra* notes 26–28 and accompanying text. A landowner seeking a benefit from the government in the form of protection against liability should earn that benefit by disclosing all discoverable contamination and remedying it, not by remaining ignorant of the existence of contamination on the property. With respect to undiscovered contamination, a cleanup program should be structured to create incentives for the landowner—who has the most significant knowledge and control of the property—to come forward with all relevant information. Although, as Buzbee asserts, the government's vigilance may be greater if it will bear part of the cleanup costs, landowners have the lowest information costs and should be given the greatest possible incentive to minimize their own risk. *See* Buzbee, *supra* note 48, at 102.

[113] *See, e.g.*, MO. ANN. STAT. § 260.567(2), (3), (5), (6) (Vernon Supp. 1996); MONT. CODE ANN. § 75-10-736(1)–(2) (1995); VT. STAT. ANN. tit. 10, § 6615a(e)(2) (Supp. 1996).

[114] *See, e.g.*, MONT. CODE ANN. § 75-10-736(3) (1995).

[115] *Cf.* Clayton Act § 7A, 15 U.S.C. § 18a (1994). Of course, such an approach would require restrictions to prevent abuse.

plot destined for industrial use, for example, may remain somewhat contaminated, but a residential parcel would have to meet the strictest cleanup standards.[116] In addition to the difficult issues of environmental justice created by such a legislative scheme[117] and the possibility that lower standards may contribute to undesirable interstate competition,[118] evidence indicates that purchasers and lenders are willing to proceed under a voluntary program without lowered standards. For example, between 1989 and 1993, Minnesota's Voluntary Investigation and Cleanup program received and processed 422 applications without reducing cleanup standards.[119]

The Model Statute which follows is my attempt to construct a voluntary cleanup program applicable to prospective purchasers in light of these factors.

---

[116] *See, e.g.*, MICH. COMP. LAWS ANN. § 324.20118 (West Supp. 1996); N.J. STAT. ANN. § 58:10B–12 (West Supp. 1996); S. 1834, 103d Cong. §§ 502–503 (1994); Douglas A. McWilliams, *Environmental Justice and Industrial Redevelopment: Economics and Equality in Urban Revitalization*, 21 ECOLOGY L.Q. 705, 738–41 (1994). *See generally* Krista J. Ayers, Comment, *The Potential for Future Use Analysis in Superfund Remediation Programs*, 44 EMORY L.J. 1503 (1995).

[117] *See* Anne L. Kelly, *Reinvention in the Name of Environmental Justice: A View from State Government*, 14 VA. ENVTL. L.J. 769, 779–83 (1995); McWilliams, *supra* note 116, at 741; Georgette C. Poindexter, *Addressing Morality in Urban Brownfield Redevelopment: Using Stakeholder Theory To Craft Legal Process*, 15 VA. ENVTL. L.J. 37, 55–59 (1995); *cf.* Vicki Been, *What's Fairness Got To Do with It?: Environmental Justice and the Siting of Locally Undesirable Land Uses*, 78 CORNELL L. REV. 1001 (1993) (discussing environmental justice in the context of siting in the first instance).

[118] *But see* Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the 'Race-to-the-Bottom' Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992).

[119] John B. Casserly, Note, *Minnesota's Land Recycling Act: Solving Problems by Evolving Superfund*, 2 WIS. ENVTL. L.J. 261, 271 (1995). *See* MINN. STAT. § 115B.175 (1994) (providing no variance in cleanup standards for planned use of property). *But see* MINN. STAT. ANN. §§ 115B.17(2a), 115B.175(2)(a)(1) (West. Supp. 1996) (incorporating 1995 amendment allowing variable cleanup standards). For other statistics on the success of voluntary programs, see, for example, *Around the States*, HAZARDOUS WASTE NEWS, Apr. 8, 1996, *available in* Westlaw, 1996 WL 7981730 (120 sites in Texas nearing final approval under program that began in September 1995); Dieter, *supra* note 103, at 1A (63 applications to Indiana program in two and one-half years).

Others argue that flexibility in cleanup requirements may be important. *See, e.g.*, Tondro, *supra* note 2, at 800–01 (noting that one company that speculates in site cleanups considers flexible cleanup standards the key to commercial feasibility). The existence of repeat players in state cleanup programs may affect the dynamics of the cleanup process (for example, by reducing transaction costs caused by unfamiliarity with the programs). But the enormous risks which a repeat player must undertake suggest that very few companies are likely to be engaged in large-scale land cleanup as a primary business. *See id.* at 801 (commenting that speculating company carries insurance with "a 'huge' deductible").

## V. A Proposed Statutory Scheme to Provide for the Voluntary Cleanup of Brownfields by Prospective Purchasers

This Part provides model statutory language designed to address the brownfields problem, primarily from the point of view of the prospective purchaser. As discussed in Parts III and IV, current legislation and legislative proposals often fail to address the brownfields problem in a manner that is clear and specific, and often contain little assurance that a prospective purchaser can return contaminated property to productive use rapidly. This Model Statute attempts to address these shortcomings without imposing significant costs on the enacting government.

In drafting this language, I have been inspired by policy judgments and drafting choices in a number of state statutes.[120] This statute is designed for implementation at the federal level. Language in brackets indicates important attentuations for state-level implementation, although I omit many of the most obvious changes.

For the sake of brevity, I assume that the following terms are defined elsewhere in the enacting jurisdiction's environmental laws:

- Administrator (the Administrator of the EPA);
- department (the relevant state environmental agency);
- environmental professional (an individual certified to supervise cleanup activities);
- EPA (the federal agency);
- National Priorities List (40 C.F.R. pt. 300, app. B);
- person (defined broadly to include individuals and other entities);
- State Environmental Act (the enacting state's mini-CERCLA law (applicable when this Model Statute is implemented at the state level)).

I also assume that "facility," "hazardous substance," "release," "remedial action," and "removal" are defined as they are in section 101 of CERCLA.

---

[120] *See, e.g.*, statutes cited in *supra* note 92.

## A MODEL STATUTE TO PROVIDE FOR THE VOLUNTARY CLEANUP OF CONTAMINATED PROPERTIES AND TO LIMIT THE LIABILITY OF PERSONS CLEANING UP SUCH PROPERTIES

### SECTION 1. DEFINITIONS

As used in this Act—

(a) "Cleanup plan" means the basic agreement between the participant and the EPA, specifying the particular removal or remedial action to be taken on the property.

(b) "Eligible property" means real property located within the United States which—

(1) is not listed on the National Priorities List;

(2) is not the subject of a current or impending investigation or action by the EPA [or by the department]; and

(3) contains a facility which is currently, has been, or is likely to have been the site of a release or a threatened release of a hazardous substance.

(c) "Participant" means a person whose application to participate in the program has been approved by the Administrator under Section 2 of this Act.

(d) "Program" means the program of voluntary cleanup and releif from liability established by Sections 2 through 13 of this Act.

(e) "Prospective purchaser" means a person who is not a responsible party and who—

(1) has entered into a contractual agreement to purchase an eligible property, or

(2) holds an option to purchase an eligible property

**for the fair market value of such property as a result of an arm's-length transaction.**

**(f) "Responsible party" means a person who is potentially liable under 42 U.S.C. § 9607(a) [section ___ of the State Environmental Act] with respect to a release of a hazardous substance.**

COMMENT: This section defines the scope of the parties and properties eligible to participate. To be an eligible prospective purchaser, a person must have either a contract or an option to purchase a property. This definition requires a degree of commitment that will help avoid flooding the EPA with requests for clearance from parties who have not yet demonstrated any serious interest in a site. Likewise, a property is not eligible for the program unless there is at least a likelihood that a release has occurred, again, to avoid unnecessary requests for reassurance from the EPA.

SECTION 2. APPLICATION PROCEDURE

**(a) A responsible party with respect to an eligible property or a prospective purchaser of an eligible property may apply to participate in the program.**

**(b) An application shall be submitted to the Administrator and shall include:**

**(1) the name(s) of the applicant(s), the current owner(s) of the property, and any responsible parties known to the applicant;**

**(2) the legal description of the property;**

**(3) an environmental assessment of the property, including the source, nature, and location of all hazardous substances known to the applicant to be located on the property;**

**(4) proposed general plans for removal or remedial action on the property;**

**(5) the certification of the applicant that the information contained in the application is, to the best of the applicant's knowledge and belief, true, complete, and not misleading; and**

**(6) an application fee of $___.**

**(c) The Administrator shall approve or deny an application within 60 days of its submission. The Administrator may extend the 60-day period by a maximum of 30 additional days if the application contains unusually complex environmental or legal issues. Notice of any extension shall be delivered in writing to the applicant before the expiration of the original 60-day period.**

**(d) If the Administrator does not take action on an application before the expiration of the period described in Subsection (c), the application shall be deemed approved if the application includes—**

**(1) a signed opinion of an attorney licensed to practice in the jurisdiction in which the property is located—**

**(A) that the information contained in the application is, to the best of such attorney's knowledge and belief, true, complete, and not misleading; and**

**(B) that the proposed removal or remedial action is consistent with Section 3(b) of this Act; and**

**(2) the certification of an environmental professional licensed to practice in the jurisdiction in which the property is located—**

**(A) that the information contained in the application is, to the best of such professional's knowledge and belief, true, complete, and not misleading;**

**(B) that the proposed removal or remedial action will satisfy the requirements of Section 3(b) of this Act, and 42 U.S.C. § 9621 [section ___ of the State Environ-**

**mental Act], including the rules and regulations promulgated under each Act; and**

**(C) that the proposed removal or remedial action is feasible.**

**(e) If the Administrator denies an application, the Administrator shall, within 30 days of such denial, deliver to the applicant a written explanation of the reasons for such denial.**

COMMENT: This Section is intended to provide the EPA with the information necessary to make an initial determination of eligibility for the program, so that the EPA can screen out applicants who are not appropriate for the program. Subsections (c) and (d) impose a 60 to 90 day limit on the EPA's initial decision; if no decision is rendered during that period, the application is deemed approved if it contains certain representations. The purpose of this structure is to create an incentive for the EPA to process applications speedily, while ensuring the EPA can protect itself by identifying individuals (the licensed attorney and environmental professional) responsible for misleading applications. Note that the consequence of automatic approval is not an automatic release from liability or even approval of a cleanup plan; all the requirements of the following sections must still be met if the applicant is to receive the benefits of the program.

SECTION 3. APPROVAL OF CLEANUP PLAN

**(a) Following the approval of an application under Section 2 of this Act, the participant shall submit to the Administrator a cleanup plan for the Administrator's approval.**

**(b) The Administrator shall approve a cleanup plan only if—**

**(1) the plan provides for the recovery by the EPA of all direct and indirect costs, in excess of the application fee, of overseeing and supervising removal or remedial action on the property;**

**(2) the plan specifies in detail the particular removal or remedial action to be taken on the property;**

**(3) the removal or remedial action will be sufficient to restore the property to the condition to which it would be restored if the EPA undertook a response action on the property under 42 U.S.C. § 9604 [department undertook a response action under section __ of the State Environmental Act];**

**(4) the removal or remedial action will be performed by competent, financially responsible technicians and supervised by a licensed environmental professional;**

**(5) the removal or remedial action will not cause, contribute to, or worsen any release or threatened release of a hazardous substance on the property;**

**(6) the removal or remedial action will adequately protect human health and the environment;**

**(7) the participant is financially capable of undertaking the removal or remedial action; and**

**(8) the plan includes a grant to the Administrator and the Administrator's authorized representatives of an irrevocable easement or right of entry onto the property for purposes of oversight and monitoring during the performance of and following the completion of the removal or remedial action.**

**(c) If the participant is not the owner of the property, the Administrator shall not approve a cleanup plan unless the owner first agrees to its terms.**

**(d) Before approving a cleanup plan, the Administrator shall—**

**(1) publish a notice and a brief summary of the plan in a daily newspaper of general circulation in the area of the property;**

**(2) publish a notice and a brief summary of the plan in the Federal Register;**

**(3) make reasonable attempts to provide personal notice of the plan to all responsible parties known to the EPA and to owners and residents of property located within __ yards of the property;**

**(4) provide a 30-day period for the submission of written comments to the EPA regarding the plan; and**

**(5) hold a public hearing at which members of the public may comment on the plan if a release or threatened release of a hazardous substance or the removal or remedial action to be performed on the property has affected directly or is likely to affect directly the health of occupants of nearby residential property.**

**(e) If the Administrator denies the proposed cleanup plan, the Administrator shall, within 30 days of such denial, deliver to the participant a written explanation of the reasons for such denial.**

COMMENT: This Section lays out the basic substantive and procedural requirements of the cleanup plan. Subsection (b)(1) ensures that the federal government does not bear any of the cleanup costs. Of course, if the government wishes to make the program even more attractive, it may choose to absorb its administrative costs. Subsection (b)(3) incorporates the standard of cleanup imposed by CERCLA, or in the case of a state, the mini-CERCLA law, which may be use-specific. (Although flexible standards are probably not a necessary element of a voluntary cleanup program, if the state has flexible standards for mandatory cleanups, there is no reason to impose stricter standards on a volunteer.) Subsection (d) outlines a number of procedural requirements and attempts to balance speed against safety by requiring a public hearing only where human health at nearby homes is an issue. Note that the entire Section is phrased in terms of necessary, rather than sufficient, requirements; nothing prevents the EPA from denying approval to a plan for a reason not listed. Section 13, however, does provide for administrative

review of the denial of a plan. Additionally, nothing in the Statute forecloses a party from reapplying.

SECTION 4. CERTIFICATE OF COMPLETION

**(a) When a participant has completed the removal or remedial action required by an approved cleanup plan, the environmental professional supervising the removal or remedial action shall certify to the Administrator that the removal or remedial action has been completed in accordance with the cleanup plan.**

**(b) When the Administrator has verified that the participant has satisfied the terms of its cleanup plan, the Administrator shall issue the participant a certificate of completion.**

**(c) A certificate of completion shall—**

**(1) contain the name of the participant and the name of any person relieved from liability by Section 8(c) of this Act;**

**(2) contain the legal description of the property;**

**(3) summarize the nature of the removal or remedial action performed on the property;**

**(4) summarize the nature of the liability relief provided by Sections 5 through 8 of this Act; and**

**(5) be recorded by the Administrator in the real property records of the jurisdiction in which the property is located.**

**(d) If the Administrator refuses to issue a certificate of completion after receiving the certification of an environmental professional as specified in Subsection (a), the Administrator shall, within 30 days of such refusal, deliver to the participant a written explanation of the reasons for such refusal.**

COMMENT: Section 4 provides for the issuance of a certificate of completion when a site has been cleaned up to the satisfaction of the EPA. The recording of the certificate, along with a summary of Sections 5 through 8, is intended to reassure later purchasers and lenders about the status of the property.

SECTION 5. RELIEF FROM LIABILITY

**(a) A participant who receives a certificate of completion from the Administrator shall not be considered a responsible party with respect to any release of a hazardous substance occurring on the property before the certificate is issued.**

**[(b) The state shall not commence an action under federal law to recover costs from a participant who is relieved from liability with respect to a release of a hazardous substance by the application of Subsection (a).]**

**(c) The relief provided to a participant by a certificate of completion continues notwithstanding—**

**(1) a change in federal or state law;**

**(2) the subsequent discovery that the removal or remedial action performed by the participant failed to fully restore the property to the condition required by Section 3(b)(3) of this Act, *provided* that the participant exercised due care in performing the removal or remedial action; or**

**(3) the discovery that a substance which was not considered hazardous at the time the certificate was issued has been released on the property.**

COMMENT: This section describes the effect of a certificate. The participant is expressly declared not to be a responsible party under CERCLA or, in the case of a state enactment, under the state's mini-CERCLA law. Although a state statute cannot affect the standard of liability under CERCLA, Subsection (b) will at least prevent the state from pursuing the participant under the federal law. Subsection (c) notes several circumstances under which subsequent events do not affect the participant's liability.

The government bears the risk of a change in the law or a faulty cleanup, but the participant bears a number of other significant risks under Section 7.

**[SECTION 6. RELIEF FROM LIABILITY TO THIRD PARTIES**

**A participant who receives a certificate of completion from the director shall not be liable to any other person under section __ of the State Environmental Act with respect to any release of a hazardous substance occurring on the property before the certificate is issued.]**

COMMENT: This Section is intended to protect the participant from cost recovery or contribution actions under the mini-CERCLA law; accordingly, the blank should refer to any sections of that law providing such rights to responsible parties. Depending on the structure of a state's mini-CERCLA law, this Section may be duplicative of Section 5(a). In a federal enactment, this Section would be unnecessary because Section 5(a) would protect a participant from third party actions.

**SECTION 7. EXCEPTIONS TO RELIEF FROM LIABILITY**

**Notwithstanding Sections 5 and 6 of this Act, a participant is not relieved from liability with respect to a release of a hazardous substance occurring on the property—**

**(a) if the release occurs after the certificate of completion is issued;**

**(b) if the participant obtains the approval of its application, the approval of its cleanup plan, or the issuance of its certificate of completion by means of fraud, misrepresentation, or knowing failure to disclose material information;**

**(c) if the existence of the hazardous substance on the property is not disclosed by the participant in its cleanup plan, regardless of whether the participant knew or should have known of the existence of the hazardous substance on the property;**

**(d) if the release is caused by the participant or an agent of the participant, unless the release is remediated before the certificate of completion is issued and is included in the certificate of completion;**

**(e) in a criminal action or an action for damages to natural resources; or**

**(f) in an action for common-law nuisance or trespass or an action for the conduct of an abnormally dangerous activity.**

COMMENT: This section carves out several significant areas of liability which remain with the participant—most notably, the risks of subsequent releases and of undisclosed substances. These provisions are intended to place the responsibility on the participant to disclose and clean up all hazardous substances on the property. Because this Section does not affirmatively impose liability, however, the innocent purchaser defense might still apply with respect to an undiscoverable substance. Subsection (f) ensures that common-law liability also remains; third parties whose property is damaged by pollution receive no particular benefit from the cleanup, and they should be able to seek compensation from those responsible. Note, however, that because a prospective purchaser is unlikely to be liable for the common-law torts of previous owners, this carve-out is unlikely to pose a significant obstacle to a prospective purchaser.

SECTION 8. TRANSFERABILITY OF RELIEF FROM LIABILITY

**(a) If a participant is relieved from liability with respect to a release of a hazardous substance under Sections 5 through 7 of this Act, such relief also extends to any person who—**

**(1) purchases the property,**

**(2) leases the property, or**

**(3) acquires, merges with, or purchases all or substantially all of the assets of the participant**

**after the certificate of completion is issued, *provided* that such person is not otherwise a responsible party with respect to the release and that such person is subject to any duties of the participant under the cleanup plan or the certificate of completion.**

**(b) The relief provided to a subsequent owner or lessee under Subsection (a) continues notwithstanding a determination that the participant is ineligible for relief under Section 7 of this Act if—**

**(1) the owner or lessee is not otherwise a responsible party with respect to the release of the hazardous substance at issue;**

**(2) the owner or lessee purchased or leased the property in good faith for its fair market value; and**

**(3) the actions of the participant cannot be imputed to the owner or lessee under ordinary principles of law.**

**(c) If the participant is a prospective purchaser who is relieved from liability with respect to a release of a hazardous substance under Sections 5 through 7 of this Act, such relief also extends to the person from whom the prospective purchaser purchases the property if—**

**(1) the prospective purchaser and such person so agree;**

**(2) such person bears the expenses of the removal or remedial action performed on the property, directly or indirectly;**

**(3) such person is a responsible party with respect to the release only because of such person's ownership of the property; and**

**(4) the Administrator approves and incorporates notice of such relief in the certificate of completion.**

COMMENT: Section 8 continues liability relief down the chain of title and the chain of corporate succession, excluding persons

who otherwise would be responsible parties. Subsection (b) protects bona fide innocent purchasers and lessees, but not necessarily corporate successors, against a later revocation of the original participant's relief. Subsection (c) recognizes that in certain situations, the person who owns the property before the participant is entitled to protection; where an innocent seller bears the cost of the cleanup, the seller-prospective purchaser relationship is functionally identical to the participant-subsequent buyer relationship.

SECTION 9. LIABILITY OF LENDERS

**(a) A person who, without participating in the management of the property, holds indicia of ownership primarily to protect such person's security interest in the property shall not be considered a responsible party with respect to a release of a hazardous substance occurring on the property if—**

**(1) the owner of the property is relieved from liability under Sections 5 through 8 of this Act with respect to the release;**

**(2) the release is not caused by such person; and**

**(3) such person does not participate actively in decisions regarding hazardous substances on the property.**

**(b) A person who lends money to a prospective purchaser to enable such prospective purchaser to participate in the program shall not be considered a responsible party with respect to a release of a hazardous substance solely as a result of making such loan.**

COMMENT: This Section takes a cautious approach to the difficult subject of lender liability, relieving the lender of liability where the borrower is relieved and the lender is not itself at fault. The broader subject of lender liability where the borrower is at fault is left to another statute more narrowly focused on that subject, but note that the lender under this Section is subject to any exception that applies to the borrower under Section 7. Subsection (b) provides a measure of assurance to a lender

making a loan to a prospective purchaser: the loan itself is not sufficient to make the lender a responsible party.

SECTION 10. SAFE HARBOR PROVISIONS

**(a) A prospective purchaser shall not be considered a responsible party with respect to a release of a hazardous substance solely as a result of—**

**(1) conducting an environmental assessment of real property;**

**(2) contracting to purchase real property or purchasing an option on real property;**

**(3) applying to participate in the program; or**

**(4) conducting or supervising removal or remedial action, with the exercise of due care, in accordance with an approved cleanup plan.**

**(b) The information contained in an application, a cleanup plan, or a certificate of completion shall not be considered an admission of liability by the applicant or participant for any purpose.**

COMMENT: Subsection (a) provides safe harbors for applicants, participants, and persons generally considering purchasing contaminated property. Of course, other laws still apply. Thus, for example, the negligent performance of an environmental assessment could give rise to liability. Subsection (b) assures applicants and participants that disclosures to the EPA will not be used against them in subsequent litigation.

SECTION 11. COST RECOVERY BY PARTICIPANT

**(a) A participant who receives a certificate of completion may bring an action against any responsible party under 42 U.S.C. § 9607(a) or 42 U.S.C. § 9613(f) [section ___ of the State Environmental Act] to recover the participant's costs of performing removal or remedial action pursuant to this Act.**

**(b) If the participant is a prospective purchaser and the person from whom the prospective purchaser purchases the property qualifies for relief from liability under Section 8(c) of this Act, such person may bring an action against any responsible party under 42 U.S.C. § 9607(a) or 42 U.S.C. § 9613(f) [section ___ of the State Environmental Act] to recover such person's costs of performing removal or remedial action pursuant to this Act.**

COMMENT: This Section is intended to ensure that the participant can recover its cleanup expenses from those at fault. Only cleanup expenses, and not other expenses of participating in the program, are included, on the assumption that these would be the only costs recoverable in an ordinary cost-recovery or contribution suit.

SECTION 12. TERMINATION OF PARTICIPATION

**(a) A participant may terminate its participation in the program on 30 days written notice to the Administrator.**

**(b) The Administrator may terminate the participation of a participant in the program only if—**

> **(1) the participant, after a reasonable period of time, has not proposed and is unlikely to be able to propose a cleanup plan that meets the criteria of Section 3(b) of this Act;**
>
> **(2) the participant fails materially to comply with the requirements of the cleanup plan or the requirements of this Act; or**
>
> **(3) based on newly discovered information, the Administrator determines that the removal or remedial action performed or to be performed on the property poses a serious threat of harm to human health or the environment.**

**(c) Subject only to Section 10(b) of this Act, any termination of participation in the program shall not affect the rights of the EPA in any way.**

COMMENT: This Section allows a participant to back out of the program for any reason, but requires the Administrator to show some cause for terminating a participant's rights. Subsection (c) preserves the EPA's rights; thus, if a participant dropped out after unearthing contaminants and increasing hazards on the property, the EPA would retain the power it would ordinarily have under CERCLA to obtain a cleanup injunction or to take action itself on the property.

SECTION 13. ADMINISTRATIVE REVIEW

**(a) A decision of the Administrator to approve an application, to approve a cleanup plan, or to issue a certificate of completion shall be final and shall not be reviewable.**

**(b) If the director—**

**(1) denies an application for any reason other than incompleteness,**

**(2) denies approval of a cleanup plan,**

**(3) refuses to issue a certificate of completion, or**

**(4) terminates the participation of a participant in the program,**

**the aggrieved applicant or participant may seek review before the EPA's Environmental Appeals Board.**

COMMENT: In the interest of finality, Subsection (a) makes a decision to proceed unreviewable. A decision against the applicant or participant is subject to administrative review.

[SECTION 14. FEDERAL-STATE COORDINATION

**The director shall attempt to negotiate an agreement with the EPA in order to assure participants in the program that**

**a certificate of completion will relieve participants from liability to the United States.]**

COMMENT: This Section, as part of a state enactment, would indicate the legislature's desire to expand the significance of the certificate as broadly as possible. An agreement between the state and the EPA may help to encourage participation in the program by blocking even more avenues of potential liability.

