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THE SMALL-BUSINESS EXEMPTION UNDER THE FAIR LABOR STANDARDS ACT: THE “ORIGINAL” ACCUMULATION OF CAPITAL AND THE INVERSION OF INDUSTRIAL POLICY

*Marc Linder**

A . . . self-respecting democracy can plead no . . . economic reason for chiseling workers' wages or stretching workers' hours. . . . All but the hopelessly reactionary will agree that to conserve our primary resources of man power, government must have some control over . . . the exploitation of unorganized labor.¹

—President Franklin D. Roosevelt, 1937

By expanding and increasing the FLSA small business exemption, we have done much to preserve the admirable capacity of American entrepreneurs to grow from today's small employers into the larger employers of tomorrow. That is good for the economy; it is good for America's work force.²

—President George Bush, 1989

* Professor, University of Iowa. B.A., University of Chicago; Ph.D, Princeton; J.D., Harvard. Jason Befus's courage on the roof and the ground in sticking up for his rights, made this article possible and necessary. Larry Norton subjected the manuscript to embarrassing criticism, while Cathy Kiley Ruckelshaus brought her demanding standards to bear by insisting on clarifications, documentation and the elimination of oversimplifications.

¹ *The President Recommends Legislation Establishing Minimum Wages and Maximum Hours*, reprinted in THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT: 1937 VOLUME: THE CONSTITUTION PREVAILS 209, 210-11 (1941).

² George Bush, *Statement upon Signing H.R. 2710*, reprinted in 2 PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE BUSH: 1989, at 1533 (1990).

I. THIS OVERTIME IS ON THE HOUSE

Another issue that has come to our attention is the concern of many small contractors that they will be placed at a competitive disadvantage against other contractors who are not complying with the rule and who may escape OSHA enforcement. What some contractors may not realize is that OSHA does not have jurisdiction over sole proprietorships or other companies where no employer-employee relationship exists. Unfortunately, this may mean that there is not a level playing field between these different types of companies in the residential construction industry, so the concern is understandable. It is not, however, a valid reason to deny needed fall protection to millions of workers.³

Hail as big as baseballs pounded Iowa City, Iowa, in the late afternoon of May 18, 1997.⁴ In 15 minutes the storm damaged enough houses to qualify as the 1997 Full Employment for Roofers Act (of Nature). Because the damage outran the capacity of local roofing contractors to respond to homeowners' calls—spurred on by an invasion of hundreds of insurance agents detailed by insurance companies to inspect and authorize payments for roof repairs⁵—"hailstormers," migrating roofing contractors and their crews who follow storms around the country, "fill[ing] in labor vacuums," soon arrived and settled in for months of work.⁶

³ *OSHA Fall Protection Standards: Hearings Before the Subcommittee on Regulation and Paperwork of the House Committee on Small Business*, 104th Cong. 73-74 (1995) (statement of Joseph Dear, Assistant Secretary of Labor for Occupational Safety and Health).

⁴ *Rain, Hail, Tornadoes Hit Eastern Iowa*, DES MOINES REG., May 19, 1997, at 2.

⁵ Associated Press, *Insurance Claims Flood in After Hailstorm*, (May 21, 1997) <<http://thonline.com/news/052197/Iowa/59917.html>>.

⁶ Kathleen Hughes, *Hailstormers '97: Transient Roofing Crews Invade Johnson County*, ICON (Aug. 7, 1997) <<http://www.jeonet.com/icon/back/1997/-08-07-97/cover.html>>.

In June, a 24-year-old local unemployed man noticed a posting at the Iowa Workforce Development (aka unemployment) office in Iowa City for a job as a roofer. Although he had never worked as a roofer, the \$8 an hour wage exceeded the pay of the other listed jobs.⁷ When he called, the employer hired him on the spot.

As the worker soon discovered, however, the conditions of employment left much to be desired. Despite the fact that Iowa City boasted a 2 percent unemployment rate, among the lowest in the United States, and has enjoyed such low rates for years,⁸ the employer did not pay overtime (for hours in excess of 40 per workweek), maintain a workers compensation policy, or pay into the social security or unemployment insurance systems. The employer was also often weeks behind in paying wages. Despite the fact that roofing is very dangerous work—61 roofers in the United States were killed on the job in 1996 alone⁹—the employer also

⁷ Nationally the mean hourly wage for roofers was \$12.87 in 1996. The modal wage range—that is, the wage which the largest group of roofers (17 percent) received—was \$5.75-\$8.49. Roofing was the only construction trade characterized by such a low modal wage range. U.S. Bureau of Labor Statistics, *Occupational Employment Statistics: 1996 National Occupational Employment and Wage Data* (visited Apr. 19, 1998) <<http://stats.bls.gov/oes/national/-oes87808.html>>. The establishment-based wage data collected by the Bureau of Labor Statistics (“BLS”) are flawed by virtue of being linked to employers’ reports to state unemployment insurance systems. U.S. BUREAU OF LABOR STATISTICS, BLS HANDBOOK OF METHODS 17-19, 32-34, 42-46 (1997). Because employers who, like the one mentioned in the text, do not comply with their obligations to pay into that system also tend to pay lower wages, their absence from the sample distorts the average wage levels and wage range distributions. The BLS is aware of this flaw and suspects that this uncovered sector of construction has expanded during the 1980s and 1990s, but does not adjust for it. Telephone Interview with George Werking, Assistant Commissioner, Office of Federal/State Programs, Department of Labor (Feb. 17, 1998).

⁸ The unemployment rate was as low as 0.6 percent for 1989 and never exceeded 3.4 percent on an annual basis in the last 10 years. Iowa Workforce Development, LMI Bureau, *Iowa City Labor Force Summary* (visited Apr. 19, 1998). <<http://www.state.ia.us/government/wd/lmi/etables/cityiowa.txt>>.

⁹ U.S. DEPT. OF LABOR, CENSUS OF FATAL OCCUPATIONAL INJURIES tbl.2 (Nov. 24, 1997).

failed to comply with the Occupational Safety and Health Administration's fall protection standards for residential roofing.¹⁰

Arrests throughout the spring and summer of "illegal aliens" working for "substandard wages" for out-of-state roofing contractors¹¹ pointed to another facet of the paradoxical coexistence of unfavorable working conditions and a very tight labor market.¹² Local observers were moved by the illegality of such conditions, including the failure to report wages to the Internal Revenue Service, when Mexican workers were involved:¹³ "No disability, no social security, no insurance, nothing. It's not the way to . . . sub the work out."¹⁴ But the almost identical practices of local roofers vis-à-vis local or, in any event, U.S.-citizen workers, which had been quotidian for years, remained invisible to them and never prompted anyone to protest.

Unbeknownst to him, the worker was embarking upon a labor law odyssey in the course of which he would become the victim of the Fair Labor Standards Amendments of 1989, which were best known for having raised the minimum wage. By the time he was fired in November for attempting to assert his rights under various labor and social insurance laws, he would know more about one particular aspect of those amendments than virtually all the lobbyists who pleaded for them, the legislators who enacted them, and the employers' associations and labor unions that are supposed to monitor such laws.

¹⁰ 29 C.F.R. §§ 1926.501(b)(13), 1926.502 (1997). Throughout this Article, the term "residential" does not refer to high-rise apartment houses.

¹¹ Dave Gosch, *Illegal Aliens Pouring In to Fix Hail-Damaged Roofs*, CEDAR RAPIDS GAZETTE, (July 11, 1997) <<http://www.gazetteonline.com/showcase/show934.html>>. See also Iowa, STATES NEWS BRIEFS, May 30, 1997.

¹² In California, state labor agencies have added construction (together with restaurants) to agriculture and garment manufacture as industries targeted for investigation. Construction was selected for investigation because it draws on the same (immigrant) labor base of "the 'most exploitable' workers." Andy McCue, *State to Expand Crackdown on Labor Law Violations*, PRESS-ENTERPRISE (Riverside, Cal.), Dec. 4, 1997, at D1 (quoting Jose Millan, State Labor Commissioner).

¹³ Gosch, *supra* note 11.

¹⁴ Hughes, *supra* note 6 (quoting Bill Schiefer, President of the Eastern Iowa Building Inspectors).

Dissatisfied because the employer was not withholding and paying in social security taxes, the worker spoke to a local labor law professor, who deposed him at length about various aspects of his employment. The professor suggested that the worker request time and one-half for the hundred hours of overtime that he had worked. At first the employer indicated that he would acquiesce in the demand. Later, however, he refused, saying that he had consulted an attorney, who had informed him that for two reasons he was not covered by the overtime law: he did not do \$500,000 of business annually, and he was not engaged in interstate commerce. The professor, who fancied himself immensely learned in the Fair Labor Standards Act ("FLSA"), laughed. He knew that Congress, taking its cue from the U.S. Supreme Court's vindication of an extremely expansive concept of the congressional commerce power, had inserted precisely such a broad coverage provision into the FLSA. He also knew that, apart from farm workers and a few other groups of marginal workers whose employers had successfully lobbied Congress for exemptions, "virtually every employer is covered under one or another of the law's coverage tests."¹⁵ The labor law sage confidently informed the worker that no matter how small the employer's business, "if he's got you hammering one nail or laying down one shingle that was produced outside of Iowa, you're covered."

Thus, too, began a labor law professor's odyssey and acquaintanceship with an obscure provision of the Fair Labor Standards Amendments of 1989. His journey would prove to be a lonely and jarring one since virtually no one else who should have been familiar with Congress's handiwork expelling employees of small construction contractors from the minimum wage and overtime had paved the road.

This Article examines the origins, development, legislative reality and rhetoric, and economic policy behind and consequences of the alleged small-business exemption in the FLSA. It explains how a mandatory fair labor standards regime originally designed to benefit workers and law-abiding employers by putting an end to wage-cutting as a competitive tool, has, perversely, been refash-

¹⁵ LEWIN G. JOEL III, *EVERY EMPLOYEE'S GUIDE TO THE LAW* 68 (1993).

ioned to authorize and reinforce such sweatshop methods. During the first quarter-century of the FLSA, small businesses were exempt because they were, by and large, identical with local economic activity, which premodern constitutional jurisprudence deemed beyond the congressional commerce power. Today, when virtually no constitutional obstacle stands in the way of achieving universal minimum wage and overtime protection, Congress is, ironically, excluding more and more workers of small employers from the FLSA. The Article explains that this exemption is dysfunctional because the new *de facto* industrial policy is based on a flawed theory of capital accumulation: freeing all of the smallest businesses from minimum wage and overtime obligations merely condemns the vast majority of their employees to working under substandard conditions without enabling more than a few of them to capitalize their wage-chiseling into job-generation. Exposing the juridical forms in which this transmogrification of public policy has been clothed is the purpose of this Article.

In order to focus attention on the bizarrely unsystematic and even blind manner in which the national legislature of the world's leading economy can make and silently invert industrial policy, this study uses the construction industry, which was the most radically affected by the 1989 amendments, to illustrate the process. It should have come as no surprise to Congress that the establishment of an enclave of unfair labor standards encourages small construction employers—defined as doing less than \$500,000 of business annually, but employing perhaps as many as 10 workers—to use their lawful exemption from the FLSA as a springboard to create a sector of outlawry in which they illegally exempt themselves from the rest of the federal and state labor-protective regime including social security, unemployment insurance, workers compensation, and occupational safety and health regulations. The fact that the roofing contractor mentioned at the outset had been failing to pay his employees time and a half for overtime long before a lawyer informed him that he was exempt underscores the seamlessness of this policy web: Congress was in large part merely legalizing or ratifying what had been rampant noncompliance

among small employers,¹⁶ the lawfulness of whose post-1989 compensation practices was purely inadvertent.