# NOTE

# STOP-LOSS INSURANCE, STATE REGULATION, AND ERISA: DEFINING THE SCOPE OF FEDERAL PREEMPTION

TROY PAREDES*

*The Employee Retirement Income Security Act of 1974 preempts state laws relating to employee welfare benefit plans. ERISA does not, however, preempt state laws regulating insurance. Stop-loss insurance, by which an employer that self-funds its benefit plan insures against the risk of excessive payouts, does not fit neatly into ERISA's regulatory framework. As a result, the Circuit Courts of Appeal have split over how to treat stop-loss plans for preemption purposes. In this Note, Troy Paredes argues that ERISA's dual regulatory scheme, precedent, basic insurance principles, and the legislative history of the Act suggest that ERISA should not be construed to preempt states from enforcing their insurance laws against a stop-loss plan's insurer.*

Many people think that the Employee Retirement Income Security Act of 1974, better known simply as "ERISA," only relates to pension law. ERISA, however, also regulates employee welfare benefit plans, which the statute broadly defines as health plans "established or maintained by an employer . . . for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, [or] disability."[1]

Most notably, ERISA expansively preempts state laws that "relate to" employee welfare plans.[2] There is, however, a prominent exception to ERISA's broad preemptive reach. Even if the law relates to a welfare plan, the statute does not preempt a state law that regulates insurance, subject to the "deemer clause."[3] Under this regulatory scheme, how an employer structures its employee welfare plan has considerable legal and practical consequences.

---

*Associate, O'Melveny & Myers, L.L.P., San Francisco, Cal.; A.B. Economics, University of California at Berkeley, 1992; J.D., Yale Law School, 1996. I would like to thank Jan Deutsch and John Langbein for their helpful comments and insights during the writing of this Note. I take full responsibility for any mistakes, however.

[1] 29 U.S.C. § 1002(1) (1974).

[2] *See infra* note 32.

[3] *See infra* text accompanying notes 48–53.

There are several ways an employer may structure its welfare plan. For example, an employer may fully self-insure, or self-fund,[4] its plan either by setting aside funds to satisfy potential claims against the plan or by simply paying benefits to plan participants out of the company's general accounts. In either case, the employer-sponsor retains the risk of providing health care. Alternatively, an employer may fully insure its plan by purchasing health and accident insurance on behalf of plan participants from a third-party insurer. Employers, however, are increasingly turning to a third option, which combines features of both models just described. Under this third option, referred to as a "stop-loss plan," an employer self-funds but purchases a form of reinsurance known as stop-loss insurance to insure itself against the risk that claims against its plan will exceed a certain specified level.

Over the last decade, employers have increasingly chosen to self-fund their welfare plans.[5] The most recent studies indicate that over 65% of employers self-insure,[6] and that about half of the nation's workforce is covered under a self-insured plan.[7] In 1992, nearly 90% of Fortune 500 companies and 78% of employers with 1000 or more employees self-funded their welfare plans.[8]

When employers self-fund, however, they expose themselves to a substantial risk of loss. As a result, few employers today fully self-fund their welfare plans. Instead, even employers that choose not to purchase basic health and accident insurance on behalf of their participants usually purchase stop-loss insurance

---

[4] "Self-insure" and "self-fund" will be used interchangeably throughout this Note.

[5] For a general overview of the increase in self-funding, see UNITED STATES GENERAL ACCOUNTING OFFICE, GAO/HEHS-95-167, EMPLOYER-BASED HEALTH PLANS: ISSUES, TRENDS, AND CHALLENGES POSED BY ERISA (1995), *available in* LEXIS, Legis Library, Gaorpt File at 14–20 [hereinafter ISSUES, TRENDS, AND CHALLENGES]; Jesselyn Alicia Brown, Note, *ERISA and State Health Care Reform: Roadblock or Scapegoat*, 13 YALE L. & POL'Y REV. 339, 341 (1996); Kevin Caster, Note, *The Future of Self-Funded Health Plans*, 79 IOWA L. REV. 413, 414 n.10 (1994); Laura J. Schacht, Note, *The Health Care Crisis: Improving Access for Employees Covered by Self-Insured Health Plans Under ERISA and the Americans with Disabilities Act*, 45 WASH. U. J. URB. & CONTEMP. L. 303, 304 n.3 (1994); Sharon McEachern, *America's Newest Insurance Companies Are Employers*, BUS. & HEALTH, Oct. 1990, at 49.

[6] *See* A. Foster Higgins & Co., FOSTER HIGGINS HEALTH CARE BENEFITS SURVEY 19 (1992) [hereinafter FOSTER HIGGINS]; *see also* Caster, *supra* note 5, at 413 n.10.

[7] Schacht, *supra* note 5, at 304 n.9 (citing Albert Crenshaw, *States, Companies Fight Over Health Care Costs: Firms Fear Loss of Regulation Exemption*, WASH. POST, July 10, 1992, at C11).

[8] *See* FOSTER HIGGINS, *supra* note 6, at 19; *see also* Schacht, *supra* note 5, at 305 n.9.

to limit their exposure to risk and consequent liability.[9] The most recent data show that over 70% of otherwise self-funded plans are covered by some form of stop-loss insurance.[10] Indeed, 96% of employers with fewer than 1000 employees purchase stop-loss protection.[11] Not only is the number of plans with stop-loss coverage substantial, but that number is increasing.[12]

ERISA creates a distinction between fully insured plans and fully self-funded plans for federal preemption of state regulation governing welfare plans.[13] ERISA preempts states from regulating fully self-funded plans but permits states to regulate fully insured plans indirectly by regulating their insurer. This distinction between fully insured plans and fully self-funded plans, however, does not reach the question motivating this Note: Does ERISA also permit states to regulate a stop-loss plan's stop-loss insurer? This question is important because it ultimately defines the scope of ERISA's preemptive reach, which has real-life consequences for millions of plan participants and, of course, state regulators.[14] Indeed, the General Accounting Office explained in a 1995 report to Congress that the issue of whether a stop-loss plan is subject to indirect state insurance regulation (i.e., where the state regulates the plan's insurer but does not regulate the plan itself directly) is a leading challenge posed under ERISA and is of considerable concern.[15]

Given that a stop-loss plan resembles both an insured plan and a self-funded plan, it is perhaps not surprising that the Circuit Courts of Appeal are split over how to treat a stop-loss plan for preemption purposes. The majority view among the circuits is

---

[9] *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 6; Daniel A. Engel, *ERISA: To Preempt or Not to Preempt, That Is the Question!*, 22 TORT & INS. L.J. 431, 433, 443–46 (1986); Schacht, *supra* note 5, at 313; Julie K. Swedback, *The Deemer Clause: A Legislative Savior for Self-Funded Health Insurance Plans Under the Employee Retirement Income Security Act of 1974*, 18 WM. MITCHELL L. REV. 757, 760 n.17 (1992); Alan I. Widiss, *To Insure or Not to Insure Persons Infected with the Virus that Causes AIDS*, 77 IOWA L. REV. 1617, 1699 (1992); Lawrence Allen Vranka, Jr., *Defining the Contours of ERISA Preemption of State Insurance Regulation: Making Employee Benefit Plan Regulation an Exclusively Federal Concern*, 42 VAND. L. REV. 607, 636–38 (1989); Marc Grobman, *Self-Funded Benefits Plans Enjoy Freedom and Flexibility*, BUS. & HEALTH, Oct. 1991, at 26; McEachern, *supra* note 5, at 49.

[10] *See* FOSTER HIGGINS, *supra* note 6, at 19.

[11] *See id.* at 19.

[12] *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 5.

[13] The Supreme Court explained the distinction through its construction of the statute in *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985) and *FMC Corp. v. Holliday*, 498 U.S. 52 (1990).

[14] *See infra* notes 40–41.

[15] *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5 at 8–13.

that ERISA preempts states from regulating a stop-loss plan's stop-loss provider.[16] I disagree.[17]

Part I of this Note provides an overview of ERISA, emphasizing the statute's dual regulatory scheme and the practical effect of ERISA's preemption provisions. Part II discusses the general distinction between insured and self-funded plans under ERISA. The discussion focuses on the Court's opinions in *Metropolitan Life Ins. Co. v. Massachusetts*[18] and *FMC Corp. v. Holliday*.[19] Part III introduces stop-loss plans and reviews the leading circuit court opinions addressing the issue of stop-loss plans under ERISA. Finally, Part IV argues that ERISA should not be constructed to preempt states from enforcing their insurance laws against a stop-loss plan's insurer.

## I. Overview of ERISA and Federal Preemption

Congress passed ERISA in 1974[20] to address the problems and inadequacies that plagued employee pension and welfare benefit plans[21] offered by employers to their employees. The unexpected termination of plans and other benefit losses and reductions were Congress's core concerns.[22] Congress explained "that the operational scope and economic impact of [benefit] plans is increasingly interstate; that the continued well-being and security of

---

[16] For a discussion of both majority and minority views among the circuits, see *infra* Part III.B.

[17] Accordingly, this Note can be interpreted, in part, as a response to a recent article arguing that the Court should subscribe to the majority view and hold that a stop-loss plan is exempt from indirect state insurance regulation of its insurer. *See* Jeffrey G. Lenhart, *ERISA Preemption: The Effect of Stop-Loss Insurance on Self-Insured Health Plans*, 14 Va. Tax Rev. 615 (1995).

[18] 471 U.S. 724 (1985).

[19] 498 U.S. 52 (1990).

[20] For a thorough discussion of the legislative history of ERISA, see Catherine L. Fisk, *The Last Article About the Language of ERISA Preemption? A Case Study of the Failure of Textualism*, 33 Harv. J. on Legis. 35, 52–57 (1996); David Gregory, *The Scope of ERISA Preemption of State Law: A Study of Effective Federalism*, 48 U. Pitt. L. Rev. 427, 443–53 (1987); William J. Kilberg & Catherine L. Heron, *Preemption of State Law Under ERISA*, 1979 Duke L.J. 383, 390–92 (1979); Theodore P. Manno, *ERISA Preemption and the McCarran-Ferguson Act: The Need for Congressional Action*, 52 Temp. L.Q. 51, 60–63 (1979); Daniel C. Schaffer & Daniel M. Fox, *Semi-Preemption in ERISA: Legislative Process & Health Policy*, 7 Am. J. Tax Pol'y 47, 48–52 (1988).

[21] An employee pension plan "provides retirement income to employees, or . . . results in a deferral of income by employees for periods extending to the termination of covered employment or beyond." 29 U.S.C. § 1002(2)(A). For the definition of employee welfare benefit plan, see *supra* note 1 and accompanying text.

[22] For Congress's account of the concerns that ultimately led to ERISA, see 29 U.S.C. § 1001(a) (1974).

millions of employees and their dependents are directly affected by these plans; [and] that they are affected with a national public interest."[23]

In response to these concerns, Congress designed ERISA to promote and protect the rights and interests of employees and their beneficiaries who participate in employee benefit plans.[24] To achieve its objective, Congress established in ERISA various uniform standards to regulate benefit plans.[25] For example, ERISA sets minimum standards requiring employers to report and disclose to participants financial and other information. It also sets minimum fiduciary responsibilities and standards of conduct that govern the establishment, operation, and administration of plans. Although ERISA regulates the substantive content of pension plans, it does not regulate the substantive content of welfare plans. Most notably, the statute does not set financial solvency requirements for welfare plans or require plans to provide any minimum or specific benefits.[26]

To protect the interests of plan participants, Congress also decided that it was necessary to ensure federal uniformity of benefit plan regulation.[27] By occupying the regulatory field of benefit plans, Congress intended to eliminate the burdens and inefficiencies that are introduced into plan creation and administration when an employer has to comply with different, if not conflicting, laws in each state in which it operates.[28] If an em-

---

[23] 29 U.S.C. § 1001(a).

[24] *See, e.g.*, 29 U.S.C. § 1001; Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 137 (1990) ("ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans."); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 90 (1983) (same); 120 CONG. REC. 29,197 (1974) (remarks of Rep. John Dent (D-Pa.)) ("With the preemption of the field, we round out the protection afforded participants . . . ."); Swedback, *supra* note 9, at 792; James R. Bruner, Note, *AIDS and ERISA Preemption: The Double Threat*, 41 DUKE L.J. 1115, 1153 n.221 (1992); Molly B. Kenny, Note, *Regulation of Employee Welfare Benefit Plans: The Scope of ERISA's Preemption and the State Power to Regulate Insurance*, 4 U. DAYTON L. REV. 177, 177 (1979).

[25] Title I of ERISA regulates reporting, disclosure, participation and vesting, funding, fiduciary duties, and the enforcement of plan administration. Title II regulates tax-qualified plans. Title III regulates jurisdiction and enforcement. Title IV regulates termination insurance.

[26] For a more detailed discussion of what ERISA does not regulate, see David J. Brummond, *Federal Preemption of State Insurance Regulation Under ERISA*, 62 IOWA L. REV. 57, 117–18 (1976).

[27] *See* remarks of Sen. Jacob Javitz (R-N.Y.) *infra* note 33.

[28] *See* New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1677 (1995); FMC Corp. v. Holliday, 498 U.S. 52, 60 (1990); Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 142 (1990); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 9–11 (1987); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 105 &

ployer has to comply with varied state laws, the employer may decide to decrease the level or quality of benefits offered under its plan to finance administrative and other regulation-related costs.[29] In addition, the more costly it is for an employer to offer a benefit plan, the more likely it is that an employer will simply decide not to offer some or all of its employees a plan at all.[30] In any case, employees can expect to bear at least some of the cost of burdensome state regulation.

Congress attempted to achieve federal uniformity of benefit plan regulation through ERISA's preemption provisions: the "preemption," "savings," and "deemer" clauses.[31] ERISA's preemption clause provides that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan."[32] The phrase "relate to" is the key to federal preemption under ERISA. The Supreme Court has interpreted this phrase expansively,[33] repeatedly explaining that a state "law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan."[34] The preemption clause is not limited to state laws spe-

---

n.25 (1983); 120 CONG. REC. 29,197 (1974) (remarks of Rep. Dent); 120 CONG. REC. 29,933 (1974) (remarks of Sen. Harrison Williams, Jr. (D-N.J.)).

[29] *See FMC*, 498 U.S. at 60; *Fort Halifax*, 482 U.S. at 9–11; *Shaw*, 463 U.S. at 105 n.25. Further, a single set of federal regulations that displaces myriad state laws makes it easier and less costly for employers to operate in more than one state, thus facilitating interstate commerce.

[30] *See Fort Halifax*, 482 U.S. at 9–11; *Shaw*, 463 U.S. at 105 n.25; S. REP. NO. 383, 93d Cong., 2d Sess. 18 (1974); 120 CONG. REC. 29,198 (1974) (remarks of Rep. Al Ullman (D-Or.)).

[31] 29 U.S.C. § 1144(a)–(b)(2)(B).

[32] 29 U.S.C. § 1144(a). Under ERISA, "'State law' includes all laws, decisions, rules, regulations or other State action that have the effect of law." *Id.* § 1144(c)(1).

[33] *See FMC*, 498 U.S. at 58 (explaining that the preemption clause is "conspicuous for its breadth"); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45–46 (1987) ("[T]he express preemption provisions of ERISA are deliberately expansive."); *Shaw*, 463 U.S. at 96 ("The breadth of [the preemption clause's] preemptive reach is apparent from that section's language."). The Supreme Court's expansive interpretation of the preemption clause reflects Congress's intent to preempt broadly all types of state laws. *See* 120 CONG. REC. 29,197 (1974) (remarks of Rep. Dent) ("Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority [of] the sole power to regulate the field of employee benefit plans."); 120 CONG. REC. 29,933 (1974) (remarks of Sen. Williams) ("It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations."); 120 CONG. REC. 29,942 (1974) (remarks of Sen. Javitz) ("[T]he emergence of a comprehensive and pervasive Federal interest and the interests of uniformity with respect to interstate plans required . . . the displacement of State action in the field of private employee benefit programs.").

[34] *FMC*, 498 U.S. at 58; *Pilot Life*, 481 U.S. at 47; *Shaw*, 463 U.S. at 96–97. The Court's broad interpretation of the preemption clause is consistent with ERISA's legislative history. The bill that became ERISA originally contained a limited preemp-

cifically directed at employee benefit plans.[35] Instead, it "displace[s] all state laws that fall within its sphere,"[36] "including state laws that are consistent with ERISA's substantive requirements,"[37] state common-law causes of action,[38] and state laws that only indirectly or collaterally affect a plan.[39] As a result of its expansive reach, ERISA preemption has consistently thwarted various state efforts to regulate and reform health care.[40] Moreover, because ERISA does not regulate the substance of welfare plans and preempts states from doing so, the preemption clause has left a sizable regulatory void within which employers are virtually free to create and administer their welfare plans as they see fit. ERISA's regulatory void is consequently a source of major concern for state regulators and the public generally.[41]

---

tion clause that only preempted state laws that related to subjects specifically covered by the statute. The House bill provided that ERISA would supersede state laws "relat[ing] to the reporting and disclosure responsibilities, and fiduciary responsibilities, of persons acting on behalf of any employee benefit plan to which part 1 applies." 3 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, at 4057–58 (1976). The Senate bill preempted state laws "relat[ing] to the subject matters regulated by this Act or in the Welfare and Pension Plans Disclosure Act." *Id.* at 3820. The Conference Committee rejected both of these narrow preemption provisions in favor of the more expansive language that was ultimately adopted. *See* H.R. CONF. REP. No. 1280, 93d Cong., 2d Sess. at 383 (1974); S. CONF. REP. No. 1090, 93d Cong., 2d Sess. at 383 (1974).

[35] *See* Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139 (1990); *Pilot Life*, 481 U.S. at 47–48. For a catalog of state laws that ERISA has been held to preempt, see Fisk, *supra* note 20, at 37–38 nn.6–17.

[36] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 739 (1985).

[37] *Id.* at 739; *see, e.g.*, *FMC*, 498 U.S. at 58–59.

[38] *See, e.g.*, *Pilot Life*, 481 U.S. at 48.

[39] *See, e.g.*, *Ingersoll-Rand*, 498 U.S. at 139; *Metropolitan Life*, 471 U.S. at 740.

[40] *See, e.g.*, ISSUES, TRENDS, AND CHALLENGES, *supra* note 5; Mary Anne Bobinski, *Unhealthy Federalism: Barriers to Increasing Health Care Access for the Uninsured*, 24 U.C. DAVIS L. REV. 258 (1990); Caster, *supra* note 5; Joleen Ann Hancock, Comment, *Diseased Federalism: State Health Care Laws Fall Prey to ERISA Preemption*, 25 CUMB. L. REV. 383, 403–07 (1995); *ERISA: States Push to Raze the Biggest Barrier to Health Reform*, STATE HEALTH NOTES, Nov. 14, 1994, at 1 [hereinafter *States Push*]; NATIONAL GOVERNORS' ASSOCIATION, ERISA: ROADBLOCK TO STATE HEALTH CARE REFORM, Issue Brief, 3 (July 21, 1994) [hereinafter NATIONAL GOVERNORS' ASSOCIATION]; *cf.* Brown, *supra* note 5.

[41] *See, e.g.*, ISSUES, TRENDS, AND CHALLENGES, *supra* note 5; Bobinski, *supra* note 40, at 275; Bruner, *supra* note 24, at 1153. The case law, ERISA literature, and the media are replete with examples of the untoward consequences of ERISA preemption. A leading concern resulting from ERISA preemption and the statute's regulatory void is that together they permit plan sponsors to decrease or eliminate benefits, even after a plan participant becomes ill (the Equal Employment Opportunity Commission, however, has established guidelines under the Americans with Disabilities Act to address this concern) or to cancel suddenly a participant's benefits without notice, even if the participant has been a life-long employee of the employer or is an elderly retiree. *See* Caster, *supra* note 5, at 414 & n.13; Schacht, *supra* note 5, at 304–05 nn.4–7; Swedback, *supra* note 9, at 766 n.39. One commentator summarizes the unsavory

Despite its breadth, the preemption clause is not all-inclusive. The Supreme Court has recognized that a state law "may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."[42] For example, in its most recent ERISA preemption case, the Court held that a New York state law that has only an indirect economic effect on the relative cost of various health insurance packages, including numerous welfare plans, does not relate to the plans within the meaning of the preemption clause.[43]

The savings clause further limits ERISA's preemptive scope by providing an exception to the preemption clause. The savings clause saves from preemption state laws that regulate insurance, banking, or securities and thus acts as an inherent restriction on the statute's preemptive reach.[44] The savings clause provides that "nothing in this [chapter] shall be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities,"[45] even if the law relates to a benefit plan.

---

consequences of ERISA's regulatory void: "Think back on any number of stories of health insurance atrocities: the Texas man whose employer was allowed to slash his AIDS coverage as he was dying of the disease; the retiree whose 'lifetime' insurance was suddenly canceled; the woman with advanced breast cancer unfairly denied coverage for the only treatment that might save her life. All these cases have one unexpected thing in common: the monumentally boring, complex, far-reaching law called ERISA." Nina Martin, *ERISA, The Law That Ate Health Care Reform*, CAL. LAW., May 1993, at 40–41.

Further, because a self-insured plan does not have to comply with state financial solvency and capitalization requirements, there is an increased risk of plan bankruptcy. *See* Brummond, *supra* note 26, at 117 n.474; Swedback, *supra* note 9, at 766 n.39. For example, an employer may inadequately fund its welfare plan or may use plan funds as working capital. *See* Brummond, *supra* note 26, at 117 n.474.

There are, however, potential advantages to plan participants when an employer self-insures. Namely, as Congress hoped, an employer who is not burdened by costly regulation may be encouraged to offer a plan and a full array of benefits. *See generally* notes 28–30 and accompanying text.

[42] *Ingersoll-Rand*, 498 U.S. at 139.

[43] *See* New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671 (1995); *see also* Mackey v. Lanier Collection Agency & Servs. Inc., 486 U.S. 825 (1988) (garnishment law under which creditors can garnish ERISA welfare benefits not preempted); Fort Halifax Packing Co. v. Coyne, 482 U.S. 1 (1987) (law requiring companies to make one-time severance payments when closing plant not preempted). For a general discussion of *Travelers*, see Brown, *supra* note 5; Karen A. Jordan, *Travelers Insurance: New Support for the Argument to Restrain ERISA Preemption*, 13 YALE J. ON REG. 255 (1996).

[44] As one commentator put it: "Although Congress had expressed its intent in making the area of employee benefits a federal concern, it also had been unmistakably clear in stating that certain state laws were to be saved from preemption. Thus, there were limits to the scope of preemption already embodied in the statute." Vranka, *supra* note 9, at 614.

[45] 29 U.S.C. § 1144(b)(2)(A). For purposes of this Note, the savings clause is important only insofar as it saves state insurance regulation from preemption.

Congress enacted the savings clause to harmonize ERISA with the McCarran-Ferguson Act,[46] in which Congress resolved many of the federalism issues surrounding insurance regulation by essentially delegating this regulatory field principally to the states.[47] In fact, the Court has used the criteria for determining what constitutes the "business of insurance" under the McCarran-Ferguson Act to determine what activities constitute the business of insurance under the savings clause, suggesting that the savings clause and the McCarran-Ferguson Act are in practice coextensive.[48] By saving state insurance regulation from preemption, Congress preserved and reaffirmed the role of the states as the primary regulators in the field of insurance, notwithstanding the leading congressional objective of federally uniform benefit plan regulation.[49] As the Supreme Court put it:

> The ERISA saving clause, with its similarly worded protection of "any law of any State which regulates insurance,"

---

[46] 15 U.S.C. §§ 1011–1015 (1945).

[47] The McCarran-Ferguson Act provides in relevant part that "[n]o Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance." 15 U.S.C. § 1012(b).

[48] *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985). The Supreme Court has developed a two-tier test for determining whether a state law regulates insurance under the savings clause. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48–52 (1987); *Metropolitan Life*, 471 U.S. at 740–44. Under the "common-sense" test, "a law must not just have an impact on the insurance industry, but must be specifically directed toward that industry." *Pilot Life*, 481 U.S. at 50. Under the second-tier of the test, called the "McCarran-Ferguson" test, a court must consider whether the state law satisfies the three criteria developed under the McCarran-Ferguson Act for determining whether a practice constitutes the "business of insurance" within the meaning of that statute. *See id.* at 50–51; *Metropolitan Life*, 471 U.S. at 743. The McCarran-Ferguson criteria are: (1) whether the practice has the effect of transferring or spreading a policyholder's risk; (2) whether the practice is an integral part of the policy relationship between the insurer and the insured; and (3) whether the practice is limited to entities within the insurance industry (which effectively subsumes the common-sense test). *See Pilot Life*, 481 U.S. at 50–51; *Metropolitan Life*, 471 U.S. at 743; Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982). While each criterion is a relevant consideration, none is determinative. *See Pireno*, 458 U.S. at 129.

[49] *See, e.g.*, Simmons v. Prudential Ins. Co. of Am., 641 F. Supp. 675, 679 (D. Colo. 1986) ("The general preemption provision . . . is modified by . . . the savings clause. Congressional intent with respect to this clause is clear as well. Here, the lawmakers wished to preserve for the states the traditional role of insurance regulator as established by the McCarran-Ferguson Act."); JOHN J. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 417 (2d ed. 1995) ("This provision, frequently called the insurance savings clause or insurance exception, continues the federal policy entrenched in the McCarran-Ferguson Act of 1945 . . . that the federal government defers to the states in the regulation of the insurance industry."); Vranka, *supra* note 9, at 620; Bruner, *supra* note 24, at 1154; Kenny, *supra* note 24, at 183; Leslie C. Levin, Comment, *ERISA Preemption and Indirect Regulation of Employee Welfare Plans Through State Insurance Laws*, 78 COLUM. L. REV. 1536, 1539–40 (1978).

> appears to have been designed to preserve the McCarran-Ferguson Act's reservation of the business of insurance to the States. The saving clause and the McCarran-Ferguson Act serve the same federal policy and utilize similar language to define what is left to the States.[50]

The final step in the preemption analysis is ERISA's deemer clause, which provides an exception to the savings clause. The deemer clause provides in relevant part that no benefit plan "shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies."[51] Welfare plans are economically similar to the business of insurance in that they transfer and spread risk,[52] the defining characteristics of insurance.[53] Congress apparently feared that state regulators might try to circumvent the preemption clause by deeming welfare plans insurance and regulating the plans under the savings clause.[54] By distinguishing welfare plans from insurance for purposes of the savings clause, though both transfer and spread risk, the deemer clause prevents states from weakening the preemption clause.[55] In short, the deemer clause

---

[50] *Metropolitan Life*, 471 U.S. at 744 n.21.

[51] 29 U.S.C. § 1144(b)(2)(B). The meaning of the phrase, "purporting to regulate insurance companies," has spawned much debate. *See, e.g.*, FMC Corp. v. Holliday, 498 U.S. 52 (1990); Bruner, *supra* note 24, at 1135–54. In *FMC*, the Court settled the controversy. The Court explained: "Laws that *purportedly* regulate insurance companies or insurance contracts are laws having the 'appearance of' regulating or 'intending' to regulate insurance companies or contracts. Congress' use of the word [purporting] does not indicate that it directed the deemer clause solely at deceit that it feared state legislatures would practice . . . . Nor, in our view, is the deemer clause directed solely at laws governing the business of insurance." *FMC*, 498 U.S. at 63–64 (citations omitted).

[52] *See* Eversole v. Metropolitan Life Ins. Co., Inc., 500 F. Supp. 1162, 1169 (C.D. Cal. 1980); Brummond, *supra* note 26, at 68–72, 76–77, 99; Manno, *supra* note 20, at 59; Vranka, *supra* note 9, at 634.

[53] *See, e.g.*, Group Life & Health Ins. Co. v. Royal Drug Co., 440 U.S. 205, 211 (1979) ("The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk."); GEORGE COUCH, COUCH ON INSURANCE § 1:2–:3, at 4–8 (2d ed. 1984).

[54] *See, e.g.*, FMC Corp. Employee Welfare Benefit Plan Comm. v. Good Samaritan Hosp. of the Santa Clara Valley, No. C-88-3092-FMC, 1988 WL 424459, at *2 (N.D. Cal. Dec. 5, 1988); Kenny, *supra* note 24, at 184; Levin, *supra* note 49, at 1540.

[55] LANGBEIN & WOLK, *supra* note 49, at 417 ("The insurance exception is itself subject to an exception, the so-called 'deemer clause' . . ., whose main message is that employee benefit plans are not to be considered insurers for purposes of the insurance savings clause (even though, like insurance, such plans often bear and spread risk). In the absence of [the deemer clause], it would have been open to argue that any plan is an insurer, hence that the insurance savings clause operates so broadly that it largely negatives the general preemption rule . . . .").

preserves benefit plan regulation as an "exclusive federal concern."[56]

ERISA's preemption provisions may be summarized as follows. A state law is preempted if it relates to an employee benefit plan unless (a) the law regulates insurance (or banking or securities) within the meaning of the savings clause and (b) it is unnecessary to deem the plan insurance in order to enforce the law. This framework effectively creates a dual regulatory scheme: the field of benefit plan regulation is the exclusive domain of the federal government, whereas the states primarily occupy the field of insurance regulation.

## II. Self-Insured vs. Insured Plans: The Savings and Deemer Clauses

ERISA's preemption provisions, particularly the interaction between the statute's savings and deemer clauses, result in a distinction between insured and self-insured welfare plans for purposes of ERISA preemption. The Supreme Court has explained this distinction twice. In *Metropolitan Life Ins. Co. v. Massachusetts*[57] and *FMC Corp. v. Holliday*,[58] the Court interpreted the preemption provisions to permit states to regulate an insured plan by regulating its insurer under the savings clause. In both cases, however, the Court concluded that the deemer clause prevents states from directly regulating either insured or self-insured plans. The statutory distinction between self-insured and insured plans is important because most employers self-insure their welfare plans, which means that state efforts to regulate and reform health care are largely ineffective.[59] This is a particularly vexing result given ERISA's regulatory void with respect to welfare plans.

### A. Metropolitan Life Ins. Co. v. Massachusetts

At issue in *Metropolitan Life* was a Massachusetts statute requiring that certain minimum mental health care benefits be provided to Massachusetts residents who were covered under an

---

[56] FMC Corp. v. Holliday, 498 U.S. 52, 58 (1990).
[57] 471 U.S. 714 (1985).
[58] 498 U.S. 52 (1990).
[59] *See supra* notes 6–7.

employee health care plan that provided hospital or surgical expenses (i.e., an employee welfare plan). The Massachusetts Attorney General sought declaratory and injunctive relief to enforce the statute against Metropolitan Life. Metropolitan Life had issued group-health policies providing hospital and surgical coverage to welfare plans and to employers and unions that employed or represented employees residing in Massachusetts. Metropolitan Life, however, failed to provide the benefits mandated by the statute. The insurance company contended that ERISA preempted the Massachusetts mandatory-benefit law. The insurance company reasoned that because it had issued the policies to welfare plans, laws regulating the policies fell within the scope of the preemption clause.[60] Massachusetts responded that the savings clause saved the statute from preemption because the statute regulated insurance.[61]

The Court began by distinguishing between insured and self-insured plans at the beginning of its opinion: "Plans may self-insure or they may purchase insurance for their participants. Plans that purchase insurance—so-called 'insured plans'—are directly affected by state laws that regulate the insurance industry."[62] The Court readily found that the Massachusetts statute related to a welfare plan governed by ERISA and thus fell within the scope of the preemption clause.[63]

The Court also found that the law regulated the business of insurance within the meaning of the savings clause.[64] Metropolitan Life had argued that the Court should interpret the savings clause narrowly to save from preemption only "traditional insurance law[s]," such as laws that regulate the way insurance in sold, and not "recent innovations" that regulate the substantive terms of insurance contracts, such as the Massachusetts mandatory-benefit law.[65] The Court rejected this argument and held that the state law fell within the savings clause and was thus saved from preemption.[66] The Court said it refused "to impose any

---

[60] *See Metropolitan Life*, 471 U.S. at 727.
[61] *See id.* at 739–41.
[62] *Id.* at 732.
[63] *See id.* at 739 ("Though [the law] is not denominated a benefit-plan law, it bears indirectly but substantially on all insured benefit plans, for it requires them to purchase the mental-health benefits specified in the statute when they purchase a certain kind of common insurance policy.").
[64] *See id.* at 739–44.
[65] *See id.* at 741–42.
[66] *See id.* at 744–46.

limitation on the saving clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it."[67] Thus, the Court concluded that the savings clause was not limited to traditional insurance laws as defined by *Metropolitan Life*.[68]

Finally, the Court indicated that although Massachusetts could regulate the plans' insurer, Massachusetts could not directly regulate the welfare plans under the deemer clause.[69] Thus, the practical result of *Metropolitan Life* was as follows: states could not regulate welfare plans directly because of the deemer clause, but states could regulate insurers who provide insurance to welfare plans. The Court explained the statutory distinction between insured and self-insured plans: "We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the 'deemer clause' . . . ."[70] *Metropolitan Life* attempted to track and implement ERISA's dual regulatory scheme, namely, that the field of benefit plan regulation is the exclusive domain of the federal government, whereas the states primarily occupy the field of insurance regulation.

Lower courts applying *Metropolitan Life* did not always agree how ERISA's distinction between insured plans and self-insured plans should work in practice.[71] The Supreme Court granted certiorari in *FMC Corp. v. Holliday* to resolve the courts' differences.

---

[67] *Id.* at 746.

[68] Even if the savings clause was limited to the *Metropolitan Life* definition, the result would have been unchanged, for the Court found that the Massachusetts statute was in fact a traditional insurance law. *See id.* at 741–42.

[69] *See id.* at 735 n.14 ("[The statute] also requires benefit plans that are self-insured to provide the mandated mental-health benefits. In light of ERISA's 'deemer clause,' . . . Massachusetts has never tried to enforce [the statute] as applied to benefit plans directly, effectively conceding that such an application . . . would be pre-empted by ERISA's pre-emption clause.").

[70] *Id.* at 747.

[71] *See* FMC Corp. v. Holliday, 498 U.S. 52, 56 (1990); Roger C. Siske & Joni L. Andrioff, *Selected Topics in ERISA Preemption, Advanced Law of Pensions and Deferred Compensation*, ALI-ABA Course of Study, C758 ALI-ABA 45, at 61–63 (1992); Bruner, *supra* note 24, at 1118 n.18, 1134–37; Swedback, *supra* note 9, at 776–77 nn.98–99, 780–81 nn.130–31.

### B. FMC Corp. v. Holliday

In 1987, Cynthia Holliday, the daughter of an FMC employee and a participant in FMC's self-funded welfare plan, was seriously injured in an automobile accident. The plan included a subrogation clause under which plan members agreed to reimburse the plan "for benefits paid if the member recovers on a claim in a liability action against a third party."[72] Mr. Holliday brought a state negligence action on behalf of his daughter against the driver of the car in which she was injured; the parties settled the claim. While the action was pending, FMC notified the Hollidays that it would seek reimbursement for the medical expenses FMC had paid. The Hollidays refused to reimburse the FMC plan, arguing that section 1720 of Pennsylvania's Motor Vehicle Responsibility Law, an antisubrogation provision, defeated the plan's subrogation provision.[73] FMC responded that ERISA preempted Pennsylvania's antisubrogation law insofar as it related to FMC's self-funded welfare plan.

The Court agreed with FMC and held that ERISA preempted Pennsylvania's antisubrogation law.[74] The Court found that the Pennsylvania statute related to FMC's welfare plan,[75] but that the statute fell within the scope of the savings clause because the statute regulated insurance.[76] The most controversial part of the Court's opinion was its construction of the interaction between the savings and deemer clauses. Reaffirming *Metropolitan Life*, the *FMC* Court interpreted ERISA to distinguish between an insured and a self-insured plan for preemption purposes.[77] The Court concluded that an insured plan is subject to indirect state insurance regulation while a self-insured plan is not: "Our inter-

---

[72] *FMC*, 498 U.S. at 54.

[73] *See id.* at 55 n.1. Section 1720 of Pennsylvania's Motor Vehicle Financial Responsibility Law provided: "In actions arising out of the maintenance or use of a motor vehicle, there shall be no right of subrogation or reimbursement from a claimant's tort recovery with respect to workers' compensation benefits, benefits available under section 1711 (relating to required benefits), 1712 (relating to availability of benefits) or 1715 (relating to availability of adequate limits) or benefits in lieu thereof paid or payable under section 1719 (relating to coordination of benefits)." 75 PA. CONS. STAT. § 1720 (1987).

[74] *See FMC*, 498 U.S. at 65.

[75] *See id.* at 58.

[76] *See id.* at 61.

[77] The *FMC* Court defined insured plans as those that "purchase an insurance policy from any insurance company in order to satisfy its obligations to its participants." *Id.* at 54. For a further discussion of the *FMC* Court's definition of insured, see *infra* Part IV.D.

pretation of the deemer clause makes clear that if a plan is insured, a State may regulate it indirectly through regulation of its insurer and its insurer's insurance contracts; if the plan is uninsured, the State may not regulate it."[78] The Court reasoned:

> [S]elf-funded ERISA plans are exempt from state regulation insofar as that regulation "relate[s] to" the plans. State laws directed toward [self-funded] plans are pre-empted because they relate to an employee benefit plan but are not "saved" because they do not regulate insurance. State laws that directly regulate insurance are "saved" but do not reach self-funded employee benefit plans because the plans may not be deemed to be insurance companies, other insurers, or engaged in the business of insurance for purposes of such state laws. On the other hand, employee benefit plans that are insured are subject to indirect state insurance regulation. An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations *insofar as they apply to the plan's insurer.*[79]

As in *Metropolitan Life*, the Court in *FMC* distinguished insured from self-funded plans in order to track and implement ERISA's dual regulatory framework generally and the savings clause specifically. The Court explained: "By recognizing a distinction between insurers of plans and the contracts of those insurers, which are subject to direct state regulation, and self-insured employee benefit plans governed by ERISA, which are not, we observe Congress' presumed desire to reserve to the States the regulation of the 'business of insurance.'"[80]

Today, the legal distinction between a fully insured welfare plan (i.e., one in which the employer purchases health and accident insurance on behalf of its employees) and a fully self-funded welfare plan (i.e., one in which the employer does not purchase any form of insurance but retains the entire risk of providing health care benefits to plan participants) is well-understood and well-established in the courts in both theory and practice. Courts consistently hold that states may regulate fully insured plans indirectly by regulating their insurer but may not

---

[78] *Id.* at 64.
[79] *Id.* at 61 (emphasis added).
[80] *Id.* at 63.

regulate fully self-funded plans,[81] which means that fully self-funded plans escape state regulation. Despite the *FMC* Court's relatively extensive discussion, the practical effect and extent of ERISA's distinction between insured and self-funded plans is still not fully understood. The manner in which welfare plans that purchase stop-loss insurance, and thus fall somewhere between fully insured and fully self-insured, should be treated for preemption purposes remains unsettled.

## III. THE STOP-LOSS CONTROVERSY

How to treat plans between the extremes of fully insured and fully self-insured plans for purposes of ERISA preemption remains unsettled. This middle ground is principally occupied by stop-loss plans. A stop-loss plan is one in which an employer that otherwise self-insures purchases stop-loss insurance, a form of reinsurance, to insure the risk that employees' actual claims will exceed some specific level.

Because stop-loss plans exhibit characteristics of both insured and self-insured plans, they have created disagreement and confusion among courts.[82] Most notably, courts disagree over whether an otherwise self-insured plan that purchases stop-loss insurance is insured under *Metropolitan Life* and *FMC* and thus subject to state insurance regulation of its stop-loss provider. The courts' disagreement has resulted in a circuit split, with most circuits holding that stop-loss plans are exempt from state insurance regulation. But even those courts that have lined up on the same side of the debate sometimes do so for different reasons, which adds to the confusion surrounding stop-loss plans.[83]

---

[81] *See, e.g.*, cases cited *infra* notes 92–93. As noted previously, a self-insured welfare plan is largely free from regulation. State regulation of a self-insured plan is preempted, and ERISA does not regulate the substantive content of a welfare plan. This lack of regulation poses a number of risks and concerns because an employer typically has a great deal of discretion in creating and administering its welfare plan. *See supra* note 41.

[82] *See* discussion *infra* Part III.B.

[83] For example, the Ninth Circuit has twice held that a stop-loss plan is self-insured for preemption purposes; the different panels, however, relied on different reasoning. *Compare* Moore v. Provident Life & Accident Ins. Co., 786 F.2d 922, 926-27 (9th Cir. 1986) *with* United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga, 801 F.2d 1157, 1161–62 (9th Cir. 1986).

### A. *Introduction to Stop-Loss Plans*

Over the last decade, employers have increasingly chosen to self-fund their employee welfare plans.[84] There are many advantages to self-funding. First, self-funding gives an employer better access to information and more control and flexibility in developing and administering its plan.[85] Second, self-funding enables an employer to decrease costs by tailoring its plan to its workforce, including employee demographics, health-care needs, and past experiences. Third, when an employer self-insures, it does not have to pay loading costs that finance the insurance company's administrative costs and profits. Fourth, an employer can exploit cash flows by self-insuring. A self-funded employer earns interest on contributions to its plan until claims are actually paid and recoups any money that is left over at the end of the year if claims fall short of expectations.[86] Finally, an employer who self-insures can exploit ERISA's distinction between insured and self-insured plans and thereby avoid burdensome and costly state regulation. But even an employer who self-funds usually purchases stop-loss insurance to protect itself against the risk of major losses. According to the most recent data, over seventy percent of employers who self-fund purchase stop-loss protection, and the number of stop-loss plans is growing.[87]

There are two types of stop-loss insurance. Specific stop-loss insurance covers a plan against the risk that a particular participant's claims will exceed some specified level. For example, if the insurance kicks in when an individual's claims exceed $20,000 per year and a participant has bona fide claims of $30,000, the plan's stop-loss insurer covers $10,000 of the person's claims. Alternatively, aggregate stop-loss insurance covers a plan against the risk that the sum of all of its participants' claims will exceed some specified level. For example, if the insurance kicks in when aggregate claims exceed $2 million per year and claims under the plan total $2.5 million, the stop-loss insurer covers $500,000 of the claims.

The specified level at which the insurance kicks in is known as the "trigger point." Generally, the trigger point is a function

---

[84] *See supra* notes 5–8 and accompanying text.

[85] *See* Bobinski, *supra* note 40, at 297 n.139; Schacht, *supra* note 5, at 312.

[86] *See* Bobinski, *supra* note 40, at 297 n.139; Schacht, *supra* note 5, at 312.

[87] *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 12; FOSTER HIGGINS, *supra* note 6, at 19.

of expected claims and the employer's risk aversion. Stop-loss insurance provides coverage above the trigger point by indemnifying the plan (or its employer-sponsor), the insured under the policy, and not the plan's participants directly, who are indemnified by the plan.[88] A plan that purchases stop-loss insurance remains ultimately liable to plan participants, even for claims above the trigger point. In effect, a self-funded plan covered by stop-loss insurance is self-insured for claims below the trigger point and insured for claims above the trigger point.[89] The judicial confusion and disagreement regarding whether stop-loss plans are insured or self-funded for preemption purposes is therefore understandable.

Whether courts treat stop-loss plans as insured and subject to state insurance regulation or as self-funded and exempt from state insurance regulation has practical and significant consequences. How the stop-loss insurance issue is resolved will ultimately define the scope of ERISA's preemptive impact and thus the regulatory void left by ERISA with regard to employee welfare plans, the unsavory results of which have already been described.[90] The stop-loss controversy is accordingly of growing concern to state regulators, plan sponsors, and the public in general.[91]

---

[88] Stop-loss insurance may insure either the plan or the plan's employer-sponsor. Whether the stop-loss coverage insures the plan or its employer-sponsor does not affect the rest of this Note's analysis.

[89] It is worthwhile to distinguish stop-loss insurance from a minimum premium policy. Under a minimum premium policy, an employer is obliged to pay the insurance company the amount of claims made until the sum of the claims made plus the minimum premium equals the premium that would be charged for the covered risks under a traditional group policy. *See* Siske & Andrioff, *supra* note 71, at 72. The minimum premium policy is a substitute for traditional group insurance and was designed to enable an employer to: (1) decrease its premiums; (2) decrease the amount of state premium taxes the employer pays to its insurer; and (3) benefit from improved cash flows and the use of the float on funds prior to benefit payments.

A minimum premium policy is substantially the same as a welfare plan that purchases stop-loss insurance and administrative services from an insurance company. Although these different arrangements are functionally similar and subject the insurer to the same fundamental risks, they create different legal rights and obligations. In particular, under a minimum premium policy, the insurer provides a group insurance policy under which the insurer is contractually and directly liable to plan participants. As a result, the insurer, and not the employer, bears the ultimate risk of paying claims. The Ninth Circuit and the California Supreme Court have held that a welfare plan that purchases a minimum premium policy is insured for purposes of ERISA preemption. *See* General Motors Corp. v. California State Bd. of Equalization, 815 F.2d 1305 (9th Cir. 1987); Metropolitan Life Ins. Co. v. California State Bd. of Equalization, 32 Cal. 3d 649 (1982). On the other hand, as discussed in detail below, courts, including the Ninth Circuit, have generally held that a plan that purchases stop-loss insurance is not insured for purposes of ERISA preemption. *See infra* Part III.B.1.

[90] *See supra* note 41.

[91] *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 5, 10–12.

### B. *Circuit Split*

Circuit courts are split over whether a plan that purchases stop-loss insurance should be treated as insured or self-insured under *Metropolitan Life* and *FMC* and thus over whether the plan's stop-loss provider is subject to state insurance regulation. The majority view among courts, including the Fourth, Fifth, and Ninth Circuits, is that a plan covered by stop-loss insurance is self-insured for purposes of ERISA preemption and thus exempt from indirect state insurance regulation.[92] The Sixth Circuit disagrees. It has held that a plan that purchases stop-loss insurance is insured, and that the plan's stop-loss provider is therefore subject to state insurance regulation.[93]

#### 1. The Majority View

Courts subscribing to the majority view that a stop-loss plan is self-funded for ERISA preemption purposes and thus exempt from state insurance regulation assert one or both of two reasons. First, courts have held that a plan that purchases stop-loss insurance remains self-insured if the policy's trigger point is not reached.[94] Unless the trigger point is reached, these courts rea-

---

[92] *See* Tri-State Mach., Inc. v. Nationwide Life Ins. Co., 33 F.3d 309, 315 (4th Cir. 1994); Hampton Indus., Inc. v. Sparrow, 981 F.2d 726, 730 (4th Cir. 1992); Thompson v. Talquin Bldg. Prod. Co., 928 F.2d 649, 653 (4th Cir. 1991); Brown v. Granatelli, 897 F.2d 1351, 1353–55 (5th Cir.); United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga, 801 F.2d 1157, 1161–62 (9th Cir. 1986); Moore v. Provident Life & Accident Ins. Co., 786 F.2d 922, 926–27 (9th Cir. 1986); American Med. Security, Inc. v. Bartlett, No. H-95-1463 (D. Md. 2/23/96); Auto Club Ins. Ass'n v. Safeco Life Ins. Co., 833 F. Supp. 637, 642–43 (W.D. Mich. 1993); Eppard v. Builders Transp., Inc., Civ. A. No. 92-0002-C, 1993 WL 28813, at *3–*4 (W.D. Va. Feb. 4, 1993); Birdsong v. Olson, 708 F. Supp. 792, 800 (W.D. Tex. 1989); Buchman v. Wayne Trace Sch. Dist. Bd. of Educ., 763 F. Supp. 1405, 1409–10 (N.D. Ohio 1991); Drexelbrook Eng'g Co. v. Travelers Ins. Co., 710 F. Supp. 590, 596–98 (E.D. Pa. 1989); Rasmussen v. Metropolitan Life Ins. Co., 675 F. Supp. 1497, 1501–02 (W.D. La. 1987); Bone v. Association Management Servs., Inc., 632 F. Supp. 493, 495 (S.D. Miss. 1986); Cuttle v. Federal Employees Metal Traces Council, 632 F. Supp. 1154, 1157 (D. Me. 1985).

[93] *See* Northern Group Servs., Inc. v. Auto Owners Ins. Co., 833 F.2d 85, 90–91 (6th Cir. 1987); Michigan United Food & Commercial Workers Unions v. Baerwaldt, 767 F.2d 308, 311–13 (6th Cir. 1985); Hall v. Pennwalt Group Medical Expense Benefits Plan, Civ. A. 88-7672, 1989 WL 45627, at *4–*5 (E.D. Pa. March 29, 1989); Auto Club Ins. Ass'n v. Mut. Sav. & Loan Ass'n, 672 F. Supp. 997, 1000–02 (E.D. Mich. 1987); State Farm Mut. Auto. Ins. v. American Community Mut. Ins. Co., 659 F. Supp. 635, 637–39 (E.D. Mich. 1987); Simmons v. Prudential Ins. Co. of Am., 641 F. Supp. 675, 679–80 (D. Colo. 1986).

[94] *See Moore*, 786 F.2d at 926–27; *Birdsong*, 708 F. Supp. at 800; *Rasmussen*, 675 F. Supp. at 1502; *see also* Bruenn v. Aetna Life Ins. Co., 197 Cal. App. 3d 1000,

son, the stop-loss insurer has never acted as an insurer in relation to the plan because the insurer has never been obligated to satisfy claims.[95] Because the insurer does not engage in the business of insurance in relation to the plan, state law regulating the insurer falls outside the scope of the savings clause, and the plan is uninsured. This reasoning has real-life consequences because in many, if not most, cases actual claims against a stop-loss plan never reach the plan's stop-loss trigger point, which is to be expected since stop-loss coverage characteristically insures the plan against unexpected catastrophic losses.

In *Moore v. Provident Life & Accident Ins. Co.*,[96] the trustees of a self-insured welfare plan contracted with Provident, an insurance company, to provide the plan aggregate stop-loss coverage. Under the agreement, the plan's trustees also adopted the terms and provisions of Provident's group policy as the welfare plan's. A third-party administrator administered the plan, but Provident retained the privilege to review the administrator's determinations and to defend and settle any action filed on a claim against the plan.

After being injured in a motorcycle accident, plaintiff Moore submitted a claim to the fund's administrator. The administrator paid Moore's claims until it realized that Moore was ineligible for benefits, at which time the administrator discontinued payments to Moore. Moore brought suit seeking compensatory and punitive damages against Provident and others for the discontinuation of his benefits. Moore alleged breach of covenant of good faith and fair dealing, breach of fiduciary duties, fraud, and violation of the California Insurance Code.[97]

The Ninth Circuit held that ERISA preempted Moore's statutory and common-law claims.[98] The court readily found that Moore's claims against Provident related to the welfare plan and

---

1004–05 (1987). None of these courts qualified its holding by explaining that the plan would have been considered insured had the trigger point been reached, although the courts' reasoning implies this.

[95] *See Moore*, 786 F.2d at 926–27; *Rasmussen*, 675 F. Supp. at 1502 ("It is undisputed that during the period relevant to this lawsuit . . . Metropolitan Life acted solely in its function as claims administrator, using Georgia-Pacific funds to pay medical care benefits. The trigger point was never reached, and Metropolitan Life never paid nor was obliged to pay hospital benefits during this period."); *see also Bruenn*, 197 Cal. App. 3d at 1004–05.