The Article begins with an analysis of the congressional transvaluation of small businesses, which culminated in a revision of the FLSA largely exempting them from minimum wage and overtime obligations; this statutory change was designed to constrain their employees to subsidize their capital accumulation by depressing wage and hour standards. The Article then proceeds to a detailed legislative history. First, it is shown that small business advocates' efforts to characterize the FLSA as having always embodied a general small-business exemption are misleading: to the extent that small firms' exempt status was a function of their local and non-interstate orientation, of which their smallness was an indicator, it was logical for Congress progressively to eliminate the exemption as the Supreme Court came to approve a vastly more comprehensive commerce power. The Article then systematizes the legislative history of the creation of "enterprise coverage" in 1961, which implemented the Court's modernized understanding of the breadth of federal regulation of an increasingly nationalized economy. After tracing the seeds of reversal of this congressional policy of ever broader coverage in 1977, the Article offers a comprehensive analysis of the 1989 amendments, which is enriched by interviews with many of the crucial participants. A review of further efforts in the 1990s to convert the small-business exemption from enterprise coverage into a total exemption by eliminating coverage of workers individually engaged in interstate commerce or production of goods for such commerce is followed by an empirical analysis of the surprisingly broad impact of the 1989 coverage restriction on the employees and employers in the construction industry. The penultimate section is devoted to explaining how the national legislative process generated such a perverse outcome. In the final section the troubling possibility is

¹⁶ The Minimum Wage Study Commission found the highest incidence of overtime violations in establishments with 1 to 9 employees: 26.7 percent of covered/nonexempt establishments in 1979. Brigitte Sellekaerts & Stephen Welch, *Violations of the Fair Labor Standards Act: Inferences from the 1979 Noncompliance Survey*, in 3 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 77, 83 tbl.3 (1981).

raised that, if large capital and organized labor regard the markets in which they operate as immune to competitive wage-cutting from the small-business sector, they might become indifferent to more extreme efforts to deregulate labor standards.

II. THE NEO-SMITHIAN ECONOMIC POLICY BEHIND THE UNFAIR LABOR STANDARDS AMENDMENTS OF 1989

Senator [H. ALEXANDER] SMITH. I have had called to my attention that the minimum wage legislation in Great Britain and Australia was an outcome of a socialistic government

Senator [PAUL] DOUGLAS. Historically . . . in Australia it was put into effect . . . by the Liberal Party. But in the state of Victoria, which is where minimum wages were tried most, it was by the so-called Conservative Party.

I would like to have the Secretary's statement as to whether he believes the minimum wage is a socialistic institution?

Secretary [of Labor JAMES] MITCHELL. No, sir.¹⁷

What possible context could link Karl Marx, who spilled nothing but contemptuous bile on socialist demands for a statutory minimum wage,¹⁸ with the U.S. national minimum wage and overtime law? After all, Marx's account of the 400-year history of Britain's "Blood Legislation . . . for Depressing Wages," which imposed a maximum on wages in order to suppress workers' efforts

¹⁷ *Amending the Fair Labor Standards Act of 1938: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 84th Cong. 58-59 (1955) [hereinafter *1955 Hearings*].

¹⁸ In 1880, leading French socialists asked Marx and Engels' help in drafting a labor party electoral program, which included a reformist demand for a statutory minimum wage, of which Marx said: "If the French proletariat is still so childish that it requires such bait, so is it not worth while drawing up any programme whatever." Letter from Karl Marx to Adolph Sorge (Nov. 5, 1880), in 34 KARL MARX & FRIEDRICH ENGELS, *WERKE* 475-76 (1966) (the latter part of this quotation is in English in the original); see also Letter from Friedrich Engels to Eduard Bernstein (Oct. 25, 1881), in 35 MARX & ENGELS, *supra* at 232.

to take advantage of temporarily favorable constellations of supply and demand in the labor market, but never a minimum wage to sustain their health and welfare, stressed that once the capitalist mode of production consolidated itself, such state-enforced measures were no longer necessary. On the contrary: at that point, refractory workers would be taken care of by capitalism's own "natural laws."¹⁹

The connection between Marx and the FLSA emerges in the exemptions and exclusions from that statute. The reason for this rather curious link is straightforward. The national minimum wage law fulfills a function analogous to the British maximum hours statutes—which workers in the United States generally still lack—that Marx praised: it imposes limits on the exploitability of especially vulnerable and unorganized workers.²⁰ Once such a statute protects the vast majority of a national working class and becomes an integral part of the institutional background of the labor market, those workers who are excluded from its protections are exposed to more palpable and brutal conditions of exploitation. Similarly, their employers, who are exempt from this law, become legal outlaws, free to impose on them the kinds of unfair labor standards that also make these employers unfair competitors vis-à-vis firms that are subject to and comply with the law.

What is the purpose of privileging the creation of these economic free-fire zones? Such a deregulatory program suited not only the rugged individualist rhetoric of the Reagan-Bush decade, but also the then new iconoclastic economic view that small businesses created most new jobs.²¹ As presented by President George Bush, whose explanation on the occasion of signing into law the minimum wage increase in 1989 furnishes an epigraph to this Article, the point of banishing the employees of small firms from the regime of entitlement to minimum and premium overtime wages is transparent enough: to enable small capitalists ruthlessly

¹⁹ 1 KARL MARX, *DAS KAPITAL: KRITIK DER POLITISCHEN ÖKONOMIE*, in 23 KARL MARX & FRIEDRICH ENGELS, *WERKE* 761-70 (1962) (1867).

²⁰ 1 KARL MARX, *DAS KAPITAL: KRITIK DER POLITISCHEN ÖKONOMIE*, in 23 MARX & ENGELS, *supra* note 18, at 279-320.

²¹ David Birch, *Who Creates Jobs?*, PUB. INTEREST No. 65 (Fall 1981), at 3.

to use unfettered labor market forces to pay low wages so that they can accelerate their accumulation of capital and facilitate the breakthrough to large-scale operations.

Here Marx reenters. He presented a history of the "so-called original accumulation" of capital to puncture apologetic Adam Smithian fairy tales of a peaceful "previous" accumulation, which were supposed to make plausible the mystery of the concentration of masses of capital and labor power in the hands of commodity producers, which is the result, but also the prerequisite, of capitalist production. In Marx's account this prehistory of capital, by contrast, was a centuries-long bloody process of the violent expropriation of the immediate producers and their forced transformation into the modern proletariat.²²

In explaining why he and the Congress decided to excuse small employers from paying the minimum wage and overtime, President Bush offered a new variant of the story of the previous accumulation of capital. Unlike the Smithian version, however, it was not set in "that rude state of society which precedes both the accumulation of stock and the appropriation of land"²³ Instead of choosing a fictitious location, Bush unmistakably placed it in the real late-twentieth-century business world. Ironically, what is mythical about this type of previous accumulation is not its site, but its very existence: for the typical effect of privileging a sector committed to unfair labor standards is not to catapult small employers into the ranks of large capital, but to enable already existing wage "chiselers" to survive and to encourage additional ones to start up.