[96] 786 F.2d 922 (9th Cir. 1986).

[97] *See id.* at 925.

[98] *See id.* at 926–27.

were therefore within the scope of the preemption clause.[99] The court next considered the more complex issue of whether the claims were protected by the savings clause. The court began by explaining that states "may regulate insurance companies [under the savings clause] only when they are engaged in the business of insurance," the "primary features" of which are the "spreading and underwriting of a policyholder's risk."[100] The court then reasoned that because the trigger point was never reached, Provident never acted as an insurance company in relation to the plan but had acted "merely as an administrative overseer."[101] Accordingly, the court concluded that Moore's claims fell outside the scope of the savings clause.[102] The court, however, curiously failed to explain why Provident's assumption of risk under the stop-loss policy did not itself create an insurance relationship within the meaning of the savings clause. Indeed, most insurance policies do not actually result in claims, yet the policies are undoubtedly insurance.

Next, the court considered the deemer clause and concluded that the plan was self-insured under *Metropolitan Life* and thus exempt from indirect state insurance regulation, despite the stop-loss policy that insured it.[103] The court explained: "Various district courts have held that a self-insured plan, like this Plan, falls squarely within the 'deemer' clause as an uninsured plan, and an excess coverage or 'stop-loss' policy which protects the trust or other employee benefit plan from catastrophic loss does not change this result."[104]

The second argument supporting the majority view reads *Metropolitan Life* narrowly, limiting the case to its facts and reasoning that unless a welfare plan purchases health and accident insurance on behalf of its participants, the plan is self-insured, even if the plan insures itself against catastrophic losses by purchasing stop-loss coverage.[105] These courts have emphasized

---

[99] *See id.* at 926.

[100] *Id.*

[101] *Id.* at 926–27 ("The specified aggregate amount required to trigger Provident's contractual liability to the Trust Fund was never reached. There was no insurance contract or policy involved in Moore's claim. Provident's role in relation to the Trust Fund and Moore's claim was not that of an insurance company but was merely as an administrative overseer.").

[102] *See id.* at 927.

[103] *See Moore*, 786 F.2d at 927.

[104] *Id.*

[105] *See* Thompson v. Talquin Bldg. Prod. Co., 928 F.2d 649, 653 (4th Cir. 1991);

the following distinction between stop-loss insurance and health and accident insurance: stop-loss insurance technically insures the plan, which continues to bear the ultimate responsibility for paying claims, whereas health and accident insurance insures plan participants directly.[106]

In *United Food & Commercial Workers v. Pacyga*,[107] an employee welfare plan and its two trustees challenged Arizona's common-law prohibition against the assignment of third-party claims. The welfare plan had purchased stop-loss insurance to insure against catastrophic losses; otherwise, the plan was self-funded through employer contributions. The plan contained a subrogation clause under which it paid medical benefits to a participant injured by a third party only if the participant agreed to reimburse the plan through any recovery against that third party.

After being injured in a car accident, defendant Pacyga filed a claim for medical benefits against the plan. To collect her benefits, Pacyga was required by the trustees to agree to reimburse the plan from any proceeds she might recover from the party that was liable for the accident. Pacyga agreed under protest and received her benefits. The plan and its trustees then brought a declaratory judgment action seeking a determination that the plan's subrogation clause was enforceable.[108] The question before the court was whether ERISA preempted Arizona's antisubrogation law insofar as it related to the plan.

The Ninth Circuit found that the Arizona law related to the welfare plan but regulated the business of insurance under the savings clause.[109] The court, however, concluded that the plan

---

Brown v. Granatelli, 897 F.2d 1351, 1353–54 (6th Cir. 1990); United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga, 801 F.2d 1157, 1161 (9th Cir. 1986); Auto Club Ins. Ass'n v. Safeco Life Ins. Co., 833 F. Supp. 637, 642–43 (W.D. Mich. 1993); Eppard v. Builders Transp., Inc., Civ. A. No. 92-0002-C, 1993 WL 28813, at *3–*4 (W.D. Va. Feb. 4, 1993); Buchman v. Wayne Trace Local Sch. Dist. Bd. of Educ., 763 F. Supp. 1405, 1409 (N.D. Ohio 1991); Bone v. Association Management Servs., Inc., 632 F. Supp. 493, 494–95 (S.D. Miss. 1986); Cuttle v. Federal Employees Metal Traces Council, 623 F. Supp. 1154, 1157 (D. Me. 1985). Recall that the welfare plan in *Metropolitan Life* had purchased a group health and accident policy for its participants.

[106] This reasoning implicitly prefers a formalistic approach to a stop-loss plan that elevates form over substance to a functional approach that elevates substance over form. part IV.C below directly responds to this argument.

[107] 801 F.2d 1157 (9th Cir. 1986).

[108] Like *FMC*, *Pacyga* involved a state antisubrogation law. When the Ninth Circuit considered *Pacyga*, the Supreme Court had not yet heard *FMC*.

[109] *See Pacyga*, 801 F.2d at 1161.

was self-insured, even though it had purchased stop-loss protection.[110] Consequently, the court held that ERISA preempted the antisubrogation law.[111] Unlike *Moore*, in which the court focused on the fact that the trigger point was not reached, the *Pacyga* court focused on the differences between stop-loss coverage and health and accident insurance.[112] The court found that the plan was not an insurance company and did not provide insurance contracts to its participants within the meaning of *Metropolitan Life* because the plan purchased stop-loss coverage to insure the plan and not health and accident insurance on behalf of plan participants.[113] The *Pacyga* court reasoned:

> The type of stop-loss insurance carried by the Plan herein cannot be termed health insurance, nor can it be said that the Plan is providing an insurance contract to its participants. . . . The stop-loss insurance does not pay benefits directly to participants, nor does the insurance company take over administration of the Plan at the point when the [trigger point] is reached. Thus, no insurance is provided to the participants, and the Plan should properly be termed a non-insured plan, protected by the deemer clause and preemptive of the Arizona antisubrogation law.[114]

The Fourth Circuit similarly focused on the differences between stop-loss insurance and health and accident insurance in *Thompson v. Talquin Bldg. Products Co.*,[115] the first post-*FMC* opinion to consider the issue of stop-loss insurance. Plaintiff Thompson was injured in an automobile accident and incurred medical expenses of $63,000. Thompson was covered under Talquin's welfare plan, which had bought a specific stop-loss policy to insure individual claims over $25,000. The plan, however, did not cover medical expenses that resulted from motor vehicle accidents. Thompson sought a declaratory judgment that Talquin's plan was required to cover his medical costs under Virginia state law, which Thompson contended precluded the plan's exclusion.[116] The Fourth Circuit disagreed with Thompson and held that ERISA preempted the Virginia law. According to

---

[110] See *id.* at 1159 ("The Plan in the instant appeal is self-funded, with reimbursement coverage only for catastrophic losses, and is therefore not insured.").

[111] *See id.* at 1161–62.

[112] Note that, like *Moore*, the trigger point in *Pacyga* was not reached.

[113] *See id.* at 1161.

[114] *Id.* at 1161–62.

[115] 928 F.2d 649 (4th Cir. 1991).

[116] *See id.* at 651.

the court, the state law fell within the scope of the savings clause; however, Talquin's welfare plan was self-funded for preemption purposes, even though it purchased stop-loss insurance.[117] Relying on *Pacyga*, the court explained:

> [S]top-loss insurance does not convert Talquin's self-funded employee benefit plan into an insured plan. Even with the stop-loss coverage, Talquin's Plan is directly liable to Talquin's employees for any amount of benefits owed to them under the Plan's provisions. The purpose of the stop-loss insurance is to protect Talquin from catastrophic losses, it is not accident and health insurance for employees. Instead of covering employees directly, the stop-loss insurance covers the Plan itself. Thus, for the purposes of ERISA, the Plan remains self-funded even with the stop-loss insurance.[118]

It is interesting to note that the *Thompson* court found that the stop-loss plan in question was self-funded for preemption purposes, even though Thompson's claims exceeded the plan's stop-loss trigger point.

### 2. The Minority View

The Sixth Circuit and a few district courts represent the minority view, which holds that an otherwise self-funded plan is insured for purposes of ERISA preemption and subject to state insurance regulation if the plan is covered by stop-loss insurance.[119] The leading Sixth Circuit cases supporting this view of stop-loss plans are *Michigan United Food & Commercial Workers Union v. Baerwaldt*[120] and *Northern Group Services, Inc. v. Auto Owners Ins. Co.*[121]

In *Baerwaldt*, the plaintiff welfare plans sought a declaratory judgment that ERISA preempted Michigan Public Act 429 (which mandated that all health insurance policies provide minimum levels of substance abuse coverage) insofar as the state law related to the plans. The plans were primarily self-funded but purchased stop-loss insurance from Occidental to protect against catastrophic losses.[122] The plans also hired Occidental to admin-

---

[117] *See id.* at 653.
[118] *Id.*
[119] *See* cases cited *supra* note 93.
[120] 767 F.2d 308 (6th Cir. 1985).
[121] 833 F.2d 85 (6th Cir. 1987).
[122] The plans' stop-loss arrangements were structured as follows: "Through a contract with Occidental, the plans pay all the health and welfare benefits provided under the

ister them and adopted Occidental's group health and accident policies as their own.

The Sixth Circuit found that although the plans were self-insured up to the stop-loss trigger point, they were insured for claims above the trigger point.[123] After a detailed consideration of *Metropolitan Life*, the *Baerwaldt* court concluded that ERISA did not preempt Michigan's mandatory-benefit law.[124] Reasoning away the technical distinctions between stop-loss insurance and health and accident insurance, the court explained:

> The "stop-loss" nature of the plans does not alter our conclusion . . . . [T]he plans include an arrangement whereby the plans pay premiums to Occidental to insure that Occidental will pay all benefits in excess of the claims liability under the group policies. As long as the plans purchase insurance from "an insurer offering health insurance policies in" Michigan, the policies must include the substance abuse coverage specified by Act 429.[125]

In *Northern Group Services*, the Sixth Circuit again held that a plan that purchases stop-loss insurance is insured for preemption purposes. The case involved welfare plans[126] that sought a declaratory judgment that ERISA preempted a provision in Michigan's no-fault automobile statute. The statute required no-fault automobile insurers to offer coordination of benefits provisions.[127] The court found that the law related to the welfare plans but fell within the scope of the savings clause as a state law that regulated insurance.[128] The court then considered the deemer clause and whether the Highland plan, which was self-funded except for a stop-loss policy, was insured or self-insured under *Metropolitan Life*.

The plans argued that the stop-loss plan was self-insured because the employer and not the plan was the insured under the stop-loss policy and because the insurer's liability was triggered only when claims exceeded a specified benefit level.[129] The court

---

group policies up to an agreed upon amount . . . . After the claims liability limit is reached, Occidental is liable for payment of additional benefits under the applicable policies." *Baerwaldt*, 767 F.2d at 310.

[123] "[T]he plaintiff plans are self-insured up to the claims liability limit, beyond which they are insured for excess or catastrophic losses." *Id.*

[124] *See id.* at 312.

[125] *See id.* at 312–13 (citation omitted).

[126] All but one of the plans were fully self-insured. The one exception was the Highland plan.

[127] Northern Group Servs. v. Auto Owners Ins. Co., 833 F.2d 85, 87 (6th Cir. 1987).

[128] *See id.* at 89–90.

[129] *See id.* at 91.

rejected both arguments, holding that the Highland plan was insured and therefore subject to state insurance regulation.[130] Instead of emphasizing the technical differences between stop-loss and health and accident policies as did the *Pacyga* and *Thompson* courts, the Sixth Circuit emphasized the functional similarities between the different insurance arrangements. The court reasoned: "Whether the actual insured is the employer or the ERISA plan, the stop-loss insurance is purchased to 'provide benefits for plans subject to ERISA.' That the Plan pays a deductible does not alter the fact that benefits payable above specified levels . . . are nonetheless insured."[131]

The current confusion and disagreement among the circuit and district courts have caused uncertainty for state regulators, employers and their plans, plan participants, and courts, especially those courts that have not yet considered the issue of stop-loss insurance. Indeed, the confusion and disagreement among the courts creates judicial disuniformity that rivals the legislative disuniformity that Congress intended to eliminate by making benefit plan regulation an exclusively federal concern. The uncertainty about stop-loss plans creates its own costs and inefficiencies by, for example, making it difficult for the relevant parties to plan and conduct their affairs.

In the past, the Supreme Court has denied certiorari when given the opportunity to address the stop-loss issue and decide whether stop-loss plans are subject to state insurance regulation under the savings clause.[132] To remedy the confusion and uncertainty that surround the issue, the Court should settle the issue and harmonize the courts, especially given the vast and growing number of self-funded welfare plans that purchase stop-loss protection.[133] Indeed, it is reasonable to speculate that the Court will resolve the issue of stop-loss insurance sooner rather than later

---

[130] The Sixth Circuit also held in *Northern Group Services* that states were not preempted from regulating a self-funded welfare plan directly. *Northern Group Servs.*, 833 F.2d at 91–95. This Note aper does not subscribe to this part of the opinion. Further, the Sixth Circuit later overturned this part of *Northern Group Services*. *See* Lincoln Mut. Cas. Co. v. Lectron Prod., Inc., Employee Health Benefit Plan, 970 F.2d 206, 210 (6th Cir. 1992).

[131] *Northern Group Servs.*, 833 F.2d at 91 (citations omitted).

[132] *See* Tri-State Mach., Inc. v. Nationwide Life Ins. Co., 115 S. Ct. 1175 (1995), *denying cert. to* 33 F.3d 309 (4th Cir. 1994); Brown v. Granatelli, 498 U.S. 848 (1990), *denying cert. to* 897 F.2d 1351 (5th Cir.); Northern Group Servs., Inc. v. State Farm Mut. Auto. Ins. Co., 486 U.S. 1017 (1988), *denying cert. to* 833 F.2d 85 (6th Cir. 1987); Michigan United Food & Commercial Workers Unions v. Baerwaldt, 474 U.S. 1059 (1986), *denying cert. to* 767 F.2d 308 (6th Cir. 1985).

[133] Another recent commentator has also urged the Court to address the issue of

given that employers increasingly structure their welfare plans as stop-loss plans, that the circuits are split over the stop-loss issue, that state regulators are increasingly concerned about ERISA preemption generally and the stop-loss issue specifically,[134] and that the nation continues to focus on health insurance. When the Court finally addresses stop-loss plans, it should reject the majority view and hold that a plan's stop-loss insurer is subject to state insurance regulation under ERISA's savings clause.

## IV. Stop-Loss Plans and State Insurance Regulation

A plan that purchases stop-loss insurance should be considered insured for purposes of ERISA preemption and thus subject to indirect state insurance regulation.[135] First, the statute and its dual regulatory scheme indicate that ERISA should not preempt state insurance regulation of a stop-loss plan's stop-loss insurer. Second, a plan is insured according to basic principles of insurance if the plan purchases stop-loss insurance to shift the risk that actual claims against the plan will exceed some specified level. Third, when a self-funded plan purchases stop-loss protection, the plan effectively creates health and accident insurance for plan participants. As a result, a stop-loss plan and a fully insured plan are substantially similar in terms of their substance and function and thus should be treated the same for purposes of ERISA preemption. Fourth, a plan with stop-loss coverage fits within the definition of insured suggested by the Supreme Court in *FMC*.

Before discussing the reasons for treating stop-loss plans as insured and subject under the savings clause to state laws regulating insurance, it is first necessary to establish that stop-loss insurance constitutes the business of insurance within the meaning of the savings clause. Otherwise, the issue of stop-loss insurance is moot since state insurance laws would fall outside the

---

stop-loss plans directly when next given the opportunity. *See* Lenhart, *supra* note 17, at 641.

[134] *See* Issues, Trends, and Challenges, *supra* note 5, at 5–7. For general background regarding state regulators' concern over the scope of ERISA preemption, see Bobinski, *supra* note 40; Brown, *supra* note 5; Caster, *supra* note 5; Hancock, *supra* note 40; *States Push*, *supra* note 40 at 1; National Governors' Association , *supra* note 40 at 3.

[135] Even if a plan is insured, however, states may not regulate it directly. *See, e.g.*, Lincoln Mut. Cas. Co. v. Lectron Prod., Inc., Employee Health Benefit Plan, 970 F.2d 206, 210 (6th Cir. 1992).

savings clause insofar as they applied to a plan's stop-loss insurer.

In *Metropolitan Life*, the Court adopted a test based on the McCarran-Ferguson Act[136] for determining whether a practice is "the business of insurance" under ERISA's savings clause.[137] The test is straightforward: "*first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the industry."[138] Stop-loss insurance satisfies each criterion of this test, and none of the courts subscribing to the majority view has disputed this. First, stop-loss coverage transfers the risk that claims under the plan will exceed the trigger point from the plan to its stop-loss insurer. The employer is solely liable up to the trigger point. Thereafter, the insurer is liable to indemnify the employer for benefit payments made under its plan. Second, the insurer's assumption of risk that claims will exceed the trigger point is an integral part of its policy relationship with the plan. And third, stop-loss protection is limited to the insurance industry because companies outside this industry do not charge premiums to provide coverage for benefits above a specified level. As one district court subscribing to the majority view summarized: "We do not dispute that if we apply the McCarran-Ferguson test to *Travelers* as an excess insurer, we must find them in the business of insurance; they are certainly not in the landscaping business."[139]

Despite this straightforward application of the McCarran-Ferguson test to a stop-loss plan, the majority of courts, as explained above, have rejected this reasoning, holding instead that a stop-loss plan is not insured under ERISA.[140]

---

[136] 15 U.S.C. §§ 1011–1015 (1945).

[137] *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985). The Court has also adopted a common-sense test. *See supra* note 39. To the extent that state insurance laws regulating a plan's stop-loss provider are directed at the insurance industry, this test is satisfied. Indeed, this test is, in practice, subsumed by the third factor under the McCarran-Ferguson test.

[138] *Metropolitan Life*, 471 U.S. at 743 (quoting Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119, 129 (1982)).

[139] Drexelbrook Eng'g Co. v. Travelers Ins. Co., 710 F. Supp. 590, 597 (E.D. Pa. 1989).

[140] *See supra* Part III.B.1.

### A. *Statutory Construction*

Whether ERISA preempts state insurance regulation of a plan's stop-loss insurer should begin (and arguably end) with the statute itself because the stop-loss issue is fundamentally a question of statutory construction. Statutory construction depends on the statute's language, structure, purpose, and legislative history.

ERISA's preemption clause may be characterized as a form of "express field" preemption.[141] The federal government expressly occupies the field of benefit plan regulation through the preemption clause, which prohibits states from entering this regulatory field.[142] Whenever Congress has spoken directly to the issue of preemption and affirmatively expressed its intent to preempt state law, as it did in ERISA, the question is not whether Congress intended to preempt state law, but to what extent it intended such preemption. The fundamental chore of the following analysis, therefore, is to determine from statutory construction whether ERISA's preemptive reach extends far enough to preempt state

---

[141] Federal law generally preempts state law in any of three ways. *See* Cipollone v. Liggett Group, Inc., 112 S. Ct. 2608, 2617–18 (1992); Wisconsin Pub. Intervenor v. Mortier, 501 U.S. 597, 604–05 (1991); Metropolitan Life Ins. Co. v. Mass., 471 U.S. 722, 738 (1985); Michigan Canners & Freezer Ass'n, Inc. v. Agricultural Mktg. & Bargaining Bd., 476 U.S. 461, 469 (1984); *see also* Jose L. Fernandez, *Dynamic Statutory Interpretation: Occupational Safety and Health Act Preemption and State Environmental Regulation*, 22 FLA. ST. U. L. REV. 75, 82–87 (1994); Stephen A. Gardbaum, *The Nature of Preemption*, 79 CORNELL L. REV. 767, 771–77, 801–12 (1994); William W. Bratton, Jr., Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623, 624–30 (1975); Elaine M. Martin, Note, *Symposium: The Burger Court and American Institutions*, 60 NOTRE DAME L. REV. 1233, 1234–50 (1985). First, when enacting a statute, Congress may explicitly preempt state law in the terms of the statute ("express preemption"). Second, even if Congress does not explicitly preempt state law, Congress may implicitly express in a statute its intent to preempt state law in a certain field by effectively occupying that field with federal regulation ("field preemption"). The Court has explained that Congress manifests an intent to occupy a field as follows: (1) if federal regulation is "so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it;" (2) if "the Act of Congress . . . touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state law on the same subject;" or (3) if the goals "sought to be obtained" and the "obligations imposed" reveal a congressional purpose to supersede state law. *Wisconsin Pub. Intervenor*, 501 U.S. at 605 (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). Third, absent express or field preemption, preemption still occurs to the extent that state law actually conflicts with federal law ("conflict preemption"). Such a conflict occurs when compliance with both federal and state law is impossible, or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[142] *See supra* notes 31–41 and accompanying text.

insurance regulation of a stop-loss plan's stop-loss insurer. The analysis concludes that it does not.

1. Statutory Language, Structure, and Purpose and Legislative History

a. *Statutory language.* Statutory language provides the strongest evidence of congressional intent, particularly when the statute includes express preemption and savings clauses. Where Congress has explicitly delineated the reach of federal preemption in the terms of the statute itself, it is arguably unnecessary to look beyond the statute's language to its structure, purpose, and legislative history.[143] Accordingly, this preemption analysis starts with the language of ERISA's preemption provisions, the plain meaning of which the Court has consistently emphasized in its ERISA preemption cases.[144]

Although ERISA's preemption provisions have already been detailed, the statutory language is worth reiterating here.[145] The preemption clause preempts "any and all State laws insofar as

---

[143] *See Cipollone*, 112 S. Ct. at 2626 (Blackmun, J., concurring in part, concurring in the judgment in part). Justice Blackmun stated "We do not, absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress' language." *Id.* Justice Scalia, concurring in the judgment in part, wrote that "The existence of an express pre-emption provision tends to contradict any inference that Congress intended to occupy a field broader than the statute's express language defines." *Id.* at 2633. As Justice Stevens explained in the majority opinion in *Cipollone*:

> When Congress has considered the issue of pre-emption and has included in the enacted legislation a provision explicitly addressing that issue, and when that provision provides "a reliable indicium of congressional intent with respect to state authority, there is no need to infer congressional intent to pre-empt state laws from the substantive provisions" of the legislation. Such reasoning is a variant of the familiar principle of *expression unius est exclusio alterius*: Congress' enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not preempted.

*Id.* at 2618 (citations omitted).

[144] *See, e.g.*, District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 583 (1992) (relying on "ordinary meaning" of phrase "relate to"); FMC Corp. v. Holliday, 498 U.S. 52, 57, 61 (1990); Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 742, 744 (1985) (relying on "plain meaning" of savings clause); Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 48, 50 (1987) (relying on "common-sense" meaning of statutory language); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 96–97 (1983) ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, it if has a connection with or reference to such a plan."). However, *Travelers* suggests that, going forward, the Court may rely more on the purpose of ERISA's preemption provisions to inform the Court's construction of the statute and possibly less on the plain meaning of the statute's language. *See* New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671, 1677–81 (1995). For an interesting discussion of the use of plain meaning in ERISA preemption cases, see Fisk, *supra* note 20, at 60–78.

[145] For a more detailed discussion, see *supra* Part I.

they may now or hereafter relate to any employee benefit plan . . . ."[146] The savings clause provides that "nothing in this subchapter shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . ."[147] The deemer clause provides that no benefit plan "shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies . . . ."[148] Given the language of ERISA's preemption provisions, it is curious that most courts considering the issue have held that ERISA preempts states from regulating a stop-loss plan's stop-loss provider.

This analysis assumes that state regulation of a plan's stop-loss provider relates to the plan and thus initially falls within the scope of ERISA's preemption clause. The remaining question that concerns this analysis, then, is whether the regulation falls within the scope of the savings clause without running afoul of the deemer clause.

A state insurance law that regulates a plan's stop-loss provider "regulates insurance" within the meaning of the savings clause. Generally, a stop-loss insurer engages in the business of insurance once it assumes an employer's risk that claims under the employer's welfare plan will exceed a specified amount, whether or not the trigger point is ever reached.[149] Specifically, and perhaps more importantly for ERISA preemption purposes, stop-loss insurance is the business of insurance within the meaning of the savings clause.[150] Further, nothing in the language of the savings clause suggests that Congress intended to distinguish health and accident insurance from other types of insurance, such as stop-loss coverage, and only save health and accident insurance from preemption. By its terms, however, the savings clause saves all state insurance regulation without regard to the type or nature of the insurance or the regulation. The *Metropolitan Life* Court recognized this expansive reach of the savings clause. Relying on the plain language of the provision and the McCarran-Ferguson test defining the business of insurance, the Court found that the savings clause did not distinguish between allegedly traditional insurance laws, such as those that regulate

---

[146] 29 U.S.C. § 1144(a).
[147] *Id.* § 1144(b)(2)(A).
[148] *Id.* § 1144(b)(2)(B).
[149] *See infra* Part IV.B.
[150] *See supra* notes 137–139 and accompanying text.

how insurance is sold, and innovative insurance laws, such as mandatory-benefit laws, as Metropolitan Life had urged. Instead, the Court found that both types of regulation fall within the scope of the savings clause as laws that regulate insurance.[151] However, even if Congress had distinguished stop-loss coverage from health and accident insurance in the savings clause, stop-loss coverage provided to a plan effectively operates like health and accident insurance provided to plan participants.[152]

The next consideration is whether state regulation of a plan's stop-loss provider, even if the regulation falls within the savings clause, offends the deemer clause, which is the principal point of contention in the stop-loss debate. Despite having the support of most courts, the majority view's construction of the deemer clause does not have the support of the statutory language. It is unnecessary to deem a welfare plan that purchases stop-loss coverage "an insurance company or other insurer . . . or . . . engaged in the business of insurance" in order to regulate the plan's stop-loss provider. This is true for the same reason that the Court in *Metropolitan Life* and *FMC* found that it is unnecessary for a state to deem a welfare plan insurance in order to regulate an insurer that provides the plan's health and accident insurance. Even though a stop-loss provider insures a welfare plan, the insurer remains an insurer for purposes of state laws regulating insurance, and thus the insurer is subject to state insurance regulation. Distinguishing a stop-loss plan from a fully self-funded plan for purposes of ERISA preemption simply gives life to the deemer clause.[153] Consequently, state insurance regulation of a plan's stop-loss provider does not offend the deemer clause, but is instead consistent with the provision. The majority view apparently fails to recognize this, which is curious because the *FMC* Court applied the same reasoning when it held that

---

[151] *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 736–37, 741–44 (1985). Furthermore, the *Metropolitan Life* Court generally noted that the savings clause "is broad on its face." *Id.* at 746 n.24.

[152] *See infra* Part IV.C.

[153] The Court made the same argument in *Metropolitan Life* when it found a fully insured plan subject to indirect state insurance regulation. The Court explained: "We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the 'deemer clause,' a distinction Congress is aware of and one that it has chosen not to alter." *Metropolitan Life*, 471 U.S. at 747.

states could regulate a fully insured welfare plan's insurer under the savings clause. As the *FMC* Court put it:

> An insurance company that insures a plan remains an insurer for purposes of state laws "purporting to regulate insurance" after application of the deemer clause. The insurance company is therefore not relieved from state insurance regulation. The ERISA plan is consequently bound by state insurance regulations insofar as they apply to the plan's insurer.[154]

To summarize, the majority view's construction of the savings and deemer clauses effectively imposes extrastatutory limitations on the savings clause. The savings clause is not limited to state insurance regulation of health and accident insurance. Furthermore, it is not necessary to deem a stop-loss plan insurance in order to regulate its stop-loss insurer. According to the language of ERISA, state insurance laws that regulate a plan's stop-loss provider fall within the scope of the savings clause and do not run afoul of the deemer clause, which is the only statutory limitation on the savings clause. Thus, state regulation of a stop-loss plan's stop-loss insurer is saved from preemption by the terms of the statute itself. Indeed, as the *Metropolitan Life* Court explained when it rejected Metropolitan Life's narrow construction of the savings clause: "We therefore decline to

---

[154] FMC Corp. v. Holliday, 498 U.S. 52, 61 (1990). A fundamental error of the majority view is related to the deemer clause. Instead of focusing on the statutory language, the majority view focuses on the labels "insured" and "self-funded" as outcome-determinative. Setting aside labels, this Note has argued that, according to the statutory language, ERISA does not preempt states from regulating a plan's stop-loss insurer. Nonetheless, the majority view holds that a plan with stop-loss coverage is self-funded, and that states are therefore preempted from regulating the plan's insurer. The majority's reasoning has it backwards. The mere fact that the majority view deems a welfare plan self-funded should not be sufficient to undermine the result that obtains under a careful consideration of the statutory language. Whether the plan is termed insured or self-funded should not drive the preemption analysis as it does under the majority view. To the contrary, the preemption analysis should, if anything, drive the label attached to the plan. Thus, since states are permitted to regulate a plan's stop-loss insurer under the terms of the statute itself, a stop-loss plan should be deemed insured. In other words, when considering the issue of stop-loss insurance, the essential question should not be is the plan insured or self-funded. Rather, the essential question should be whether the state law falls within the savings clause without running afoul of the deemer clause, which will then determine whether the plan is insured or self-funded under *Metropolitan Life* and *FMC*. (But even accepting the majority view's approach, a stop-loss plan is in fact insured. *See infra* Part IV.B, .D.) Indeed, the lack of rigorous, or even thoughtful, statutory construction in the opinions comprising the majority view is generally remarkable. Instead of carefully considering the statutory language, the courts jump to the conclusion that a plan with stop-loss protection is not insured, and that ERISA therefore must preempt state regulation of the plan's insurer, whatever the statutory language.

impose any limitation on the savings clause beyond those Congress imposed in the clause itself and in the 'deemer clause' which modifies it."[155]

b. *Statutory structure.* The structure of ERISA's preemption provisions also supports the conclusion that state insurance regulation of a stop-loss plan's stop-loss provider is not preempted. The purpose of any exception to a general rule is to establish conditions under which an outcome other than the general rule obtains. As a result, when a general rule and its exception are in conflict, the exception should trump; otherwise, the exception is rendered meaningless in the very situations the exception should obtain.

After establishing benefit plan regulation as an exclusive federal concern in the preemption clause, Congress immediately and unequivocally carved out an exception to the general rule of preemption for state laws that regulate insurance in the savings clause. The savings clause thus acts as an inherent statutory limitation on the scope of federal preemption. Consistent with the language of the savings clause and its policy of preserving insurance regulation to the states, this statutory structure registers congressional intent to permit states to regulate insurance under ERISA, even though this regulation cuts against the general rule of preemption.[156] Put differently, the structure of the preemption provisions creates a dual regulatory scheme in which Congress occupies the field of benefit plan regulation but cannot impinge upon the field of insurance regulation, which Congress expressly reserved to the states. The upshot is that in practice courts should not enforce the rule of preemption by expanding ERISA's preemptive impact at the expense of the savings clause and state insurance regulation that does not offend the deemer clause.[157] In terms of stop-loss plans, this means that the preemption provisions' statutory structure supports the conclusion that state insurance laws regulating a plan's stop-loss provider are excepted from the general rule of preemption.

---

[155] *Metropolitan Life*, 471 U.S. at 746.

[156] As one commentator remarked: "The structure of [ERISA's preemption provisions] suggests great deference on the part of Congress to state insurance regulation: the sweeping preemption of state law is followed by a broad exception for state insurance regulation, with one limited qualification [the deemer clause]." Levin, *supra* note 49, at 1540.

[157] This argument is developed further *infra* Part IV.A.1.c.

c. *Statutory purpose.* The final consideration is the statutory purposes motivating the preemption provisions. Congress's paramount objective in enacting ERISA was to promote the rights and interests of benefit plan participants.[158] To this end, Congress enacted the preemption clause to ensure federal uniformity in the field of benefit plan regulation.[159]

Courts and commentators discussing ERISA's preemption provisions consistently emphasize the congressional goal of federally uniform benefit plan regulation embodied in the preemption clause,[160] partly because Congress itself emphasized this goal when it passed ERISA.[161] In fact, many courts and commentators focus on federal uniformity as if it were the only goal motivating these provisions, which, as discussed below, is inaccurate. These courts and commentators argue that subjecting a stop-loss plan to indirect state insurance regulation of its insurer threatens the federal interest in preemption and uniform benefit plan regulation at the expense of plan participants. If states are permitted to regulate a plan's stop-loss provider, the argument goes, a stop-loss plan will effectively have to comply with different laws in each state in which its employer-sponsor operates. This reintroduces into benefit plan regulation disuniformity and the consequent burdens that disuniformity imposes on plan administration, which Congress sought to remedy when it enacted ERISA.[162] Accordingly, the argument concludes, to promote the statutory goal of uniformity, courts should construct ERISA's preemption provisions to preempt states from regulating a stop-loss plan's insurer. Although this reasoning is persuasive at first blush, courts actually undermine congressional intent and the purpose behind the preemption provisions by holding that state insurance laws are preempted insofar as they regulate a stop-loss plan's insurer.

A fundamental problem with the above uniformity argument is that it is doubtful that preempting states from regulating a stop-loss plan's stop-loss insurer in order to promote federal uniformity promotes the interests of plan participants, the paramount objective of ERISA. Indeed, it probably does not. Many

---

[158] *See supra* note 24.

[159] *See supra* notes 28–41 and accompanying text.

[160] *See, e.g.*, Kilberg & Heron, *supra* note 20, at 386; Siske & Andrioff, *supra* note 71, at 47; Vranka, *supra* note 9, at 626; Kenny, *supra* note 24, at 192; *see* cases cited *supra* notes 28–30 and 33.

[161] *See supra* note 33.

[162] *See supra* notes 28–30 and accompanying text.

have suggested that there is already suboptimal welfare plan regulation to the detriment of plan participants.[163] The evidence, to the extent any exists, seems to support this conclusion, in which case it would not be in the interest of plan participants to expand ERISA's preemptive reach by further preempting indirect state insurance regulation of a stop-loss plan.

First, the untoward consequences that have resulted from ERISA preemption[164] suggest that there is too much preemption insofar as the interests of plan participants are concerned. Second, the legislative history suggests that Congress (or at least many of its members) believed that ERISA resulted in suboptimal welfare plan regulation when Congress enacted the statute. Specifically, the legislative history suggests that Congress probably did not intend for ERISA's regulatory void to persist as it has. Rather, Congress evidently thought that subsequent legislation from Congress would fill the statute's regulatory void as needed, which has not happened.[165] Further, Congress apparently contemplated that the statute's preemptive impact would be less drastic in practice than it has been, so that states themselves would have partly filled ERISA's regulatory void.[166] As two commentators note: "At least one of ERISA's principal authors has consistently suggested that the apparent principle [stated by the preemption provision] is broader than the rule that ought to be

---

[163] *See, e.g.*, Standard Oil Co. v. Agsalud, 442 F. Supp. 695, 711 (N.D. Cal. 1977) ("[W]orkers whom ERISA was primarily intended to protect may be better off with state health insurance laws than without them, and the efforts of states . . . to ensure that their citizens have low-cost comprehensive health insurance may be significantly impaired by ERISA's preemption of health insurance laws."); Cathey v. Metropolitan Life Ins. Co., 805 S.W.2d 387, 392 (Tex. 1991) (Doggett, J., concurring), *cert. denied*, 111 S. Ct. 2855 ("The United States Supreme Court has restricted the very rights of employees—to avoid the delay or denial of benefits—that Congress sought to protect. Through peculiar federal judicial interpretation, a statutory addition to workers' rights has been converted into a statutory removal of those rights. The law has been reshaped into a form that achieves the converse of its original purpose . . . . I join with the growing number of courts and commentators who express the concern that through the continued misconstruction, ERISA has become quicksand that will continue to expand and to preempt everything in its meandering path."); Bruner, *supra* note 20; Swedback, *supra* note 7; Mary Ann Chirba-Martin & Troyen A. Brenna, *The Critical Role of ERISA in State Health Reform*, HEALTH AFF., Spring (II) 1994, at 142, 152; *States Push*, *supra* note 35, at 1.

[164] See *supra* note 41.

[165] *See* Fisk, *supra* note 20, at 54–55; Leon E. Irish & Harrison J. Cohen, *ERISA Preemption: Judicial Flexibility and Statutory Rigidity*, 19 U. MICH. J.L. REF. 109, 114–16 (1985).

[166] *See, e.g.*, Irish & Cohen, *supra* note 165, at 113–14 (explaining that Congress did not fully appreciate impact of ERISA's preemption provision); Kilberg & Heron, *supra* note 20, at 391 (same); Brown *supra* note 5, at 347–48 (same); Levin, *supra* note 49, at 1542 (same).

enforced."[167] Finally, ERISA preemption consistently thwarts the efforts of states to reform health care and to provide for the health and welfare of their citizens under their police powers.[168] As a result, state regulators are concerned, and increasingly so, about ERISA's preemptive reach and what state regulators perceive to be inadequate welfare plan regulation.[169] Under conventional theories of federalism, the individual states are usually thought to be more responsive to the interests of their citizens than the federal government is. To the extent that this is true in practice, the fact that states are consistently trying to fill ERISA's regulatory void by, for example, regulating the insurers of stop-loss plans, suggests that ERISA results in too little welfare plan regulation with respect to the interests of plan participants.

Permitting states to regulate a stop-loss plan's stop-loss insurer will not necessarily result in an optimal amount of welfare plan regulation. However, given that there appears to be suboptimal welfare plan regulation to the detriment of plan participants currently, it follows that expanding ERISA's preemptive reach in order to promote the goal of uniformity would not be in the interest of participants. To the contrary, plan participants would probably benefit if ERISA preemption were hemmed in, in which case less uniformity and more state regulation would obtain. Thus, courts presumably promote the rights and interests of plan participants when, instead of promoting uniformity, they hold that states are not preempted from regulating a plan's stop-loss provider. In short, the overriding purpose of the statute to protect the benefits of plan participants supports this Note's conclusion.

A second problem with the above uniformity argument is that the argument is not supported by the statute. In short, the argument ignores the savings clause and thus undermines ERISA's dual regulatory framework. By saving from preemption state laws that regulate insurance, Congress intended to reaffirm the federal policy of state primacy in the field of insurance regula-

---

[167] Irish & Cohen, *supra* note 165, at 111; *see also* Fisk, *supra* note 20, at 56 ("Broad preemption of state law makes little sense when Congress does not extensively regulate in an area, as is the case with nonpension benefits. There is no evidence that Congress realized that broad preemption of state law would create a large regulatory void with regard to nonpension benefits . . . .").

[168] *See supra* note 40.

[169] *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5.

tion originally established in the McCarran-Ferguson Act, which settled the federalism issues surrounding insurance regulation by delegating insurance regulation principally to the states.[170] The *Metropolitan Life* Court reinforced that the policies of the savings clause and the McCarran-Ferguson Act are coextensive when it adopted the McCarran-Ferguson criteria to define the business of insurance under the savings clause.[171]

Congress explicitly undercut its goal of uniform benefit plan regulation and the federal interest in preemption by permitting states to regulate insurance under the savings clause. To the extent that states regulate insurance differently, the savings clause results in disuniformity in the field of benefit plan regulation. As an exception to the preemption clause, the savings clause thus indicates that federal uniformity is not always the dominant congressional objective. The purpose of the savings clause to reserve insurance regulation to the states supersedes the goal of federal uniformity when the two are in tension; otherwise, Congress would not have saved state insurance regulation from preemption in the first place. In short, Congress was willing to sacrifice uniformity in order to reaffirm state primacy in the field of insurance regulation. As Senator Jacob Javitz (R-N.Y.), a leading sponsor of the bill that became ERISA, explained: "[C]omprehensive and pervasive federal interests and the interests of uniformity with respect to interstate plans required—*but for certain exceptions*—the displacement of State action in the field of private employee benefit programs."[172] These "certain exceptions" included state insurance regulation.

Admittedly, prohibiting states from regulating a stop-loss plan's insurer promotes the statutory goal of uniform benefit plan regulation. But, as explained above, the objective of uniformity is restrained by the savings clause and its goal of state primacy in the field of insurance regulation. Consequently, promoting federal uniformity does not justify constructing the preemption pro-

---

[170] *See supra* notes 46–50 and accompanying text.

[171] *See* Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985).

[172] 120 CONG. REC. 29,942 (1974) (emphasis added). *See also* CONG. REC. 29, 197 (1974) (remarks of Rep. Dent) ("The conferees, *with the narrow exceptions specifically enumerated*, applied [the principle of field preemption] in its broadest sense to foreclose any non-Federal regulation of employee benefit plans.") (emphasis added); 120 CONG. REC. 29,933 (1974) (remarks of Sen. Williams) ("It should be stressed that *with the narrow exceptions specified in the bill*, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations . . . .") (emphasis added).

visions to limit the scope of the savings clause, thereby sacrificing state insurance regulation, in order to expand ERISA's preemptive reach. Rather, preempting state insurance laws to promote uniformity frustrates ERISA's dual regulatory scheme and the savings clause in particular.[173] A construction of ERISA's preemption provisions that relies on the statutory goal of uniform benefit plan regulation to preempt state insurance regulation of a plan's (stop-loss) insurer renders the savings clause (and ERISA's dual regulatory scheme) meaningless in the very situations where Congress intended the savings clause to operate as an exception to the general rule of preemption and the goal of uniformity.[174] In terms of stop-loss insurance, this means that courts should not hold that ERISA preempts states from regulating a plan's stop-loss insurer in order to promote uniformity when the state insurance law falls within the scope of the savings clause and does not run afoul of the deemer clause.[175] The disuniformity that results when states are permitted to regulate a plan's stop-loss provider is the direct result of the savings clause. By disregarding ERISA's dual regulatory scheme and holding a stop-loss plan exempt from state insurance regulation, courts remove from ERISA the disuniformity that Congress purposefully put into the statute.

Even though the majority view's construction of the preemption provisions would ensure that a plan does not face disuniform regulation to the extent that the plan purchases stop-loss insurance, it is not the role of the courts to create uniformity by preempting state laws that Congress expressly saved from ERISA preemption, even though the laws undercut the statutory goal of uniformity. It is for Congress, not the courts, to legislate this change.[176] Indeed, the *Metropolitan Life* Court, recognizing that

---

[173] Indeed, the very reason the Court distinguished a self-funded plan from an insured plan was to give effect to ERISA's dual regulatory scheme and the savings clause especially. *See supra* notes 70 and 80 and accompanying text.

[174] *See supra* Part IV.A.1.b.

[175] The real assault on the goal of uniform benefit plan regulation is the savings clause itself and *Metropolitan Life* and *FMC*. It would be somewhat disingenuous and unprincipled to hold a stop-loss plan exempt from indirect state insurance regulation in order to promote federal uniformity but to hold that a fully insured plan is subject to such regulation.

[176] In other words, if a federal statute is flawed, it is the role of Congress as the legislature, not the role of courts, to fix it. *See, e.g.*, Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n, 461 U.S. 190, 223 (1983) ("Given this statutory scheme, it is for Congress to rethink the division of regulatory authority in light of its possible exercise by the states to undercut a federal objective. The courts should not assume the role which the system assigns to Congress."); *see generally* Jane

it threatened uniform benefit plan regulation when it read ERISA to permit states to regulate a plan's insurer, explained:

> We are aware that our decision results in a distinction between insured and uninsured plans, leaving the former open to indirect regulation while the latter are not. By so doing we merely give life to a distinction created by Congress in the "deemer clause," a distinction Congress is aware of and one that it has chosen not to alter. We also are aware that appellants' construction of the statute would eliminate some of the disuniformities currently facing national plans that enter into local markets to purchase insurance. Such disuniformities, however, are the inevitable result of the congressional decision to "save" local insurance regulation. Arguments as to the wisdom of these policy choices must be directed at Congress.[177]

In short, the statutory purposes behind the preemption provisions and the dual regulatory scheme they establish support this Note's conclusion that ERISA does not preempt state insurance laws that regulate a stop-loss plan's stop-loss insurer.

d. *Legislative history.* Although ERISA's legislative history is voluminous,[178] discussion of the statute's preemption provisions in the statute's legislative history is sparse. The history contains no discussion explaining the relationship between the preemption, savings, and deemer clauses, and only refers to the savings clause in passing. In fact, on the floor of the House and Senate there were no comments specifically addressing the savings clause. The legislative history, however, does register Congress's intent to broadly preempt state laws that relate to employee benefit plans in order to ensure uniform benefit plan regulation.[179] As Representative John Dent (D-Pa.), a leading sponsor of the bill that became ERISA, remarked:

> Finally, I wish to make note of what is to many the crowning achievement of this legislation, the reservation to Federal authority of the sole power to regulate the field of employee benefit plans. With the preemption of the field, we round out

---

S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation,* 108 HARV. L. REV. 593, 636–46 (1995).

[177] Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 747 (1985).

[178] *See supra* note 20.

[179] However, there is some debate as to whether Congress fully appreciated the preemptive reach of ERISA's preemption provision and the untoward consequences that would result. *See, e.g.*, Irish & Cohen, *supra* note 165, at 114; Kilberg & Heron, *supra* note 20, at 391; Brown, *supra* note 5, at 347–48; Levin, *supra* note 49, at 1542. This further supports the conclusion that Congress probably did not intend to preempt state insurance regulation of stop-loss insurance.

> the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation.[180]

Similarly, Senator Harrison Williams, Jr. (D-N.J.) explained that federal preemption "is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law."[181]

However, the legislative history contains no evidence suggesting that Congress intended for the preemption clause's expansive reach to come at the expense of state insurance regulation and the scope of the savings clause. To the contrary, the leading sponsors of ERISA also noted that the goal of preemption and the federal interest in uniformity were subject to express exceptions in the savings clause.[182] For example, Representative Dent continued after his above remarks: "The conferees, *with the narrow exceptions specifically enumerated*, applied [the principle of field preemption] in its broadest sense to foreclose any non-Federal regulation of employee benefit plans."[183] Accordingly, to the extent that ERISA's legislative history mentions the preemption provisions, and particularly the savings clause, it supports this Note's statutory construction. At the very least, ERISA's legislative history does not suggest a different construction. In short, nothing in the legislative history suggests that Congress intended for ERISA to preempt indirect state insurance regulation of a stop-loss plan's insurer.[184]

The result of the above preemption analysis is straightforward. Contrary to the majority view, ERISA's statutory language, structure, purpose and legislative history converge to the conclusion that ERISA does not preempt state insurance regulation of a stop-loss plan's stop-loss provider.[185]

---

[180] 120 CONG. REC. 29,197 (1974). *See also supra* notes 33–41 and accompanying text.

[181] 120 CONG. REC. 29,933 (1974).

[182] *See supra* note 172.

[183] 120 CONG. REC. 29,197 (1974) (emphasis added).

[184] The *Metropolitan Life* Court similarly found that ERISA's legislative history did not suggest a result other than that states are permitted to regulate a fully insured plan's insurer. *See Metropolitan Life*, 471 U.S. at 745–46.

[185] This preemption analysis is consistent with the Court's most recent ERISA opinion, *Travelers*. In *Travelers*, the Court held that a state law that has only an indirect economic effect on the relative cost of various health insurance packages, including numerous welfare plans, does not relate to the plans under the preemption clause. New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 115 S. Ct. 1671 (1995). Commentators have read *Travelers* to restrict the scope of ERISA's preemptive reach by narrowing the scope of the preemption clause and its "relate to" language. *See, e.g.*, Jordan, *supra* note 43, at 255; Brown, *supra* note 5, at 343. The

### 2. Presumption Against Preemption

Undergirding this Note's statutory construction is the well-established starting presumption of preemption analysis that Congress does not intend to preempt state law with federal law.[186] This presumption is fortified where the traditional regulatory jurisdiction of the states is involved, especially the authority of the states to regulate the public health and safety under state police powers.[187] In such cases, the Supreme Court starts with the "assumption that the historic police powers of the States

---

narrowed construction of the preemption clause in *Travelers*, which effectively restricts ERISA's preemptive reach, is arguably inconsistent with the majority view's construction of the savings and deemer clauses, which effectively expands ERISA's preemptive reach. This implies that *Travelers* is apparently consistent with an interpretation of the preemption provisions that does not unduly limit the scope of the savings clause by preempting state insurance laws that regulate a plan's stop-loss provider. At the very least, the tenor of *Travelers* to hem in ERISA preemption favors the minority view of the stop-loss issue over the majority view.

[186] *See Travelers*, 115 S. Ct. at 1676 ("And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of pre-emption with the starting presumption that Congress does not intend to supplant state law."); District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 587 (1992) (Stevens, J., dissenting); *FMC*, 498 U.S. at 62 ("Our construction of the deemer clause is also respectful of the presumption that Congress does not intend to pre-empt areas of traditional state regulation."); *Metropolitan Life*, 471 U.S. at 740; Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); Maurer v. Hamilton, 309 U.S. 598, 614 (1940); Reid v. Colorado, 187 U.S. 137, 148 (1902). This norm applies in both express and implied preemption cases. Cipollone v. Liggett Group, 112 S. Ct. 2608, 2626 (1992); *Jones*, 430 U.S. at 525; Martin, *supra* note 141, at 1237 n.24; Jeffrey R. Stern, Note, *Preemption Doctrine and the Failure of Textualism in* Cipollone v. Liggett Group, 80 VA. L. REV. 979, 1008 n.160 (1994).

The Court's respect for the values of federalism and state sovereignty underlies its presumption against preemption. *See Cipollone*, 112 S. Ct. at 2626 ("The principles of federalism and respect for state sovereignty that underlie the Court's reluctance to find pre-emption where Congress has not spoken directly to the issue apply with equal force where Congress has spoken though ambiguously."); *Jones*, 430 U.S. at 525 ("[The presumption against preemption] provides assurances that 'the federal-state balance' . . . will not be disturbed unintentionally by the courts.") (citations omitted). As one commentator put it:

> Requiring an expressed congressional intent to preempt would ensure compliance with the preemption doctrine's axiom that, whenever possible, state exercises of police power should be respected. At issue is the "traditional power of the states to provide for the public health, safety, and morals." This power is not to be frustrated except pursuant to a "clear and manifest purpose of Congress." An express intent requirement would also protect two basic assumptions of federalism: (1) that the states hold a fount of "reserved power" under the Tenth Amendment; and (2) that the states act as "laboratories of experimentation" where, given the political will, a single state could explore what the national consensus was not ready to try.

Fernandez, *supra* note 141, at 98 (citations omitted).

[187] *See, e.g.*, *Travelers*, 115 S. Ct. at 1683; *Maurer*, 309 U.S. at 614; Kelly v. Washington, 302 U.S. 1, 13 (1937).