In one ironic sense, however, the supposed basis for the exemption is, literally, set in a quasi-Smithian pre-accumulation state: one-fourth to one-third of all construction business owners report that they used no capital at all to start or become the owner of their business.²⁴ The ease with which would-be wage-chiselers

²² 1 KARL MARX, *DAS KAPITAL: KRITIK DER POLITISCHEN ÖKONOMIE*, in 23 MARX & ENGELS, *supra* note 18, at 741-91; ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 259-60 (Edwin Cannan ed. 1937)(1776).

²³ SMITH, *supra* note 22, at 47.

²⁴ U.S. BUREAU OF THE CENSUS, 1992 ECONOMIC CENSUS: CHARACTERISTICS OF BUSINESS OWNERS 118 tbl.14a (1997) (indicating that 26.4 percent of

can go into the construction business and take advantage of the exemption from coverage under the FLSA is even greater than these capital-less origins suggest. Many small special trade contractors, such as roofers, require their customers to pay for materials in advance. Moreover, in many cases the customers also pay the employees' wages: where contractors lack either assets or credit to meet their payroll, they, like the roofing contractor mentioned at the outset, unlawfully shifting their entrepreneurial risk, do not pay their workers until they themselves are paid.

By perpetuating the very conditions that it was the purpose of the FLSA to eliminate, Bush's approach undermines the law's underlying proto-industrial policy of driving such "parasitic" employers out of business and concentrating production in more efficient firms.²⁵ It also deflects attention from the fact that many construction employers (who remain or choose to remain) small can afford to pay high (union) wages and still make "a comfortable, if not luxurious living."²⁶

It was precisely firms, small or large, that were unable to increase productivity in the wake of mandated wage increases that a wage and hour statute was designed to oust from business in favor of more productive entities. Senator Kit Bond recently illustrated the inversion of industrial policy that has occurred by adducing a small firm's very inability to adapt to external stimuli

all construction business owners needed no capital to start their businesses); U.S. BUREAU OF THE CENSUS, 1987 ECONOMIC CENSUS: CHARACTERISTICS OF BUSINESS OWNERS 98 tbl.15a (1992) (reporting that proportions ranged from 26.2 percent among women, to 32.3 percent among white men, to 40.0 percent among blacks). The start-up capital "includes assets and money that were your own, that were given to you, and that you borrowed." *Id.* at C-1. Since capital requirements in the specialty trades, which constitute the bulk of the smallest employers, are below average for construction, this cross-tabulation, if available, would presumably reveal an even higher percentage of capital-less business founders.

²⁵ Marc Linder, *The Minimum Wage as Industrial Policy: A Forgotten Role*, 16 J. LEGIS. 151, 152 (1990).

²⁶ Gay Miller, *Union Plumber Fights Nonunion Competitor and Barbs About Bills*, WALL ST. J., July 24, 1977, at 1, 17 (reporting that plumbing contractor earns \$29,000 a year on revenue of \$279,000 paying \$12.33 an hour including benefits to four union journeymen plumbers).

as the reason for keeping it alive: "If you increase the minimum wage for the smallest of the employers, there are real tradeoffs. The smallest of the small employers, American businesses grossing under \$500,000 per year, will, in my view, be forced to lay off workers. . . . An increase in wages with no increase in productivity and revenues means lost jobs."²⁷ Moreover, exempting the very employers who are most likely not to pay the minimum wage turns into a farce the carefully orchestrated debates over raising a minimum wage that will not apply to those who need it most. (That farcicalness is underscored by the hopelessly obsolete level of the minimum wage setting: even after it was increased to \$4.75 in 1996, it amounted, in real terms, to only 65.9 percent of its all-time highest value in 1968, and remained far below the level attained in all years between 1956 and 1984.)²⁸

In an effort to enlist new sources of support for labor market deregulation, Republicans have more recently taken to suggesting that it is also a feminist policy: "Almost 8 million women-owned businesses exist in the United States, and many of those . . . are very small businesses just getting started. If they are getting started, if they are making a success, we do not want to penalize them and their workers by imposing on the smallest of the small businesses a burden that they cannot handle."²⁹ President Clinton's administrator of the Small Business Administration ("SBA") went even further, suggesting that subminimum wages in small businesses were discounted, as it were, by the fee that workers there owed the owners for employing them in their first jobs, providing general skills, "hiring a large fraction of part time, seasonal and contingent workers," and "bearing the cost of turnover associated with minimum wage jobs."³⁰

²⁷ 142 CONG. REC. 7410 (1996) (statement of Sen. Bond).

²⁸ Calculated according to U.S. Dept. of Labor, *Value of the Federal Minimum Wage, 1954-1996*, (visited Apr. 19, 1998) <<http://dol.gov/dol/esa/-public/minwage/chart2.htm>>. See GABRIEL KOLKO, MAIN CURRENTS IN AMERICAN HISTORY 326 (1984) (referring to the FLSA as "irrelevant to human needs . . .").

²⁹ 142 CONG. REC. at 7464 (statement of Sen. Bond).

³⁰ 142 CONG. REC. at 7465 (statement of Sen. Bond quoting from a letter from Phil Lader to the Secretary of Labor).