[are] not to be superseded by the Federal Act unless that [is] the clear and manifest purpose of Congress."[188]

State insurance laws regulating a plan's stop-loss insurer fall within the traditional regulatory jurisdiction of the states. First, such regulation directly impacts the health and welfare of a state's citizens, which have historically been a matter of local concern under traditional state police powers.[189] Second, Congress expressly delegated insurance regulation principally to the states in the McCarran-Ferguson Act. In general support of these two points, the presumption against preemption has consistently informed the Supreme Court's statutory construction of ERISA's preemption provisions.[190] In fact, *Travelers* indicates that the Court is prepared to give the presumption more weight in future ERISA cases. The *Travelers* Court recently explained: "And yet, despite the variety of these opportunities for federal preeminence, we have never assumed lightly that Congress has derogated state regulation, but instead have addressed claims of preemption with the starting assumption that Congress does not intend to supplant state law."[191] Further, the Court repeatedly stressed the presumption against preemption in holding that the New York state surcharges at issue in the case fall outside the scope of the preemption clause.[192] The Court's opinion suggests that the presumption against preemption will play a more important role in future ERISA preemption cases, and that the Court will accordingly be more deferential to state law.[193]

---

[188] *Rice*, 331 U.S. at 230. *See also Travelers*, 115 S. Ct. at 1676 (citing cases); *Cipollone*, 112 S. Ct. at 2617 (citing cases); *Florida Lime*, 373 U.S. at 146; Schwartz v. Texas, 344 U.S. 199, 202–03 (1952); *Reid*, 187 U.S. at 148.

[189] *See Travelers*, 115 S. Ct. at 1680 (citing Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 719 (1985)).

[190] *See id.* at 1679, 1683; District of Columbia v. Greater Washington Bd. of Trade, 113 S. Ct. 580, 587 (1992) (Stevens, J., dissenting); *FMC*, 498 U.S. at 62; *Metropolitan Life*, 471 U.S. at 740.

[191] *Travelers*, 115 S. Ct. at 1676. *See also Greater Washington*, 113 S. Ct. at 587 (Stevens, J., dissenting); *FMC*, 498 U.S. at 62; *Metropolitan Life*, 471 U.S. at 740.

[192] *See Travelers*, 115 S. Ct. at 1679 (explaining presumption against preemption). The Court explained: "While Congress's extension of pre-emption to all 'state laws relating to benefit plans' was meant to sweep more broadly than 'state laws dealing with the subject matters covered by ERISA . . . .,' nothing in the language of the Act or the context of its passage indicates that Congress chose to displace general health care regulation, which historically has been a matter of local concern . . . . But as we have shown, New York's surcharges do not fall into either category; they affect only indirectly the relative prices of insurance policies, a result no different from myriad state laws in areas traditionally subject to local regulation, which Congress could not possibly have intended to eliminate." *Id.* at 1680, 1683 (citations omitted).

[193] *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 7; Jordan, *supra* note 43, at 289.

By virtue of the above statutory construction, it should be evident that there is no "clear and manifest purpose of Congress" to displace state insurance laws insofar as the laws are applied to a plan's stop-loss insurer. To the contrary, as explained at length, Congress expressly saved state insurance regulation from preemption despite ERISA's expansive preemption clause and the primary congressional goal of uniform benefit plan regulation. Even if the "clear and manifest" standard does not obtain in the case of stop-loss insurance, it should nevertheless be evident from the above arguments that the presumption against preemption is still not overcome insofar as stop-loss plans are concerned. Thus, the well-settled presumption against preemption supports the conclusion that ERISA does not preclude states from enforcing their insurance laws against a stop-loss plan's insurer. As the *Metropolitan Life* Court explained when it held Massachusetts's mandatory-benefit law was saved from preemption: "The presumption is against pre-emption, and we are not inclined to read limitations into federal statutes in order to enlarge their pre-emptive impact."[194]

### B. *Principles of Insurance*

When courts determine whether a plan is insured, and relatedly whether the plan's insurer engages in the business of insurance in relation to the plan, the courts are fundamentally dealing with issues of insurance. A fundamental flaw of the majority view is that it consistently ignores the function and economics of insurance by requiring more than the transfer of risk to find that an insurance relationship exists between a welfare plan and its stop-loss provider.

"[T]he basic function of insurance is to deal with risk."[195] Risk is the chance or possibility that a loss or harm will occur.[196]

---

[194] *Metropolitan Life*, 471 U.S. at 741.

[195] R. MEHR & E. CAMMACK, PRINCIPLES OF INSURANCE 17 (5th ed. 1972). For thorough discussions on the role and purpose of insurance, see R. KEETON, BASIC TEXT ON INSURANCE LAW (1971); IRVING PFEFFER, INSURANCE AND ECONOMIC THEORY (1956); ESSAYS IN THE THEORY OF RISK AND INSURANCE (J. Jammond ed., 1968); C. ARTHUR WILLIAMS, JR. & RICHARD M. HEINS, RISK MANAGEMENT AND INSURANCE (1964).

[196] *See* COUCH, *supra* note 53, § 2:7, at 286–87 ("In general, the risk may be any uncertain event which may in any way be of disadvantage to the party insured. It should relate to a possibility of real loss which neither the insured nor the insurer has the power to avert or hasten.") (citations omitted); PFEFFER, *supra* note 195, at 42 ("Risk

Inherent in risk is some probability that a contingency will occur and thus some probability that the contingency will not occur. The defining characteristics of insurance are the transfer and spreading of risk.[197] In particular, insurance is an arrangement whereby one party, the insured, transfers a particular risk to another party, the insurer, who indemnifies the insured against loss should the risk mature into actual harm.[198] To limit its exposure to liability, the insurer spreads each risk that it insures across a pool of assumed risks.[199]

These basic principles of insurance indicate that an insurance relationship exists between parties once the transfer of risk from the insured to its insurer is complete.[200] As suggested, risk is different from actual loss. Indeed, risk presupposes that actual loss may never occur. Since risk, and not loss, is the fundamental essential of insurance,[201] it follows that insurance also presupposes that the insured may never suffer the harm against which it insures.[202] Put differently, an insurance relationship can exist even if the insured does not make any claims against its policy and consequently the insurer does not pay benefits to its

---

is a combination of hazards and is measured by probability . . . ."); BLACK'S LAW DICTIONARY 1328 (6th ed. 1990) ("In insurance law, [risk is] the danger or hazard of a loss of the property insured; the casualty contemplated in a contract of insurance; the degree of hazard; a specified contingency or peril . . . . In general, the element of uncertainty in an undertaking . . . .").

[197] *See* Group Life & Health Ins. v. Royal Drug Co., 440 U.S. 205, 211 (1979) ("The primary elements of an insurance contract are the spreading and underwriting of a policyholder's risk."); Feinstein v. Nettleship Co. of Los Angeles, 714 F.2d 928, 931 (9th Cir. 1983) ("[T]he primary characteristic of the business of insurance is the transferring or spreading of risk."); COUCH, *supra* note 53, § 1:3, at 6–7; KEETON, *supra* note 195, § 1.2(a), at 2; Brummond, *supra* note 26, at 68.

[198] COUCH, *supra* note 53, § 1:2, at 4 ("Insurance . . . is a contract by which one party, for a consideration . . . promises to make a certain payment of money upon the destruction or injury of something in which the other party has an interest . . . . In a general sense, 'insurance' is a contract to pay a sum of money upon the happening of a particular event or contingency, or indemnify for loss in respect of a specified subject by specified perils; that is, an undertaking by one party to protect the other party from loss arising from named risks, for the consideration and upon the terms and under the conditions recited.") (citations omitted); PFEFFER, *supra* note 195, at 53; BLACK'S LAW, *supra* note 196, at 802; Brummond, *supra* note 26, at 68–69.

[199] *See* COUCH, *supra* note 53, § 1:3, at 7.

[200] The Supreme Court appears to agree. In *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119 (1982), the Court stated: "The transfer of risk from insured to insurer is effected by means of the contract between the parties—the insurance policy—and that transfer is complete at the time that the contract is entered." *Id.* at 130.

[201] *See* COUCH, *supra* note 53, § 1:3, at 6–7 ("The primary requisite essential to a contract of insurance is the assumption of a risk of loss and the undertaking to indemnify the insured against such loss.") (citation omitted); *see also supra* notes 195 and 197.

[202] In fact, insurance would not exist if all the parties knew with certainty which risks would mature into harm.

insured. To the contrary, the very reason insurance works is because not every risk that an insurer assumes results in loss and attendant claims and benefit payments.[203]

Two related points emerge from this discussion that are important to the issue of stop-loss plans. First, an insurer engages in the business of insurance once it assumes the insured's risk and becomes contractually liable to indemnify the insured against potential loss. Second, the party transferring its risk is insured even if the transferred risk never matures into harm and claims against the policy.

Recall that courts in the majority view have held that a stop-loss plan is not insured and that its stop-loss provider is not engaged in the business of insurance if participant claims do not reach the plan's trigger point and the plan's insurer consequently never pays benefits. By ignoring the uncertainty of loss inherent in risk, and thus insurance, the minority view effectively redefines insurance to require more than the transfer of risk to a third party. Specifically, by refusing to find an insurance relationship between a plan and its stop-loss provider unless the plan made claims against its stop-loss policy and the plan's insurer paid benefits, these courts effectively redefine insurance to require the insured risk to mature into actual harm and loss. This effective redefinition of insurance is contrary to basic principles of insurance and the practice of insurance, where many, if not most, insured risks never result in loss, claims, and benefit payments. Most insurance policies never actually result in claims, but they are still insurance.

Whether a stop-loss plan is insured and whether its insurer engages in the business of insurance should not be based on an *ex post* analysis of whether claims reached a plan's stop-loss trigger point, but should be based on an *ex ante* analysis of whether the plan shifted the risk of loss to a third-party insurer. Given the fundamentals of insurance, a plan becomes insured once it purchases stop-loss insurance and shifts the risk of claims above a specified level; and the plan's stop-loss provider engages in the business of insurance and acts as an insurer in relation to the plan once it assumes this risk.[204] Whether the plan's stop-loss

---

[203] COUCH, *supra* note 53, § 1:3, at 7 ("It is characteristic of insurance that a number of risks are accepted, some of which will involve losses, and that such losses are spread over all the risks so as to enable the insurer to accept each risk at a slight fraction of the possible liability upon it.") (citations omitted).

[204] *See* Northern Group Servs. v. Auto Owners Ins. Co., 833 F.2d 85, 91 (6th Cir.

trigger point is reached does not influence this result. That a claim is never made against the stop-loss policy and that the plan's stop-loss provider never pays benefits under the policy does not negate the fact that the insurer is contractually liable to indemnify the plan for losses above the trigger point, when and if they do occur. Further, that a stop-loss plan retains some risk of loss does not negate the fact that the plan is insured for losses above a certain level once it purchases stop-loss coverage.[205] As one district court summarized in holding a plan with stop-loss coverage insured under ERISA: "The critical factor was the plan's purchase of insurance."[206]

---

1987) (explaining that benefits above trigger point are insured); Simmons v. Prudential Ins. Co. of Am., 641 F. Supp. 675, 680 (D. Colo. 1986) ("Prudential was not obligated to pay benefits on its Group Insurance Plan until Sherwood's limits were exhausted. In this case, Prudential paid none. Yet premiums were paid to ensure excess coverage . . . by Prudential on behalf of the plan. Thus, the stop-loss nature of the employee benefit plan may not change the conclusion that would be drawn if the plan were fully insured. Prudential acts as an insuror [sic] under the plan and can be regulated in that manner, by the states.").

[205] Indeed, many insureds retain risk under traditional insurance policies (i.e., not reinsurance or excess insurance) through deductibles.

[206] State Farm Mut. Auto. Ins. Co. v. American Community Mut. Ins. Co., 659 F. Supp. 635, 639 (E.D. Mich. 1987); *see also* Northern Group Servs., 833 F.2d at 91; Michigan United Food & Commercial Workers Unions v. Baerwaldt, 767 F.2d 308, 312–13 (6th Cir. 1985); Hall v. Pennwalt Group Comprehensive Medical Expense Benefits Plan, Civ. A. 88-7672, 1989 WL 45627, at *5 (E.D. Pa. March 29, 1989); Auto Club Ins. Ass'n v. Mutual Sav. & Loan Ass'n, 672 F. Supp. 997, 1000 (E.D. Mich. 1987).

One reasonable response to this argument based on insurance principles is that stop-loss insurance does not transfer risk in a meaningful way. Under this view, a welfare plan characteristically purchases stop-loss insurance to transfer the risk of catastrophic loss, which is typically unlikely to mature into harm because catastrophic losses are generally associated with a remote probability. Thus, a plan with stop-loss protection that covers its risk of catastrophic loss should be considered self-insured and its insurer not engaged in the business of insurance with respect to the plan because the plan will almost always pay benefits out of its own resources and rarely if ever file a claim under its stop-loss policy. Indeed, in many of the stop-loss cases that are heard by courts, the trigger point is never reached. *See, e.g.*, Brown v. Granatelli, 897 F.2d 1351, 1353 (5th Cir. 1990); United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga, 801 F.2d 1157, 1159 (9th Cir. 1986); Moore v. Provident Life & Accident Ins. Co., 786 F.2d 922, 926 (9th Cir. 1986); Rasmussen v. Metropolitan Life Ins. Co., 675 F.Supp. 1497, 1502 (W.D. La. 1987); Bruenn v. Aetna Life Ins. Co., 197 Cal. App. 3d 1000, 1004 (1987). Since the stop-loss insurance will rarely be called, its existence should not affect the treatment of the plan for preemption purposes.

Although this argument has merit, it is not convincing. First, it runs afoul of basic insurance principles. A party is insured even if it only transfers a risk with a remote probability of maturing into harm. A second and related point is that both individuals and businesses buy traditional insurance (i.e., insurance other than reinsurance or excess insurance) primarily to protect themselves against catastrophic losses, even though such losses are unlikely to occur. People are not so concerned about minor risks and harms, such as common colds, flat tires on their cars, broken windows at their homes, or $10,000 tort actions against their businesses. Rather, people are primarily

There is also common-sense support for rejecting the majority view and holding that a stop-loss plan is insured. Deductibles are routinely included in insurance contracts of all types, including traditional health and accident insurance. The deductible and stop-loss trigger point perform similar functions. Both are risk-retention mechanisms: the insured is liable for its losses until the losses exceed the policy's deductible or trigger point, depending on the type of insurance.[207] To the extent that actual losses to an insured are less than a traditional policy's deductible or a stop-loss policy's trigger point, as the case may be, the insured never makes a claim against its insurance, and the insurer is therefore never required to pay benefits.

I trust that few people, including judges, would seriously argue that a person is uninsured if he never meets his deductible simply because he never files a claim against his policy. Rather, a lay person's common-sense understanding of insurance, which is consistent with the function and economics of insurance, correctly tells him that losses above a deductible are insured, and that the policyholder is thus insured, even if the deductible is never met.[208] Indeed, one can view the stop-loss plan as an insured plan with a very large deductible.

The fact that stop-loss insurance is not health and accident insurance does not require a different conclusion than that a stop-loss plan is insured under ERISA. It is undisputed that stop-loss insurance is different from health and accident insurance,[209] with the principal difference that stop-loss coverage insures the plan, whereas health and accident insurance insures

---

concerned about the financial cost associated with major losses, such as cancer, a head-on car collision, a fire that burns their house down, and a $10 million negligence action against their business. For example, most insureds retain some if not most of the risk of ordinary, expected losses through deductibles, while shifting the risk of catastrophic (or at least substantial) losses to an insurer. Stop-loss insurance is therefore designed to insure people against the very risk they are primarily concerned about when they buy traditional insurance. Third, plans are increasingly purchasing stop-loss coverage to protect themselves against ordinary losses by setting a low trigger point. *See* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5. Even courts subscribing to the majority view have suggested that a stop-loss plan should be considered insured if it purchases a stop-loss policy with a low trigger point as a subterfuge to avoid state insurance regulation. *See infra* note 215.

[207] That is to say, it is the risk of loss above the deductible or trigger point that is transferred to the insurer.

[208] *See* Brown v. Granatelli, 897 F.2d 1351, 1358 (5th Cir. 1990) (Brown, J., dissenting) (citing Michigan United Food & Commercial Workers Union v. Baerwaldt, 767 F.2d 308, 313 (6th Cir. 1985)); Northern Group Servs., Inc. v. Auto Owners Ins. Co., 833 F.2d 85, 91 (6th Cir. 1987).

[209] *See supra* Part III.A.

plan participants. The differences distinguishing stop-loss insurance from health and accident insurance, however, are irrelevant for determining whether a stop-loss plan is insured. As suggested above, whether a plan is insured is a question of status that is independent of the type of insurance the plan buys, or how much insurance the plan buys.[210] Although a plan insures itself differently and to a lesser extent when it purchases stop-loss protection instead of purchasing health and accident insurance for plan participants, the plan nevertheless transfers risk to an insurance company, which is sufficient to render the plan insured.[211]

### C. *Substance over Form*

Although stop-loss insurance shifts the risk of loss to a third-party insurer, the majority of courts have nonetheless concluded that a plan with stop-loss coverage is self-insured and not subject to state insurance regulation. Most of these courts have

---

[210] *See* Auto Club Ins. Ass'n v. Mutual Sav. & Loan Ass'n, 672 F.Supp. 997, 1000 (E.D. Mich. 1987); State Farm Mut. Auto. Ins. Co. v. American Community Mut. Ins. Co., 659 F.Supp. 635, 639 (E.D. Mich. 1987).

[211] Despite its seemingly contradictory language, *Metropolitan Life* is not to the contrary. The *Metropolitan Life* Court explained that "[p]lans may self-insure or they may purchase insurance for their participants. Plans that purchase insurance—so called 'insured plans'—are directly affected by state laws that regulate the insurance industry." *Metropolitan Life*, 471 U.S. at 732. This language, especially the phrase, "may purchase insurance for their participants," could reasonably be read to exclude a plan that purchases stop-loss insurance from the Court's understanding of what makes a plan insured, since a fully insured plan purchases health and accident insurance for its participants, whereas a plan or its employer-sponsor is the insured under a stop-loss policy. *See* cases cited *supra* note 105. The facts of *Metropolitan Life* support this reading of the opinion because the Court held that a plan that purchases health and accident insurance for its participants is insured.

This reading of *Metropolitan Life*, however, proves narrow and unpersuasive. First, *Metropolitan Life* did not expressly hold that a plan with stop-loss protection is not insured for preemption purposes; the issue of stop-loss insurance was not before the Court. In fact, it is unlikely that the Court intended to imply that a plan that buys stop-loss insurance is not insured under ERISA. It was reasonable for the Court to focus on health and accident insurance because the plan before it had purchased health and accident policies for its participants. Further, stop-loss insurance was not an issue under ERISA when *Metropolitan Life* was decided. The stop-loss issue did not develop in the courts until after *Metropolitan Life*. Third, as demonstrated in part IV.C below, it is not self-evident that a plan does not, at least on some level, purchase stop-loss insurance for its participants as well as for itself. Although a plan purchases stop-loss coverage primarily to protect itself against major losses, stop-loss coverage effectively insures participants' benefits above the trigger point so that plan participants are the indirect beneficiaries of a plan's stop-loss coverage. Finally, the Court's reasoning in *Metropolitan Life* is consistent with the conclusion that a plan that purchases stop-loss insurance is insured under ERISA. This is implicit in the references to *Metropolitan Life* that are found throughout the preemption analysis above in Part IV.A.

based their conclusion on the undisputed fact that stop-loss insurance is technically and legally different from health and accident insurance.[212] The following analysis responds to those who maintain that the formalistic differences between stop-loss insurance and health and accident insurance are meaningful for ERISA preemption purposes.

When considering how to treat a stop-loss plan for preemption purposes, courts should adopt a functional approach to stop-loss plans that focuses on the substance of the insurance arrangement and not on the legal and technical formalities that distinguish stop-loss insurance from health and accident insurance. First, a functional approach is consistent with the well-established tradition in the courts of respecting a transaction's substance over its form, for example, to neutralize the efforts of parties to structure their transactions in order to circumvent the law without affecting the transaction's substance. This "structuring" problem is increasingly a concern for state regulators in the ERISA preemption context as plan sponsors increasingly structure their plans as stop-loss plans as a subterfuge to avoid state insurance regulation.[213] Second, when considering how to treat a particular

---

[212] *See supra* note 105. For a discussion of these distinctions, see *supra* Part III.A.

[213] *See, e.g.*, ISSUES, TRENDS, & CHALLENGES, *supra* note 5, at 28–30 ; Fisk, *supra* note 20, at 73; Brown, *supra* note 5, at 340. By focusing on the formal differences between stop-loss coverage and health and accident insurance, the majority view encourages an employer to structure its plan as a stop-loss plan that limits the employer's risk exposure and that effectively insures participants' benefits, but that is not subject to indirect state insurance regulation under the savings clause. Indeed, under this formalistic approach, a plan could avoid state regulation by purchasing a stop-loss policy with a trigger point at or below expected claims instead of health and accident insurance for its participants. Recognizing this, some courts subscribing to the majority view have suggested that they would treat a plan that purchased a stop-loss policy with an unreasonably low trigger point as insured. *See, e.g.*, Brown v. Granatelli, 897 F.2d 1351, 1355 (5th Cir. 1990) ("If, for example, a plan paid only the first $500 of a beneficiaries' health claim, leaving all else to the insurer, labeling its coverage stop-loss or catastrophic coverage would not mask the reality that it is close to a simple purchase of group accident and sickness coverage. We look beyond form to the substance of the relationship between the plan, the participants, and the insurance carrier to see whether the plan is in fact purchasing insurance for itself and not for the plan participants, recognizing that as insurance is less for catastrophic loss, it is increasingly like accident and sickness insurance for plan participants."); Drexelbrook Eng'g Co. v. Travelers Ins. Co., 710 F. Supp. 590, 598 n.6 (E.D. Pa. 1989) ("We do not deny that there could be a situation where the stop-loss limit is so artificially low such that we would consider the arrangement a sham.").

In a 1995 report to Congress, the General Accounting Office highlighted this structuring problem and the concern it is causing state regulators. The report explains:

> Accurately assessing such trends, however, is difficult given the dynamic nature of the health market and the increasingly blurred distinction between self-funded and insured plans. In many cases, employees do not know whether their employer-based health plan is self-funded or purchased through an

insurance scheme under the law, the nature of the insured benefit, the nature of the risk that is shifted, and the identity of the ultimate beneficiaries of the insurance contract are generally more important considerations than the formal features of the insurance relationship, including the contractual and legal rights and burdens of the relevant parties.[214] From the perspective of this Note's functional approach, it should become clear that a stop-loss plan and a fully insured plan are alike in terms of their substance and thus should be treated the same under ERISA.

A welfare plan purchases stop-loss insurance to manage health and accident insurance risks. Because stop-loss insurance is a form of reinsurance, the primary risk covered by a plan's stop-loss coverage is the plan's financial losses. However, because the plan's losses and the stop-loss trigger point are a function of participant claims against the plan, the extent of the stop-loss insurer's liability, if anything, ultimately depends upon the health and well-being of plan participants. Thus, although a plan's stop-loss provider primarily reinsures the plan against the plan's losses, the provider effectively insures the risk that plan participants will become sick or get injured in an accident. In other words, the stop-loss insurer's obligation to pay arises from the illnesses and accidents of plan participants,[215] the same contingencies that subject a provider of health and accident insurance to risk.

The majority view ignores the fact that the underlying risk insured by both stop-loss insurance and health and accident insurance is the same. The majority view instead emphasizes the formality that stop-loss insurance indemnifies the plan and not its participants directly. The majority view, however, makes too much of this distinction. In fact, the distinction fails to hold when the stop-loss arrangement is analyzed functionally.

A welfare plan purchases stop-loss coverage to finance benefit payments above some level specified in the insurance contract

---

> insurer. This results partly because employers are increasingly adopting funding arrangements that are neither fully insured nor fully self-funded. These arrangements include increased use of stop-loss coverage to moderate the employer's risk . . . . States . . . believe that some of the emerging self-funded plans with extensive stop-loss coverage closely resemble more traditional health insurance and are trying to regulate these plans.

ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 5–6.

[214] This statement is simply an indirect way of saying that substance trumps form.

[215] *See Brown*, 897 F.2d at 1358 (Brown, J., dissenting) (explaining that obligations of stop-loss provider arise from sickness or accidents of plan participants).

(i.e., the trigger point).[216] Although the plan initially pays participants' claims above the trigger point, it only funds these benefits temporarily until the plan's stop-loss insurer indemnifies the plan. The ultimate payer of participant claims against a stop-loss plan, therefore, is the plan's stop-loss provider, which consequently bears the ultimate risk and loss.[217] In effect, the plan acts as a mere conduit between its participants and its stop-loss provider, even though the plan is technically the insured under the stop-loss policy.[218] If the transaction is collapsed, the effective flow of money is from the insurer to plan participants, just as it is under traditional health and accident policies.

In essence, stop-loss insurance that insures a welfare plan functions like health and accident insurance that insures plan participants directly. Admittedly, stop-loss coverage technically insures the plan against its losses and not plan participants directly. Nonetheless, a plan's stop-loss provider in practice insures participants' health and accident benefits. A plan's stop-loss provider effectively insures the risk that plan participants will become sick or get injured when it assumes the risk that claims against the plan will exceed a certain level; it thereby finances the plan's benefit payments above the trigger point. Put differently, plan participants are the indirect but ultimate beneficiaries of stop-loss coverage purchased by their welfare plan.[219] As a result, the practical consequence of stop-loss insurance is that it insures plan participants when it insures a plan against its losses. Indeed, as described above, the insurance money ultimately flows from the plan's stop-loss insurer to plan participants, with the plan only acting as intermediary.