If these alleged “costs”³¹ seem more like the conditions that enable employers to take advantage of workers with little labor market power, just how far national economic policy has regressed, at least rhetorically, since the New Deal can be gauged by Senator Borah’s response in 1937 to Senator Pepper’s question as to what would happen under the FLSA if an employer could not afford to pay a living wage: “he should close up the business. No business has a right to coin the very lifeblood of workmen into dollars and cents.”³²

The left-wing Keynesian economist Joan Robinson, adapting Oscar Wilde’s bon mot, tweaked Marx by observing that the only thing worse than being exploited is not being exploited—namely, being unemployed. Late-twentieth-century employment policy in the United States appears to be based on a transvaluation of Robinson’s dictum: it is not so much that the only thing worse than being superexploited is not being superexploited, but, rather, that being superexploited, that is, working in the unfair labor standards sector, is actually good not only for their hyper-accumulating employers and the economy as a whole, but for the workers themselves. In contrast, even in the midst of the enormous unemployment of the 1930s, the original proponents of the FLSA proceeded from a radically different set of values. Senator Borah, for example, recognized no exceptions to his principle that “American industry can pay its employees enough to enable them to live. . . . [W]e have no right to work slaves in this country, either white or black. . . . I start with the proposition that the right to live is higher than the right to own a business.”³³ Sixty years later, Senator Bond, seeking allies for an amendment excluding yet more workers from the minimum wage, seemed to suggest that software-billionaires owed their vertical take-off careers from their humble beginnings in a garage to an exemption from paying the minimum wage: “If they become successful, like a Microsoft, as soon as they hit \$500,000 annual gross revenue, then the minimum wage goes up to the full amount provided in this bill.”³⁴

³¹ *Id.*

³² 81 CONG. REC. 7796 (1937).

³³ *Id.*

³⁴ 142 CONG. REC. at 7464.

Implicit in this Horatio Alger story is the admonition to those who work for the vast majority of would-be entrepreneurs who never grow into minimum wage coverage not to despair: their sacrifices make possible the Microsofts of the world. The severe employment-related disruptions associated with the typically brief lives and brutal deaths of small businesses also fed the new ideology of universal risk glorified by market-knows-besters in the wake of the demise of the post-World War II Keynesian boom. In the words of David Birch, the Reagan-era originator of the thesis that small businesses create most new jobs: "Those firms that insulate themselves from fluctuations appear to have cut off the very vitality that keeps their counterparts going. Just as failure appears essential to our system, so does instability."³⁵

III. THE NEXUS BETWEEN THE ANTIQUATED NOTION OF INTRASTATE COMMERCE AND SMALL BUSINESS

[A]n establishment that is under \$500,000 in annual gross receipts probably would not be substantially engaged in interstate commerce.³⁶

Initially, the implicit exemption of small employers from the FLSA in 1937-1938 resulted from the trepidations of the legislative drafters in the Roosevelt administration and Congress that the Supreme Court might strike down the statute as an unconstitutionally broad exercise of the legislature's commerce power.³⁷ A cautious approach was especially prevalent in the wake of the 1936 decision in *Carter v. Carter Coal Company*—the Court's atavistically narrow interpretation of the commerce clause as applied to federal regulation of the coal industry in the midst of the greatest economic crisis in U.S. history:

³⁵ Birch, *supra* note 21, at 9.

³⁶ *Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education & Labor*, 81st Cong. 95 (1949) (testimony of Harold Nystrom, Chief, Interpretation Branch, Office of the Solicitor, U.S. Dept. of Labor) [hereinafter 1949 *Hearings*].

³⁷ On the drafters' preoccupation with the possibility that the Supreme Court would strike down the statute, see George Paulsen, *Ghost of the NRA: Drafting National Wage and Hour Legislation in 1937*, 67 SOC. SCI. Q. 241 (1986).

The relation of employer and employee is a local relation. At common law, it is one of the domestic relations. The wages are paid for the doing of local work. Working conditions are obviously local conditions. The employees are not engaged in or about commerce, but exclusively in producing a commodity. And the controversies and evils, which it is the object of the act to regulate and minimize, are local controversies and evils affecting local work undertaken to accomplish that local result. Such effect as they may have upon commerce, however extensive it may be, is secondary and indirect. An increase in the greatness of the effect adds to its importance. It does not alter its character.³⁸

Based on this unambiguous rejection, the Solicitor of Labor informed the Secretary of Labor in early 1937 that any proposed labor legislation seeking to regulate "business enterprises of a purely local nature" "categorically possesses no constitutional validity."³⁹ Nevertheless, in April, just six weeks before the FLSA bill was introduced, the Supreme Court upheld the constitutionality of the National Labor Relations Act, which empowered the National Labor Relations Board to prevent any person from engaging in any unfair labor practice "affecting commerce."⁴⁰ *NLRB v. Jones & Laughlin Steel Corporation*,⁴¹ in effect overturning *Carter Coal Company*, finally made it possible to use an economically realistic concept of interstate commerce as the basis of federal labor standards legislation: "Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens or obstructions, Congress cannot be denied the power to

³⁸ *Carter v. Carter Coal Co.*, 298 U.S. 238, 308-09 (1936).

³⁹ Letter from Charles Gregory to Frances Perkins 1, 4 (Jan. 19, 1937), in *Frances Perkins Papers*, Rare Book and Manuscript Library, Columbia University Library (Subject: Constitutional Validity of Proposed Collective Bargaining Legislation) (on file with author).

⁴⁰ 29 U.S.C. § 160(a) (1994).

⁴¹ 301 U.S. 1 (1937).

exercise that control.”⁴² The Court, however, did set limits: this power could not be extended to “effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.”⁴³ The decision galvanized the Roosevelt administration to push forward with a fair labor standards bill, but some of the drafters were still skeptical of whether the Supreme Court would find that low wages and long hours spawned labor disputes that obstructed commerce.⁴⁴

In his message to Congress on May 24, 1937, the day on which the FLSA bill was introduced, President Roosevelt conceded that “there are many purely local pursuits and services which no Federal legislation can effectively cover.”⁴⁵ Although the original administration FLSA bill was titled, “A Bill To provide for the establishment of fair labor standards in employments in and affecting interstate commerce,” and its preamble or “legislative declaration” was phrased in terms of the “employment of workers in substandard labor conditions in occupations in interstate commerce, in the production of goods for interstate commerce, or otherwise directly affecting interstate commerce,”⁴⁶ the more expansive concept of “affecting interstate commerce” did not survive the conference committee.⁴⁷ The elimination of this wider scope was, as the Wage and Hour Administrator, who was to become increasingly frustrated by the limits of his enforcement jurisdiction, later observed, “primarily based on doubts as to whether coverage

⁴² *Jones*, 301 U.S. at 37. See also Robert Stern, *The Commerce Clause and the National Economy, 1933-1946: Part Two*, 59 HARV. L. REV. 883, 885 (1946).

⁴³ *Jones*, 301 U.S. at 37.

⁴⁴ GEORGE PAULSEN, *A LIVING WAGE FOR THE FORGOTTEN MAN: THE QUEST FOR FAIR LABOR STANDARDS 1933-1941* 74-75 (1996). The Supreme Court finally approved the “‘labor dispute’ theory” of coverage in *Maryland v. Wirtz*, 392 U.S. 183, 192 (1968).

⁴⁵ *The President Recommends Legislation Establishing Minimum Wages and Maximum Hours*, *supra* note 1, at 214.

⁴⁶ S. 2745, 75th Cong. § 1(a) (1937).

⁴⁷ H.R. REP. NO. 75-2738, at 13, 28 (1938); Fair Labor Standards Act of 1938, ch. 676, § 2(a), 52 Stat. 1060, 1060 (1938).

‘affecting commerce’ would be sustained by the Supreme Court.”⁴⁸

Those small employers that became exempt from the statute did so by virtue of the design of its narrow interstate commerce coverage provision, which did not even dare to reach the constitutionally permissible limits: intended to regulate only those industries and firms most unassailably engaged in interstate commerce, it inevitably left uncovered small companies whose operations were deemed remote from the national market. Thus Senator Hugo Black, who introduced the administration bill and chaired the Education and Labor Committee, reported on behalf of the committee six weeks later, when its revised bill still included “affecting interstate commerce,” that the bill “carefully excludes . . . business . . . of a purely local nature. [I]t is not even intended to include . . . those purely local and small business establishments that happen to lie near State lines, and solely on account of such location, actually serve a wholly local community trade within two States.”⁴⁹ Black, who presided over the first set of hearings, made clear the link between small size and noninterstate commerce by observing that the bill provided “standards for those business units that are actually engaged in and substantially and materially affecting interstate commerce . . . [l]eaving to the States and the local communities . . . the power of regulating the small business units that affect the local community only.”⁵⁰ Senator Black also emphasized that by limiting coverage to “goods which are actually manufactured for transportation and are transported in interstate commerce,” the bill “eliminate[d] . . . any idea that this is an effort to regulate wages and hours in the various service employments”⁵¹ Assistant Attorney General Robert Jackson, the administration’s chief spokesman at the hearings, whose task was to address the constitutional issues of the commerce power, added that as a

⁴⁸ U.S. DEPT. OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANNUAL REPORT 52 (1946).

⁴⁹ S. REP. NO. 75-884, at 5 (1937).

⁵⁰ *Fair Labor Standards Act of 1937: Joint Hearings Before the Senate Committee on Education and Labor and the House Committee on Labor*, 75th Cong. 36 (1937) [hereinafter *1937 Hearings*].

⁵¹ 81 CONG. REC. 7648 (1937).

result of administrative impracticalities, "perhaps it is best at the present moment not to attempt to regulate . . . [s]mall employers"⁵²

This legislative cautiousness, however, soon proved superfluous. As early as 1941, the Supreme Court, in rejecting a commerce clause-based attack against the FLSA, signaled that an employer's size alone did not compel a constitutionally based exemption:

Congress, to attain its objective in the suppression of nationwide competition in interstate commerce by goods produced under substandard conditions, has made no distinction as to the volume or amount of shipments in the commerce or of production for commerce by any particular shipper or producer. It recognized that in present day industry, competition by a small part may affect the whole and that the total effect of the competition of many small producers may be great.⁵³

Indeed, in 1948, when the Wage and Hour Division ("WHD") of the U.S. Department of Labor ("DOL") published data on the size-distribution of covered establishments, two-fifths employed three or fewer employees, including 18 percent that employed only one employee.⁵⁴ And in 1961, when Congress adopted the more expansive enterprise coverage approach, the use of a dollar-volume exemption level was designed to "provide more than adequate assurance that the newly covered enterprises will be those plainly engaged to a substantial extent in interstate commerce and should make it abundantly certain that no small local business will be affected."⁵⁵ By the 1960s, after the Supreme Court had removed

⁵² 1937 *Hearings*, *supra* note 50, at 49.

⁵³ *United States v. Darby*, 312 U.S. 100, 123 (1941).

⁵⁴ Calculated according to U.S. DEP'T OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANNUAL REPORT 85 tbl.16 (1948). The establishments for which no size distribution were available have been omitted from this calculation. The first such data (for 1950) to include construction revealed that 42 percent of the establishments employed three or fewer employees compared to 38 percent for all industries. U.S. DEP'T OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANNUAL REPORT 276 tbl.14 (1950).

⁵⁵ S. REP. NO. 87-145, at 44 (1961).

virtually all commerce-clause restraints on congressional power to regulate the economy,⁵⁶ Congress pushed coverage to small and local sites within the economic network of which the New Deal drafters of the FLSA could scarcely have dreamt. By the late 1960s, for example, the law required virtually all construction firms, regardless of size, to pay the minimum wage and time and one-half for overtime hours.

A few years later Congress was so confident of the reach of its commerce power that it could even “find[] that the employment of persons in domestic service in households affects commerce.”⁵⁷ Indeed, the way in which Congress fashioned this finding in 1974 verged on a constitutional provocation:

The Committee found that domestics and the equipment that they use in their work are in interstate commerce. For example, vacuum cleaners are produced in only six States, and laundry equipment is produced in only seven States, creating a tremendous flow in commerce of these items used daily by domestics. Also it is common knowledge that every domestic handles such items as soap, wax, and other household cleaners which have moved in interstate commerce. . . . In addition, employment of domestics in households frees time for the members of the household to themselves engage in activities in interstate commerce.⁵⁸

Yet three years later, a Democratic-controlled Congress set a precedent by increasing rather than decreasing the dollar-volume threshold below which employers were exempt from enterprise coverage. And in 1989, the Bush administration, by maneuvering congressional Democrats into acquiescing in an unprecedented retrograde curtailment of coverage (based on firm size) as the quid pro quo for an increase in the minimum wage, succeeded in excluding a large number of additional workers—potentially

⁵⁶ Even the Supreme Court’s stunning reversal of its 60-year-old expansive and deferential commerce power jurisprudence in holding unconstitutional a statute that criminalized knowing possession of a firearm in a school zone expressly reaffirmed the broad reach of the FLSA. *United States v. Lopez*, 514 U.S. 549, 558 (1995).