To the extent that stop-loss insurance provided to a welfare plan functions like health and accident insurance, it follows that

---

[216] *See supra* Part III.A.

[217] This assumes that the stop-loss provider is solvent. If the insurer is insolvent, then the plan will have to satisfy claims above the trigger point.

[218] Even the Fifth Circuit, which has held that a stop-loss plan is self-insured for preemption purposes, has admitted that under certain conditions, such as a low trigger point, a plan acts merely as a conduit between its insurer and its participants, in which case the stop-loss policy should be treated like traditional health and accident insurance and the plan thus considered insured. *See Brown*, 897 F.2d at 1355.

[219] As the Sixth Circuit explained: "[S]top-loss insurance is purchased to 'provide benefits for plans subject to ERISA.'" Northern Group Servs., Inc. v. Auto Owners Ins. Co., 833 F.2d 85, 91 (6th Cir. 1987) (quoting Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 738 n.15 (1985)); *see also* Auto Club Ins. Ass'n v. Mutual Sav. & Loan Ass'n, 672 F. Supp. 997, 1000 (E.D. Mich. 1987) ("So long as the effect . . . is to insure the plan . . . it matters not that . . . the Plan participants were not the technical beneficiaries.").

a welfare plan effectively creates and provides its participants health and accident insurance when the plan buys stop-loss protection for itself. A fully insured plan and a stop-loss plan are therefore substantially the same in terms of their substance and thus should be treated the same for purposes of ERISA preemption.[220] The fact that an employer purchases stop-loss insurance principally to insure itself against major losses and not to insure plan participants directly proves unimportant under this functional analysis.[221]

The fact that stop-loss insurance only insures losses above some specified level also proves unimportant under this analysis. As already explained, a stop-loss trigger point and a traditional deductible, which is a typical feature of health and accident insurance, are functional equivalents. Both are mechanisms by which the insured retains risk; only claims above a policy's trigger point or deductible, depending on the type of insurance, are insured. A plan with stop-loss coverage, therefore, is substantially similar to a fully insured plan in which the employer pays a deductible under the health and accident policy it purchases for its participants.[222] In fact, a stop-loss plan simply can

---

[220] One economic difference between a stop-loss plan and a fully insured plan is that a stop-loss plan receives the economic benefit if claims are less than the stop-loss trigger point, whereas a fully insured plan's insurance carrier receives the benefit if claims are less than plan premiums. This difference vanishes, though, when the health and accident policy purchased by a fully insured plan includes an employer-paid deductible. In any case, this difference is not enough to undermine the substantive similarities that exist between stop-loss insurance and traditional health and accident insurance when purchased by a welfare plan. Simply, when asking whether different insurance schemes are alike in substance and function, the nature of the risk that is shifted and the identities of the ultimate beneficiaries of the insurance contract are more important than who receives the benefit.

[221] In fact, it could be argued that a plan purchases health and accident coverage principally to protect itself and only secondarily for its participants. Stop-loss coverage directly insures the plan and indirectly insures plan benefits. Traditional health and accident insurance, on the other hand, directly insures plan participants and indirectly insures the plan by shifting the plan's liability to an insurer. Once an employer decides to offer its employees and their beneficiaries a welfare plan, the employer must decide how to finance its plan benefits without subjecting itself to an unreasonable risk of loss. Both stop-loss insurance and health and accident insurance offer an employer ways of providing benefits while reducing risk. It is a fiction to say that because a plan buys health and accident insurance to cover its participants directly the plan is not also purchasing the policy to protect itself. Indeed, it is reasonable to speculate that an employer's primary motive in purchasing health and accident insurance for its participants is to reduce its own risk under its plan and that the happy by-product of this decision is that participants are also insured.

[222] Several courts have recognized that a plan's stop-loss policy is like a traditional health and accident insurance policy with a deductible. *See Brown*, 897 F.2d at 1355–58 (Brown, J., dissenting); *Northern Group Servs., Inc.*, 833 F.2d at 91; Hall v. Pennwalt Group Comprehensive Medical Expense Benefits Plan, Civ. A. 88-7672, 1989 WL

be viewed as a fully insured plan with a large deductible. This is especially true where a fully insured plan converts its health and accident policy into a stop-loss policy with a trigger point set at or near the health and accident policy's deductible limit (or the typical deductible for similar policies).[223] Under either arrangement (that is, a stop-loss scheme or traditional health and accident insurance with a deductible), the employer assumes the responsibility for paying benefits up to some specified level, either the trigger point or the deductible, at which point the employer shifts the risk of loss to a third-party insurer.

Finally, the argument that a stop-loss plan should be treated like a self-insured plan because a stop-loss plan largely self-funds, despite buying stop-loss protection, is unpersuasive. In practice, all welfare plans, including those that purchase health and accident insurance, largely self-fund. A stop-loss plan typically self-funds by setting aside in a trust or some other account resources to pay benefits up to the stop-loss trigger point or by simply paying these benefits out of the employer's general assets. The way in which fully insured plans self-fund is less straightforward. Almost all health and accident insurance is experience-rated. That is, the basic premium structure is a function of the experiences of the insured risk pool. In the welfare plan context, the insurer looks at the past experiences of the plan's participants and sets the net premium equal to the level of expected claims.[224] The insurer indemnifies plan participants up to expected claims out of the plan's premiums; the insurer is there-

---

45627, at *4–*5 (E.D. Pa. March 29, 1989); *see also* ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 29; Fisk, *supra* note 20, at 73; *cf. Metropolitan Life*, 32 Cal. 3d at 656–58) (explaining that minimum premium policy is substantially same as traditional health and accident policy). Indeed, as argued, a plan's stop-loss coverage and traditional health and accident insurance insure the same underlying risk. Thus, if the stop-loss trigger point and the traditional deductible were set at the same level, a stop-loss plan and a fully insured plan covering the same risk pool would assume (and shift) the same risk and thus presumably pay their insurer the same net premium.

[223] This type of restructuring is strong evidence of an employer's attempt to exploit the insured/self-funded distinction and thereby circumvent state insurance regulation. *See* Lenhart, *supra* note 17, at 638. Indeed, as the General Accounting Office reported to Congress: "Of more concern to state regulators than small firms' purchase of traditional stop-loss coverage, however, are new stop-loss insurance products that more closely resemble traditional health insurance products with a high deductible." ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 29. *See also* Fisk, *supra* note 20, at 73 ("State insurance regulators fear that new forms of stop-loss insurance are really ordinary insurance with a high deductible and thus are essentially a subterfuge to evade state regulation.").

[224] The net premium plus loading costs sum to the policy's gross premium. For a good discussion of insurance premium pricing, see *Metropolitan Life*, 32 Cal. 3d at 656–58.

fore meaningfully at risk only for participants' unexpected claims, such as catastrophic injuries or illnesses, which the insurer satisfies out of its own funds (i.e., not out of premium payments). Above, a stop-loss plan was characterized as a mere conduit between its stop-loss provider and its participants for benefit payments above the trigger point. Analogously, an insurer that provides health and accident insurance to a plan operates as a conduit between the plan and its participants insofar as expected claims are concerned.

The economics of experience-rated pricing demonstrate that a fully insured plan combines functional aspects of both self-insurance and third-party insurance. The plan effectively self-funds expected health and accident benefits through its premiums, but shifts the risk of unexpected claims to an insurer.[225] The risk of unexpected claims, especially claims that arise from participants' catastrophic injuries and illnesses, is the same risk that a plan purchases stop-loss coverage to insure.

The lesson of this analysis is that both a fully insured plan and a stop-loss plan in practice substantially self-fund.[226] Thus, the argument that a stop-loss plan should be considered self-insured because it substantially self-funds is unpersuasive, since this argument applies equally to a fully insured plan when the plan is considered as a whole and its economic effect emphasized over its legal form.

In sum, a stop-loss plan and a fully insured plan are alike in substance and function.[227] In practice, though, a stop-loss plan is

---

[225] Even if the plan's health and accident premium is not experience-rated, the substance of the foregoing analysis still obtains. That is, regardless of how the premium is determined, a fully insured plan effectively self-funds a large component of its participants' benefits through its premiums. Further, the extent to which a fully insured plan self-funds increases if the employer pays a deductible under the policy because the plan directly self-funds benefits up to the policy's deductible. For simplicity's sake, the analysis assumes no deductible.

[226] If a fully insured plan's deductible plus its net premiums equals the sum of a stop-loss plan's stop-loss trigger point and its net premiums, then the plans are in fact self-funded to the same extent.

[227] It has been argued that an insured plan and a self-funded plan should be treated the same for ERISA preemption purposes because the two types of plans are the same from the perspective of plan participants, whom Congress passed ERISA to protect. For example, Justice Stevens called the *FMC* Court's distinction between insured and self-insured plans "broad and illogical," explaining in his dissent: "From the standpoint of the beneficiaries of ERISA plans—who after all are the primary beneficiaries of the entire statutory program—there is no apparent reason for treating self-insured plans differently from insured plans. Why should a self-insured plan have a right to enforce a subrogation clause against an injured employee while an insured plan may not?" FMC Corp. v. Holliday, 498 U.S. 52, 66 (1990). *See also* Swedback, *supra* note 9, at 789

routinely more similar to a fully insured plan than the analysis suggests. First, in addition to purchasing stop-loss coverage, a stop-loss plan often hires a third-party administrator, known as an administrative services organization, to administer the plan.[228] The administrator is frequently either the plan's stop-loss provider or some other insurance company.[229] As a result, these stop-loss plans not only shift the risk of loss stemming from participants' illnesses and accidents but are in fact administered by insurance companies, which make the decisions about benefit coverage, claims, and settlements. For all intents and purposes, a stop-loss plan that hires an insurance company to administer it is indistinguishable from a fully insured plan. Second, a stop-loss plan frequently adopts its stop-loss provider's health and accident policy as the plan's own coverage to offer plan participants.[230] Third, instead of paying benefits above the trigger point out of its own accounts before being reimbursed by its insurer, a plan may pay the benefits above the trigger point from the insurer's general account. Indeed, a stop-loss provider sometimes indemnifies plan participants directly, like traditional health and accident insurance.[231] Finally, a plan may purchase a stop-loss policy with a trigger point set so low that the trigger point is expected to be reached, in which case the policy insures more than the risk of major or catastrophic loss.[232] A related possibility is that

---

("From an employee's perspective, as long as funding for the employee benefit plan exists, the actual source of funding is irrelevant. Generally speaking, most employees are probably not even aware that ERISA allows a distinction between benefit plans that are self-funded by their employers and benefit plans that are purchased by their employers. Most employees only care that they receive benefits."). To the extent that the perspective of plan participants should be given any weight—and arguably it should since plan participants are the ultimate beneficiaries of ERISA—Justice Steven's reasoning applies *a fortiori* to stop-loss plans.

[228] *See* Brown v. Granatelli, 897 F.2d 1351, 1353 (5th Cir.); Moore v. Provident Life & Accident Ins. Co., 786 F.2d 922, 924 (9th Cir. 1986); Hall v. Pennwalt Group Medical Expense Benefits Plan, Civ. A. 88-7672, 1989 WL 45627, at *1 (E.D. Pa. March 29, 1989); Rasmussen v. Metropolitan Life Ins. Co., 675 F. Supp. 1497, 1498 (W.D. La. 1987); Simmons v. Prudential Ins. Co. of Am., 641 F. Supp. 675, 677–78 (D. Colo. 1986).

[229] *See Moore*, 786 F.2d at 924 (stop-loss provider retaining some administrative authority); *Hall*, 1989 WL 45627, at *1; *Rasmussen*, 675 F. Supp. at 1498; *Simmons*, 641 F. Supp. at 677–78; ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at 8. Indeed, when the trigger point is not reached, the majority view has argued that a stop-loss provider that also administers the welfare plan it insures merely acts as an administrator and is thus not engaged in the business of insurance. Such a stop-loss insurer, however, acts as more than an administrator, even if the trigger point is never reached, because the insurer assumes the risk of loss.

[230] *See, e.g., Hall*, 1989 WL 45627, at *1.

[231] *See, e.g., Moore*, 786 F.2d at 924.

[232] As the General Accounting Office recently explained: "The level of stop-loss

the trigger point is set at or near typical deductible limits for health and accident policies. Even more problematic for a stop-loss plan that wants to evade state insurance regulation is if the stop-loss premium plus the trigger point equals the premium (plus the employer-paid deductible, if there is one) for traditional health and accident insurance. If any of these characteristics obtains,[233] a stop-loss plan's stop-loss coverage begins to look more like health and accident insurance in both substance and form.[234]

---

coverage that a self-funded employer purchases is one factor that influences where an employer's plan fits within this range [from fully insured to fully self-funded]: A plan with a low stop-loss threshold self-funds a smaller share of its risk than a plan with a high stop-loss threshold. Particularly among small employers, some health plans have stop-loss coverage beginning at a relatively low level of health claims." ISSUES, TRENDS, AND CHALLENGES, *supra* note 5, at *16–*17. *See also supra* note 213.

[233]Two commentators supporting the majority view have recognized the problem that these and other characteristics pose for stop-loss plans. The commentators explain the steps that a stop-loss plan should take to maximize the probability that a court will find that the plan is self-insured under ERISA as follows:

> 1. The ASO [administrative services organization] administrator could be an entity different than the stop-loss provider, and preferably not an insurance company.
>
> 2. The stop-loss policy could be clear that it insures the plan or employer against excess risks and does not insure the plan participants. Indeed, the plan might be made the sole obligor to provide benefits.
>
> 3. Payment formalities under the stop-loss policy should be strictly observed. The plan should pay all benefits from a plan account, not from the insurance company's general account, including amounts in excess of the stop-loss amount.
>
> 4. Employee disclosure documents and communications (including plan coverage cards) should be clear and specific that the plan is not insured, should not mention stop-loss coverage, and, if the plan is administered by an insurance company, should clearly describe the insurance company as the claims administrator.
>
> 5. Design of the type of stop-loss coverage may add additional advantages. Aggregate stop-loss for all participants for a one-year period is preferable to individual stop-loss, particularly individual monthly stop-loss. Moreover, if stop-loss were set at a level greater than a level which would equal traditional insurance premiums . . . it would be helpful.
>
> 6. Overall cosmetics should be considered. Often, an employer or plan converts a traditional insurance policy to an ASO with stop-loss with the same insurer and same underlying documents by merely executing an overriding ASO document. This approach invites a court to find that, in substance, no change has occurred and that the arrangement continues to be insured and state law is thus not preempted.

Siske & Andrioff, *supra* note 71, at 84.

[234]Even if one concludes generally that stop-loss coverage purchased by a welfare plan is in substance different from health and accident insurance in ways that are meaningful for ERISA preemption, I submit that it would nonetheless be difficult to conclude that the insurance schemes are meaningfully different if most of these attributes characterize a particular plan's stop-loss arrangement.

### D. FMC *Definition of "Insured"*

The conclusion that a plan with stop-loss coverage is insured under ERISA is consistent with, if not compelled by, the apparent definition of "insured" offered by the Court in *FMC*.[235] Characterizing the difference between a self-funded and an insured plan at the beginning of its opinion, the Court stated: "The Plan is self-funded; it does not purchase an insurance policy from any insurance company in order to satisfy its obligations to its participants."[236] The negative implication of the Court's statement is that a plan is insured if it finances benefit payments (i.e., "its obligations") by purchasing insurance, thus shifting the responsibility of satisfying claims against the plan to a third party. By purchasing insurance, the plan effectively creates an external source of funding. Conversely, a plan is self-funded only if it retains one-hundred percent of the risk of loss, in which case there is no external source of funds that finances benefits. This characterization of an insured plan suggests that the Court implicitly relied upon basic insurance principles to inform its definition of insured under ERISA. The Court, in effect, said that a plan is insured if it shifts risk (i.e., "its obligations") to a third party.[237]

A stop-loss plan purchases stop-loss insurance to satisfy its obligations to its participants (at least its obligations above the trigger point).[238] Specifically, by shifting risk to a third-party, stop-loss insurance provides a plan with an external source of funding from which to finance benefit payments to participants above a specified level, since the plan's insurer indemnifies the plan for claims above the stop-loss trigger point. Indeed, a stop-loss plan may only set aside enough funds to finance claims up to the trigger point and may rely solely on its stop-loss policy

---

[235] Even commentators that agree with the majority view that a stop-loss plan is self-insured have suggested this. *See* Lenhart, *supra* note 17, at 624–25. *FMC* provides even stronger support for the conclusion that a stop-loss plan is insured when the Court's reasoning is applied to the stop-loss issue. This is implicit in the recurring references to *FMC* that are found throughout the preemption analysis in Part IV.A.

[236] FMC Corp. v. Holliday, 498 U.S. 52, 54 (1990).

[237] A plan's obligations to its participants arise when the health and accident risks that participants face mature into harm and claims against the plan. Accordingly, a plan that buys insurance to satisfy its obligations to its participants is a plan that shifts the risk of loss to an insurer. Under basic principles of insurance, such a plan is insured, even if the plan retains some risk and thus self-funds some of its obligations.

[238] Northern Group Servs., Inc. v. Auto Owners Ins. Co., 833 F.2d 85, 91 (6th Cir. 1987) (explaining that welfare plans purchase stop-loss protection to provide benefits to their participants).

to finance additional benefits. Thus, under the *FMC* definition, a plan that buys stop-loss coverage is insured.[239]

That stop-loss insurance is not health and accident insurance does not change this result. Concededly, a stop-loss plan will continue to satisfy a substantial portion of its obligations out of its own resources, unlike a fully insured plan, which effectively shifts all of its obligations to a third-party insurer by purchasing health and accident insurance to cover its participants.[240] However, nothing in *FMC* suggests that only a plan that buys insurance to satisfy all of its obligations to its participants is insured.[241] To read this requirement into the Court's definition of insured would read out of *FMC* the Court's seeming reliance on basic insurance principles to determine whether a plan is insured for preemption purposes. Further, the fact that the plan is the insured under a stop-loss policy and remains ultimately liable to its participants does not negate the fact that the plan purchases the policy to meet its obligations. In short, regardless of whether a plan buys stop-loss insurance for itself or health and accident insurance for its participants, the plan buys insurance to satisfy its obligation to its participants.

## CONCLUSION

Whether or not ERISA preempts states from enforcing their insurance laws against a stop-loss plan's stop-loss insurer defines the scope of ERISA preemption and consequently the regulatory void the statute left with respect to welfare plans. Statutory construction, basic principles of insurance, the substance and function of a stop-loss plan, and the Court's definition of insured in *FMC* all argue that ERISA does not preempt states from enforcing their insurance laws against a stop-loss plan's stop-loss insurer. Indeed, holding a stop-loss plan subject to indirect state insurance regulation promotes the very reason the Court distinguished an insured plan from a self-funded plan in the first

---

[239] While the Court did not expressly hold that a plan that buys stop-loss coverage is insured, this conclusion follows from the Court's opinion, as explained above.

[240] A fully insured plan does not shift all of its obligations to an insurer, however, if the health and accident policy it buys includes an employer-paid deductible. In this case, the plan remains liable for participant claims up to the policy's deductible, similar in substance to a stop-loss plan, which is not indemnified for claims below the trigger point.

[241] In fact, like a stop-loss plan, a fully insured plan largely self-funds in practice. *See supra* Part IV.C.

place, that is, to give effect to ERISA's dual regulatory scheme generally, and the savings clause specifically. The majority view, on the other hand, undercuts the statute by effectively removing from the regulatory jurisdiction of the states a wide range of insurance activity that naturally falls within the scope of the savings clause and that states may regulate without deeming a welfare plan insurance. ERISA's preemptive reach does not extend so far as to prevent states from regulating a welfare plan's stop-loss insurer.

# BOOK REVIEWS

THE ELECTORAL COLLEGE PRIMER. By *Lawrence D. Longley* and *Neal R. Peirce.* New Haven, Conn.: Yale University Press, 1996. Pp. viii, 240, appendices, notes, index. $32.50 cloth, $15.00 paper.

With the 1996 presidential election just behind us, the workings of the electoral college are again focused in the national spotlight. Candidates planned their campaigns around states that hold "swing" blocs of electoral votes, and California was once again the grand prize. In *The Electoral College Primer,* Lawrence Longley and Neal Peirce point out that the potential for curious election results by the college's method of vote aggregation is often overlooked, simply because the electoral college usually selects the same candidate that wins the popular vote. They argue, however, that the risk involved in a system based on coincidence is too high. If and when the electoral college selects a candidate who does not win a plurality of the popular vote (as has happened in the past), the country could be plunged into a "profound constitutional and political crisis" (p. 15). Because of this potential for disaster, the authors call for a constitutional amendment providing for direct election of the president: "The choice of the chief executive must be the people's, and it should rest with none other than them" (p. 15).

To dramatize the extent of the possible crisis, Longley and Peirce open with a fictionalized account of the 1996 election. After months of tough campaigning by Bill Clinton, Bob Dole, and Ross Perot, Dole wins a plurality of the vote, but no candidate garners the majority of the electoral vote necessary for election (p. 5). After unsuccessful attempts by Clinton and Dole to lure Perot's electors, which would suffice to give either major-party candidate an electoral majority, the responsibility of selecting the next president belongs to the House of Representatives, which votes by state delegation, one vote per state (p. 9). After days of negotiations, no candidate musters the twenty-six votes necessary for election (p. 12). The situation is similar in the Senate, where efforts to select a vice-president fail as party allegiance is absolute in a chamber now half Democrat and half Republican, thanks to gains by the former in the recent election (p. 12). Neither the House nor the Senate resolves the issue by inauguration day, and the Automatic Succession Act of 1947

must be invoked. With no president-elect or vice president-elect, the Speaker of the House is entitled to assume the presidency (p. 13). President Gingrich prepares to implement his "Contract with America" (p. 14).

While Longley and Peirce do not claim that this scenario is likely, they contend that the mere possibility warrants a careful reconsideration of the electoral college. They commence with an historical examination of the college's origins and workings. Longley and Peirce argue that the Constitutional Convention of 1787 adopted this method for selecting the chief executive with "somewhat artificial" support. They explain that the college was the product of very little principled debate; rather, it was a compromise measure, eventually adopted by the Convention because of intense pressures to reach agreement. Furthermore, the authors assert, the final proposal for the electoral college received scant attention by the full Convention because the delegates all assumed that George Washington would be the first president and, therefore, cared little, at least in the short-run, about how he would be selected (p. 19). In short, Longley and Peirce conclude that the decision to create the electoral college lacked the "virtue" displayed by the founders in most of their debates (p. 26).

Having argued that the system's origins are suspect, the authors next move to the crux of their work: an analysis of the electoral college "[m]isbehaving." They explain that there are four ways in which the system can go awry: selection of the popular vote loser, selection by the House of Representatives because no candidate wins a majority in the college, selection of a candidate who amasses a mere plurality of the popular vote, and elections in which minor vote shifts in key states change the outcome (p. 26).

Using this framework of classification, the authors discuss recent "crisis elections" (p. 37). They argue that since World War II, "the electoral college has hung on the brink of deadlock or popular mandate reversal as often as it has faithfully recorded the voters' will" (p. 38). One of the six crisis elections the authors treat is that of 1948, in which the Democrats split into three wings, nominating Harry Truman, Strom Thurmond, and Henry Wallace. Although this division weakened Truman's base, he was still able to win by 114 votes in the electoral college. Longley and Peirce point out that Truman's victory was not as convincing as the electoral college tally makes it seem—a shift

of only 29,294 votes in three key states (California, Illinois, and Ohio) would have made Republican Thomas Dewey the winner. Another weakness in the college illustrated by the 1948 election, according to the authors, is the disproportionate impact that third-party candidates can have. Though New York, Michigan, and Maryland all produced popular majorities in favor of the Democratic candidates, Dewey won those states because the Democratic vote was split between Truman and Wallace. As such, states that wanted a Democrat in the White House ended up casting all of their electoral votes for a Republican (pp. 38–43).

After analyzing such "crisis" elections, Longley and Peirce take a step back and examine how a president is selected under the electoral college system. They provide a succinct summary of each step in the process, noting that while most Americans think presidential selection ends on election day, the popular vote is really just the first of many steps in the electoral system (p. 93). They concentrate on the electors themselves, whose actual role is little understood by the public. Longley and Peirce tell us that electors are most commonly nominated by political parties and then voted for, so to speak, by the people (a vote for a presidential candidate in the general election is actually a vote for all of the electors in that state who have pledged their support to that candidate) (p. 100). Though the electors, once elected, could legally cast their votes without regard to the results of the popular election, they have almost universally acted in accord with popular will since the early nineteenth century (p. 103). In fact, only eight of the 18,995 electors between 1824 and 1992 cast their votes against the candidates of their states' popular mandate (p. 106).

The authors next examine biases in the college's manner of computing votes. They argue that the system distorts the popular vote because: (1) the unit-vote system gives all of a state's electoral votes to the popular victor; (2) the method of assigning electors (total number of representatives in Congress) gives small states undue influence because all states have two Senators; and (3) the assignment of electors based on Congressional representation leaves no room for factoring in voter turnout (p. 128). The authors also contend that the electoral college disproportionately weights an individual vote in a very large state. This analysis hinges on a computation of the voting power of an individual citizen in each state. The computation creates an in-

dex which combines the probability that a particular state will determine the outcome of an election and the chance that an individual citizen's vote can change that state's winner (p. 142). The resulting index shows that each California voter possesses voting power (the power to determine the outcome of the national election) over 2.5 times greater than that of a Montana resident (pp. 142–43). The authors use these indices to conclude that the voting power of certain regions, particularly the West, is disproportionately high, and that certain minorities, as a result of their geographical concentrations, either have unfairly high (e.g., Hispanics) or low (e.g., African-Americans) voting power (pp. 147–49). The moral, according to Longley and Peirce, is that the electoral college "is an institution that aggregates votes in an inherently imperfect manner" (p. 153).