⁵⁷ 29 U.S.C. § 202(a) (1993).

⁵⁸ S. REP. NO. 93-690, at 21 (1974).

including 1.25 million or one-fourth of all construction employees—from the FLSA. In relieving tens of thousands of employers of the necessity of paying their employees the social wage, Congress has chosen to re-expose millions of workers to the bracing experience of total immersion in the sphere of unfair labor standards.

IV. THE VICISSITUDES OF CONSTRUCTION INDUSTRY COVERAGE

In my judgment, these people are in interstate commerce. They have been for the last 20 years. However, we have exempted them from the coverage of the act for economic reasons, not for constitutional reasons.⁵⁹

From the outset, the FLSA was dysfunctionally flawed by the discrepancy between its broadly declared objectives, on the one hand, and its narrow scope of coverage, intervention, and protection, on the other. The "Finding and Declaration of Policy" in the first section of the act announced that Congress sought to regulate interstate commerce in order to "correct and as rapidly as practicable to eliminate" "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers" that existed in industries engaged in commerce and production of goods for commerce and were spread and perpetuated through interstate commerce.⁶⁰ However, instead of structuring the statute so as to encompass as many workers as possible in order to effectuate this policy, Congress imposed a very narrow conception of coverage and superimposed on this general framework a substantively irrational and scandalously extensive hodgepodge of exemptions of employers and exclusions of workers that made it impossible to block the ramifying effects of wage-cutting throughout an increasingly national economy. In 1981, the Minimum Wage Study Commission

⁵⁹ 106 CONG. REC. S16,678 (daily ed. Aug. 18, 1960) (statement of Sen. John F. Kennedy).

⁶⁰ Fair Labor Standards Act of 1938, ch. 676, §§ 2(a), (b), 52 Stat. 1060, 1060 (1938).

determined that 10 percent of the employed workforce was not covered by the FLSA, but exemptions excluded a further 27 percent and 31 percent from the minimum wage and overtime provisions, respectively.⁶¹ This “bewildering array”⁶² of exemptions and exclusions, the products of efficacious employer lobbying, have become even more voluminous over time.⁶³ The commission calculated that “42 exemptions completely or partially exempt almost 30 million private-sector workers” from the minimum wage or overtime provisions.⁶⁴

The construction industry is an important case in point. When the FLSA was enacted in 1938, it was generally believed that most construction workers would not be entitled to the minimum wage or overtime because few could meet the requirement of being personally and individually “engaged in commerce or in the production of goods for commerce”⁶⁵ That year the Wage and Hour Administrator issued an interpretative bulletin stating that: “The employees of local construction contractors generally are not engaged in interstate commerce and do not produce any goods which are shipped or sold across State lines. Thus it is our opinion that employees engaged in the original construction of buildings are not generally within the scope of the Act, even if the buildings when completed are used to produce goods for commerce.” Some construction workers, however, the administrator ventured to speculate, might be covered. Employees of contractors engaged in the maintenance, repair, or reconstruction of highways, railroads,

⁶¹ Stephen Welch, *FLSA Coverage, Exemptions and Violations: Some Institutional Considerations*, in 3 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 1, 14 (1981).

⁶² *Id.* at 5.

⁶³ 29 U.S.C. § 213 (1994).

⁶⁴ 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 107 (1981).

⁶⁵ Fair Labor Standards Act of 1938, ch. 676, §§ 6(a), 7(a), 52 Stat. 1060, 1062, 1063 (1938). To be sure, many of the construction workers not covered by the FLSA were protected by the pre-New Deal Davis-Bacon Act, which required contractors on federal government projects to pay prevailing wages, thus protecting local wage levels from efforts by itinerant contractors to depress them by importing workers from other regions to work at lower rates. Act of Mar. 3, 1931, ch. 411, 46 Stat. 1494; ARMAND THIEBLOT, JR., *THE DAVIS-BACON ACT* (1975).

bridges, pipelines, and other "essential instrumentalities of interstate or foreign commerce would seem to be engaged in interstate commerce," while those employed to maintain, repair, or reconstruct buildings "used to produce goods for interstate commerce would seem to be engaged in a 'process or occupation necessary to the production' of such goods within Section 3(j) of the Act" and thus covered.⁶⁶

The first estimates of FLSA coverage that the WHD compiled in April 1939 did not even include construction workers among the 4,632,500 covered nonmanufacturing employees.⁶⁷ During World War II (1943), the WHD estimated that only 200,000 of 1,500,000 construction workers were covered and subject to the act's minimum wage and overtime provisions.⁶⁸

Despite the enormous amount of large-scale industrial, military, and infrastructural construction activity during World War II, even after it ended, the Associated General Contractors of America

⁶⁶ U.S. DEP'T OF LABOR, WAGE AND HOUR ADMINISTRATION, INTERPRETATIVE BULLETIN NO. 5, in 1940 WAGE AND HOUR MANUAL 18, 23 (Dec. 2, 1938; rev. Nov. 27, 1939). Vivien Hart incorrectly asserted that in the course of having "demolished specific exemptions" in 1966, Congress extended the definition of interstate commerce to include construction. *The Right to a Fair Wage: American Experience and the European Social Charter*, in WRITING A NATIONAL IDENTITY: POLITICAL, ECONOMIC, AND CULTURAL PERSPECTIVES ON THE WRITTEN CONSTITUTION 106, 117 (Vivien Hart & Shannon Stimson eds., 1993). First, construction was never exempt; second, it was not interstate commerce, but enterprise coverage that was defined to include construction; and finally, the year was 1961.