All these matters which the authors raise are causes for concern and have generally escaped sustained critical reflection. Their argument that the electoral college should be entirely abandoned, however, goes too far. Its first weakness lies in the authors' assessment of the origins of the electoral college. Their contention that the system did not benefit from rigorous debate at the Constitutional Convention is inaccurate. Longley and Peirce are right to suggest that there was little debate geared to devising a system which would select the consensus candidate, George Washington, since the delegates assumed that his election was veritably certain no matter what the system. However, the delegates were cognizant that the mechanism for selecting the president, like all other constitutional matters, was crucial to the long-term viability of the Republic, and hence worthy of the deepest study.[1] The future implications of every constitutional provision were duly noted; for example, the Convention had the foresight to stipulate that the federal government retain the power to ban slave importation twenty years hence, as no agreement on the slavery issue could be reached at the time.[2] After months of ideological stalemate on the matter of executive selection, the Convention referred the dilemma to the Committee of Eleven,

---

[1] MAX FARRAND, THE FRAMING OF THE CONSTITUTION OF THE UNITED STATES 163 (1913).

[2] U.S. CONST. art. I, § 9. While this provision makes no explicit mention of slavery, its intent is clear. THE FEDERALIST NO. 42, at 266–67 (James Madison) (Clinton Rossiter ed., 1961).

which proposed a selection process roughly that of the electoral college.[3]

Their recommendation, moreover, was not the result of expedient compromise. It reflected the same principled disagreements on democratic governance that underwrote the entire Convention. One such conflict concerned the degree to which citizens could be trusted to select the executive. The founders worried that the people lacked adequate knowledge or judgment for so important a decision, yet they recognized that only the expression of the popular will could legitimize a presidential election. As Alexander Hamilton put it, "It is desirable that the sense of the people should operate in the choice . . . [yet] equally desirable that the immediate election should be made by men most capable of analyzing the qualities [necessary in a successful president]."[4]

The proposition of an electoral college balanced these interests. The people's representatives in the states decide on the means for selecting electors (including the possibility of their direct, popular election),[5] yet the electors themselves decide how they will cast their own votes.[6] Furthermore, the electoral college proposition balanced the interests of large and small states. The apportionment to states of quotas of electors based on congressional representation, the framers realized, would grant the large states a greater say in the college.[7] In the event that no candidate wins a majority of electoral votes, then the voting in the House by state delegation puts small states back on equal footing. The founders actually assumed that elections would more often than not be thrown to the House.[8] Since the House could only chose from among the three candidates with the most electoral votes, the founders concluded that this system created parity between large and small states by allowing the former, exerting their significant electoral power, to choose the candidates from whom the states, on equal footing, would select the president.[9] Granted, this was a compromise, as Longley and

---

[3] The committee's proposal provided for electoral deadlocks to be broken in the Senate rather than in the House. FARRAND, *supra* note 1, at 168.

[4] *See* THE FEDERALIST No. 68 (Alexander Hamilton), *supra* note 2, at 412.

[5] FARRAND, *supra* note 1, at 164.

[6] *Id.* at 164–65.

[7] *Id.* at 167.

[8] *Id.* at 167–68.

[9] *Id.*

Peirce assert, but it was based on the same principles of "virtue" that inspired the creation of a bicameral legislature (p. 26).

Beyond the circumstances of the college's origins, the authors argue the college's putative fatal flaws. They cite past elections which were either almost or actually decided against the popular will. It is worth noting at the outset that the electoral college has only twice (or perhaps thrice)[10] actually selected a popular vote loser (p. 26).[11] One of these instances, the 1876 selection of Rutherford Hayes over Samuel Tildon, was the product of a bargain involving the removal of Northern troops from the pro-Tildon South.[12] Furthermore, Tildon's popular vote victory in 1876 was tenuous, at best. Thousands of recently freed slaves, who would undoubtedly have supported the Republican Hayes, were kept from the Southern polls.[13] Longley and Peirce are thus left with just one election in our nation's history in which the electoral college, acting on its own, enabled a candidate without a popular plurality to assume the presidency: the election of Benjamin Harrison, who lost the popular vote to Grover Cleveland by a mere 0.8% (p. 27). Nearly always, then, the popular choice is also the electoral choice.

Even so, the authors assert that the very possibility of the popular winner's losing in the electoral college warrants abandoning the college system: "What good reason is there to continue such an irrational voting system in an advanced democratic nation, where the ideal of popular choice is the most deeply ingrained of governmental principles?" (p. 125). The authors' narrow framing of this query indicates the ultimate shortcoming of *The Electoral College Primer*. Nowhere in the work do Longley and Peirce consider that the college might serve positive functions other than to mirror the popular vote. In their limited vision of the electoral college's mission, the authors imagine only one alternative to it, namely, direct, popular election: "the choice of the chief executive must be the people's, and it should rest with none other than them" (p. 125).

---

[10] The possible third case is that of the 1960 election. The authors suggest an alternate method for counting Alabama's votes that would make Richard Nixon the popular victor, though John F. Kennedy still would win in the electoral college. LONGLEY & PEIRCE at 47–49.

[11] Longley and Peirce exclude from this count the selection of John Quincy Adams over Andrew Jackson in 1824 because this determination was made by the House, not the electoral college.

[12] ERIC FONER, A SHORT HISTORY OF THE RECONSTRUCTION 242–44 (1990).

[13] 2 BERNARD BAILYN ET AL., THE GREAT REPUBLIC 62 (1992).

There are, however, other ideals and objectives involved in the electoral system besides strict fealty to popular balloting. From the time of the Constitutional Convention to the present, the principle of majority rule has not been interpreted to preclude competing doctrines. James Madison popularized the notion that one rudiment of American democracy is the prevention of a "tyranny of the majority,"[14] and the electoral college has, on occasion, served this principle well. In the 1948 election, for instance, Strom Thurmond received only 2.4% of the popular vote. His support was concentrated in like-minded Southern states, and the Dixiecrat won four such states (p. 173). Thus, his constituency was able to register a statement that would have gone all but unnoticed in a direct vote system.

Additionally, we have already noted Longley and Peirce's observation that Truman lost three key states, and their seventy-four electoral votes, because some liberals in those states voted for Wallace, thereby giving a popular plurality to the Republican Dewey (p. 43). While the authors lament that three states whose voters cast primarily liberal ballots ended up casting all of their electoral votes for a conservative, they fail to consider the merits of a magnification of the minority's voice. In a direct, popular election, the votes cast for Wallace in these states would have had no practical effect. Given the electoral college system, in which Wallace's supporters actually determined the election's outcome in those three states, the Wallace constituency was able to convey a clear message and with great impact.

An even more important principle served by the electoral college is that of federalism. Candidates must address the specific, even parochial, interests of individual states as long as the electoral system aggregates votes by state. In a direct electoral system, candidates would be free to ignore the individual state as a discrete constituency to be courted and ingratiated. This does not mean, on the other hand, that larger states will necessarily be doted upon at the expense of smaller ones. Candidates are aware that the election might have to be decided in Congress, where smaller states enjoy disproportionate power under the electoral college system, as outlined above. Contenders for the presidency, therefore, can ill-afford to ignore smaller states in their campaigning. Longley and Peirce overlook these ways in

[14] *See* THE FEDERALIST No. 10 (James Madison), *supra* note 2, at 77.

which federalism is bolstered by the electoral college, given their one-dimensional view of the college's purpose.

One might still plausibly argue that, on balance, the various ancillary democratic functions served by the college are outweighed by the potential danger in an electoral result in which popular will is patently ignored. Unfortunately, *The Electoral College Primer* does not tender such an argument. The authors' initial hypothetical only hints at such an argument and, undeveloped, is easily countered by asserting its statistical improbability, as evidenced by the empirical record: with barely an exception, the electoral college indeed enacts the popular will. Even on the rare occasions in which the system produced a result which deviated (ever so slightly) from the popular will, other democratic goals unrecognized by the authors were achieved. The electoral college thus upholds the popular will while preserving competing ideals basic to the Republic. As Alexander Hamilton remarked of the electoral college, "I . . . hesitate not to affirm that if the manner of it be not perfect, it is at least excellent."[15]

—*Grant M. Dixton*

[15] *See* THE FEDERALIST No. 68 (Alexander Hamilton), *supra* note 2, at 412.

THE POWER OF SEPARATION: AMERICAN CONSTITUTIONALISM AND THE MYTH OF THE LEGISLATIVE VETO. By *Jessica Korn*. Princeton, N.J.: Princeton University Press, 1996. Pp. 178, notes, index. $29.95 cloth.

As more countries attempt the transition to democratic government, Jessica Korn argues for the importance of reevaluating the underpinnings of our own system. In particular, Korn explores the continuing viability of the separation of powers doctrine. Her analytic crucible is the recent controversy over the legislative veto. She takes issue with political scientists, legal scholars, and journalists whose critique of the separation of powers doctrine underwrites a broader attack on the relevance of American constitutional democracy at century's end. Ultimately, the conclusion she derives from her defense of the separation of powers doctrine suffers from the same overgeneralization of which she accuses others: her sanguine assessment of the doctrine is a flimsy foundation upon which to ground her larger point.

Korn states her goal precisely. She aims to determine "whether the American constitutional order, designed in the eighteenth century for a fledgling, agrarian nation, can fulfill the governing needs of an industrial superpower in the twentieth century" (p. 1). She seeks her answer in the debate that has roiled ever since Woodrow Wilson's aspersions on the separation of powers doctrine. Wilson had argued that tripartite government, with its supposed "fundamental structural defects" (p. 2), is anachronistic in that it cannot support the "expansion and centralization of federal power made necessary by the profound political and social changes caused, at the turn of the century, by large-scale urbanization, immigration, and industrialization" (p. 4).

Wilson wrote that "the federal government lacks strength because its powers are divided, lacks promptness because its authorities are multiplied, lacks wieldiness because its processes are roundabout, lacks efficiency because its responsibility is indistinct and its action without competent direction" (p. 19). Korn endeavors to rebut Wilson's criticism, still influential in some quarters today, by arguing that the separation of powers doctrine allows for great flexibility.

According to Korn, the Wilsonians misunderstand the intent of the Framers. The Framers set out to create a Constitution with the dual aim of "ensuring effective governance" and "protecting

liberty" (p. 14). The separation of powers doctrine, therefore, must be judged not only in terms of the efficiency of the division of labor, but also in terms of its function as a bulwark for "the sovereignty of the people over their government" (p. 20). The Framers understood that these "dual objectives" of the Constitution required friction between the branches of government. Korn suggests that the Wilsonian focus on efficiency to the exclusion of the other purpose has "led students of American politics to shortsighted conclusions about the political system's working capacity for policy leadership and good administration" (p. 21).

Citing examples such as the failed SALT II nuclear weapons treaty and the Clinton Administration's health care reform proposal, Korn indicates that the balance of power system worked exactly as intended by the Framers, and exactly as the exigencies of modern America require. The inter-party gridlock and executive-legislative wrangling which scuttled these policy initiatives faithfully reflected the lack of strong public backing for the proposals, and indeed signify the success of the system, not its failure (pp. 22–23). Korn concludes that the separation of powers is still an effective and fair mechanism for delivering as much efficiency in government as liberty will allow.

To make her point, Korn turns to the legislative veto, "one of the most highly touted of the many proposals to reform constitutional structure that emerged out of the Wilsonian critique of the Constitution" (p. 4). First authorized by the Reorganization Act of 1932, the legislative veto gives Congress great power to review the executive branch: to attach provisions to legislation and conditions to individual executive actions. The legislative veto takes three main forms: a two-house veto, a one-house veto, and a committee veto. Rarely used at first, the legislative veto became popular in the 1960s and 1970s, as Congress sought to check perceived over-reaching by the executive, as administrative agencies expanded rapidly in size and scope.

As Korn says, "[T]he legislative veto became representative of the 'congressional resurgence' of the 1970s" (p. 5). The veto seemed a logical response to the growing strength of administrative bureaucracy and of the presidency in the aftermath of the Great Depression and world wars. Boosters argued that only the exercise of the veto would prevent regulatory agencies and faceless apparatchiks from wielding policy-making power. Only such an extra-constitutional measure, they argued, could prevent the

executive and its agencies from usurping power rightfully vested in Capitol Hill (p. 7).

After the decision by the highest court in *Immigration and Naturalization Service v. Chadha*, 462 U.S. 919 (1983), the legislative veto garnered widespread media attention. In *Chadha*, Chief Justice Warren Burger, writing for the majority, held the legislative veto unconstitutional on grounds that it violates the bi-cameralism and presentment clauses of Article I of the Constitution (p. 28). The case involved a legislative veto placed in the Immigration and Naturalization Act of 1952. The Act allowed either House of Congress to nullify decisions by the Attorney General to suspend individual deportation actions. In 1974, the INS began deportation proceedings against Jagdish Chadha, a native of Kenya and a British citizen, who had first come to the United States on a student visa in 1972. Following the established procedures, Chadha requested and was granted a suspension of his deportation by the Attorney General. That year, the House vetoed some of the suspensions granted by the Attorney General, and the INS was forced to deport Chadha (p. 32).

Reviewing the case in 1980, the Ninth Circuit ruled in *Chadha v. INS*, 634 F.2d 408, that the legislative veto encroached upon the prerogatives of the executive branch and violated the bi-cameralism clause of the Constitution. The court held that this was unfair to Chadha, who had gone through the proper channels seeking and securing a suspension of his deportation order. The Supreme Court, in its ruling, not only declared the veto in the Immigration and Naturalization Act unconstitutional, but ruled likewise against all such legislative vetoes.

The *Chadha* decision came as the Reagan Administration struggled to assert executive power. Pundits and academics on both sides of the debate considered the decision by the Court pivotal in its implications for the constitutional balance of power. Justice Byron White argued in his dissent that "American government cannot adapt to changing political circumstances unless it undergoes amendments to the procedure that separate executive and legislative power" (p. 8). White argued that the veto was a good way to deal with changing circumstances given the "complexity and size of the Federal Government's responsibilities" and called the veto an "important if not indispensable political invention" (pp. 28–29). Even the majority, while ruling the veto unconstitutional, conceded its benefits (pp. 29–30).

Korn observes that since Wilsonians start out with the assumption that the separation of powers leads to deadlock, "the mere fact of a shortcut through constitutional procedure was proof enough that the veto mechanism was playing an important role in determining public policy" (p. 122). Critics lamented that *Chadha* would foster executive wantonness. As Korn explains, "The *Chadha* decision attracted widespread attention from analysts of American politics because it invalidated a legislative review procedure that was perceived to have enhanced congressional control over policymaking" (p. 27). Some legal scholars even judged the rollback of the veto power as "one of the most significant institutional developments in twentieth-century American politics" (p. 29).

Taking something of a meta-perspective, Korn addresses the significance of the debate itself. She argues that the import of both the veto power and the *Chadha* ruling were exaggerated. The Wilsonians had claimed that the very emergence of the extra-constitutional legislative veto was proof of the inability of the Constitution to cope with modernity. Korn counters that legislative vetoes have played a "minimal role" (pp. 7–8) in governance, and musters three case studies to discredit the view that the legislative veto has been a "powerful instrument of congressional oversight" (p. 116).

Looking at the Federal Trade Commission, the Education Department, and the president's power to grant Most-Favored Nation trade status, Korn argues first that supporters of the legislative veto misinterpreted the scope of *Chadha*. Congress has many constitutional means of oversight, including "report and wait" provisions that require the executive to report proposed actions before implementation, and informal pressures that members of Congress can exert on executive agencies and the president. (pp. 34–35). Thus, even without the veto, Congress's oversight powers remain strong. Indeed, she says, "the legislative veto shortcut was inconsequential to congressional control of the policymaking process because of the extensive set of powers in the Constitution already available to members of Congress" (p. 13).

Second, Korn argues that the legislative veto had never really been effective. It was meaningful chiefly as a token of the resurgence of Congress against the "Imperial" presidency and the growth of a "new regulatory regime" (p. 41). While important for congressional morale, the "legislative veto never functioned as a significant mechanism for affecting policy outcomes" (p. 43).

As Korn states, "[T]he legislative veto did not acquire popularity among members because of any proven capacity to increase congressional control over policy outcomes. Members enacted it into large numbers of statutes in the 1970s because they valued its power to symbolize congressional prerogatives" (p. 46).

Korn's argument, like that of the Wilsonians, is flawed in assuming the desirability of the veto's purpose: strict Congressional oversight of the executive. Wilsonians argue that extra-constitutional measures are necessary to empower Congress. Korn contends that the separation of powers doctrine accomplishes the same on its own. Her case studies demonstrate that Congress commands an impressive array of constitutional methods of oversight more effective than the veto. Since Korn and the Wilsonians assume the propriety of Congressional primacy, they overestimate what the emergence or dispensability of a procedural device like the legislative veto tells us about the abiding relevance of the Constitution. The prism of the legislative veto is too monochromatic to shed much light on the questions of whether Congress needs more leverage in the twentieth century given the proliferation of federal agencies and the scope of their work, whether the executive can better handle its new responsibilities alone, or whether there is some happy medium. At root, the question of whether checks and balances today are more costly than beneficial turns on a plethora of factors; the role of any single factor is inevitably incomplete as a measure.

This inadequacy ultimately trivializes her discussion of case studies. For example, in her discussion of the Federal Trade Commission, Korn argues that the legislative veto proved ineffective and was largely symbolic given the Constitutional methods that Congress used to rein in the FTC. A legislative veto was first placed on the FTC's regulation of unfair or deceptive trade practices in the 1980 FTC Reauthorization Act. The veto was a two-house veto of any final regulations promulgated by the FTC. After *Chadha*, many thought the FTC would once again evade oversight. That never happened because Congress invoked constitutional measures, including special procedural requirements, which set operational parameters for the FTC. The agency was to comply with the practice of publishing proposed regulations in the Federal Register and soliciting feedback before establishing final rules; in addition, the FTC was required to hold public hearings on its proposed regulations.

The FTC had attracted congressional scrutiny mainly for the agency's practice of commencing regulatory investigations into industries that had not manifestly violated any fair trade rules. Korn reasons that in this instance, the legislative veto was "functionally irrelevant to solving the problem of the 'runaway' FTC . . . ." (p. 58) because the veto could only override final regulations. It could not affect the FTC's initial proposals for rules and for investigations. The veto served only to "symbolize congressional power, not alter policy outcomes" (pp. 60–61). Accordingly, Korn concludes that the separation of powers system achieved in practice what the legislative veto could not even in theory: the "American political system is clearly not dependent on shortcuts through constitutional procedure to restrain a politically inastute agency from exercising its powers unwisely" (p. 68).

Unfortunately, her choice of examples here is infelicitous. Korn admits that much of the change at the FTC came not as a result of Congressional action, but pursuant to internal changes at the FTC. During the Reagan Administration, the agency imposed on itself stricter standards for initiating regulatory proceedings. Decisions about investigations were made on a case by case basis, rather than industry-wide. It follows that not only did the extra-constitutional legislative veto have no impact on the FTC, but neither did Congress's constitutionally warranted actions.

Korn's analysis of Congress's attempt to control education policy with the legislative veto suffers from the same defect. Inserted into the Education Amendments of 1972 (creating the Pell Grant financial aid program) and the General Education Provisions Act of 1974, the legislative veto over the Office of Education (later the Department of Education) supposedly granted congressional control over federal education policy. Availing itself of its traditional constitutional prerogatives, Congress decided to legislate the needs-analysis formula for Pell Grants on a per annum basis rather than use its one-house veto over analyses proposed by the Department of Education. When the Department of Education launched a program about which Congress had qualms, Congress opted to block the Department with ad hoc statutes and to deploy its so-called "report and wait" power, which forced the Department to inform Congress before taking action. Under the Pucinski and Green amendments, Congress ordered the Department to publish its rules in the Federal Register and to cite statutory support for its proposed regulations.

When the Nixon Administration wanted to eliminate campus-based financial aid programs and to institute the Pell Grant program, Congress passed a statute to bar such a policy (p. 75).

Korn concludes that these constitutional levers gave Congress efficient and decisive oversight vis-a-vis the executive branch, without having to resort to the legislative veto: "Forced to comply with comprehensive reporting requirements, [the Office of Education] quickly ceased operating like a loose cannon" (p. 74). The veto "was inconsequential to Congress's impressive power to control the administration of education policy" (p. 73).

Korn even contends that *Chadha* allowed Congress to do its job better. After *Chadha*, Congress officially rescinded the power of the Secretary of Education to establish Pell needs-analysis, and it took full responsibility for the program itself. Congress also established "reg-neg" provisions for other educational policies, which required the Department to hold negotiations and discussions with interested members of the public about its policies. Korn claims the "reg-neg" procedure is a "powerful solution to congressional policymaking needs" (p. 89) that fosters government openness. The education case study yields "evidence that separation of powers procedures work to make members better at fulfilling their representative function" (p. 89).

The argument is not altogether convincing. While the case study does show the superfluity of the legislative veto for effective congressional oversight, the assumption that Congress ought to retain such extensive watchdog powers over the executive is not thereby supported. Whereas in the FTC case, it was clear that Congress needed to step in and assert control over the agency (even former FTC heads admitted the over-zealousness of the agency), it is not necessarily true that the best way to run federal education policy is for Congress to micromanage programs such as Pell Grants, down to devising the needs-analysis formula. Congress would be unable to function if it took outright responsibility for implementing every administrative program it deemed important.

Moreover, Korn offers no evidence that the "reg-neg" procedure is good policy. The openness it affords is a double-edged sword. The individuals likely to be present at "reg-neg" meetings are lobbyists for those with the greatest material interests and resources. Lobbyists for teacher unions, textbook companies, or banks interested in financial aid policy might not be ideal witnesses at hearings to determine educational policy.

Clearly, the education case study raises just as many questions about the separation of powers doctrine as it answers.

Korn's final example, the legislative veto placed in the Jackson-Vanik Amendment to the Trade Act of 1974, bogs down in similar conundra. Backers of the Jackson-Vanik Amendment attempted to reassert congressional control over trade policy. The Amendment set back President Richard Nixon's detente policy by tying trade to human rights policies, specifically those regarding emigration restrictions. If the president wished to waive the restriction, he was subject to a legislative veto. Congress also placed restrictions on the president's ability to negotiate bilateral trade agreements and to extend MFN status to communist countries.

In the wake of *Chadha*, many expected Congress's oversight on trade to diminish. Korn points out that *Chadha* was inconsequential because the legislative veto over presidential waiver authority or the extension of MFN to specific communist countries was never used. A veto was brought to the floor once over Romania in 1979, but it lost by a wide margin (p. 99). Korn argues that Congress instead opted to use a different device, namely, conditions bills. Perfectly constitutional, the conditions bills were passed by both houses and required that certain human rights conditions be met before MFN could be extended to a certain country.

The clearest case is the MFN dispute with China. After the Tiananmen Square incident, Congress passed a conditions bill in 1990 that tied annual MFN renewal to progress on human rights. Korn argues that the "conditions bills proved a much more powerful mechanism than disapproval resolutions by which to send a message protesting human-rights abuses" (p. 104). Instead of just vetoing MFN extension, which could be damaging to American business interests and could actually hurt the human rights effort, conditions bills constituted a less dramatic, yet patently efficacious way, to prod China toward reform.

Once again, Korn's analysis falters at a deeper level. It is true that the conditions bills proved far more effective than the legislative veto. But this does not go to the question of the extent to which this power, the leverage built into the separation of powers doctrine, should rightfully go. Korn assumes that using "conditions bills to force the president to pay attention and respond to congressional views" (p. 115) is a good policy outcome. But restricting the president's ability to extend MFN to

foreign countries is not necessarily unequivocally desirable. Trade policy, as demonstrated by the Smoot-Hawley Tariff Act of 1930, is susceptible to interest group pressure exerted on Congress. Even Korn admits that Congress really did not want to deny MFN to China, because of the prospect of dire fallout. It is not evident that utter congressional leverage over trade is beneficial. The larger question about the separation of powers doctrine remains unaddressed.

Despite these weaknesses, Korn's book makes an important contribution to the study of constitutional separation of powers. She demonstrates that the legislative veto did not deserve the attention it received, as it influenced policy far less than is supposed. She also argues cogently that the separation of powers doctrine is not as flawed as Wilsonians claim. Using constitutional methods, Congress was able to rein in the FTC and the Department of Education, and ensure that they did not promulgate rules arbitrarily without public input and approval. In addition, Congress's retention of some control over trade policy, out of idealism as well as on behalf of interested constituents, for better or worse, can be achieved without extra-constitutional measures. This demonstrates that separation of powers works and is adaptable to contemporary issues.

Korn overstates her case, however. Having spent an entire book describing how others overestimated the importance of the legislative veto and used the phenomenon of its emergence to support a Wilsonian critique of the Constitution, she uses counter-phenomena—the veto's disutility, as proven ultimately by *Chadha*'s lack of repercussions—to rebut the Wilsonians. Her critique proves that the legislative veto may not have been the Holy Grail that the Wilsonians (mis)took it for, but it does not show that the Wilsonian argument is meritless. Recent examples of divided government indicate that the separation of powers doctrine is a clumsy device for handling complicated modern problems such as the national debt and Social Security. A deeper study of the policy outcomes produced, or not produced, by the separation of powers system, would be more helpful in gauging its effectiveness.

—*Christopher Kao*