⁶⁷ FIRST ANNUAL REPORT OF THE ADMINISTRATOR OF THE WAGE AND HOUR DIVISION UNITED STATES DEPARTMENT OF LABOR FOR THE CALENDAR YEAR 1939 at 40-41 (1940). A comparative estimate of coverage in 1939 and 1947 also listed none of the 1,150,000 construction workers as covered in 1939. U.S. DEP'T OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISION, ANNUAL REPORT 80 tbl.13 (1948). The accuracy of these and all later DOL coverage estimates mentioned is suspect. According to Allan Moss, the chief economist of the WHD, the DOL never even revealed the underlying methodology. Moss is supervising preparation of new estimates for the 1990s, which he says will be the most accurate ever. Unfortunately, he would not pre-release the data, which were supposed to be available in early 1998. Telephone Interviews with Allan Moss (Nov. & Dec. 1997, Jan. 1998, Apr. 28, 1998).

⁶⁸ S. REP. NO. 79-1012, Pt. 2, at 87 tbl.44 (1946).

complained to the Senate Labor Committee that “the greatest uncertainty” existed as to FLSA’s applicability to construction: “The extent to which various construction operations constitute engaging in interstate commerce, or producing goods for interstate commerce has not yet been determined . . . although the law was enacted in 1938.”⁶⁹ The committee itself could do no better than offer its guess that construction was “[p]robably covered”⁷⁰ That construction firms preferred undergoing the anxiety of “the greatest uncertainty” to paying their employees overtime voluntarily and thus avoiding any legal disputes, suggests that construction workers lacked the labor market power to achieve such premium rates on their own—precisely the defect that the mandatory norm was designed to remedy.⁷¹

These early interpretations and speculations gave a premonition of the complex, narrow, and quasi-arbitrary judicial glosses that would follow as courts in the course of deciding coverage disputes strove to give meaning to cramped statutory language that increasingly conflicted with the FLSA’s invasively anticontractual orientation and the realities of a highly interdependent economy. As late as 1960, just a year before Congress expansively broadened the act’s commerce-based coverage, the Supreme Court, in yet another rearguard action denying overtime protection to employees of one of the country’s largest construction firms who had built a dam to increase a city’s water reservoir capacity, adverted to this tension:

⁶⁹ *Amendments of the Fair Labor Standards Act: Hearings Before a Subcommittee of the Senate Committee on Education and Labor*, 79th Cong. 883-84 (1945) [hereinafter *1945 Hearings*].

⁷⁰ S. REP. NO. 79-1012, Pt. 2, at 91. The committee’s uncertainty was in part a result of the fact that although the National Labor Relations Act provided for coverage of activities affecting commerce, construction was “the only major industry over which NLRB has not asserted jurisdiction.” *Id.* Prior to the enactment of Taft-Hartley in 1947, “Few cases were filed from the construction industry because of its widespread unionization and the nature of collective bargaining prevailing, and the Board had no desire to extend its operations into that field.” HARRY MILLIS & EMILY BROWN, *FROM THE WAGNER ACT TO TAFT-HARTLEY: A STUDY OF NATIONAL LABOR POLICY AND LABOR RELATIONS* 401 (1950).

⁷¹ By the early postwar period, FLSA’s unchanged minimum wage of 40 cents was so obsolete as to be economically irrelevant.

limits on coverage cannot be understood merely in terms of the social purposes of the Act, in light of which any limitations must appear inconsistent. For the Act also manifests the competing concern of Congress to avoid undue displacement of state regulation of activities of a dominantly local character. Accommodation of these interests was sought by the device of confinement of coverage to employment in activities of traditionally national concern.⁷²

In upholding the FLSA against a commerce clause-based constitutional challenge in 1941, the Supreme Court made it clear that the congressional commerce power "extends to those activities intrastate which so affect interstate commerce or the exercise of the power of Congress over it as to make regulation of them appropriate means to the attainment of a legitimate end, the exercise of the granted power of Congress to regulate interstate commerce."⁷³ But the next year the Supreme Court made it equally clear that: "The history of the legislation leaves no doubt that Congress chose not to enter areas which it might have occupied. As passed by the House, the bill applied to employers 'engaged in commerce in any industry affecting commerce.' . . . But the bill recommended by the conference applied only to employees 'engaged in commerce or in the production of goods for commerce'"⁷⁴

With the constitutional obstacles removed, it was up to Congress to enlarge the scope of coverage. The FLSA underwent no changes during World War II, but literally within days of the end of the war, President Truman accorded an important place to amending the statute in his program for the reconversion period. Starting from the position that the "foundations of a healthy national economy cannot be secure so long as any large section of

⁷² *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 316 (1960). On the company's size, see *H. B. Zachry Co. v. Mitchell*, 262 F.2d 546, 548 (5th Cir. 1959).

⁷³ *United States v. Darby*, 312 U.S. 100, 118 (1941).

⁷⁴ *A. B. Kirschbaum Co. v. Walling*, 316 U.S. 517, 522 (1942). The next year the Court reaffirmed that in the FLSA "Congress did not intend that the regulation of hours and wages should extend to the furthest reaches of federal authority." *McLeod v. Threkeld*, 319 U.S. 491, 493 (1943).

our working people receive substandard wages,” Truman proposed an extension of the act’s scope. The basis for the proposal focused on avoiding a race to the bottom: “There now exists a twilight zone in which some workers are covered, and others, doing similar work, are not. Extension of coverage would benefit both workers and employers by removing competitive inequities.”⁷⁵ Truman’s State of the Union Message in 1946 repeated the recommendation, shifting the focus to the need for a “decent standard of living” for those who did not “happen to be covered by the act as it now stands.”⁷⁶

In 1946 the Wage and Hour Administrator, who was confronted with the problem of enforcing the FLSA, was still complaining of the “serious problem” resulting from the fact that firms operating on an intrastate basis in competition with interstate firms were lawfully able to avoid minimum wage and overtime payments. As a result, the statutory policy of “eliminat[ing] unfair competition in common is defeated.” The administrator accordingly recommended that Congress amend the FLSA to reach the “activities affecting commerce” that the Supreme Court has already approved.⁷⁷

That same year, the Senate Education and Labor Committee reported out a bill embodying the Truman administration’s coverage recommendations. Senate Bill 1349 sought to exercise the congressional commerce power vindicated by the Supreme Court by affording minimum wage and overtime protection to employees of enterprises engaged in an “activity affecting commerce.” This key term was, in turn, defined to include “any activity in commerce or necessary to commerce or competing with any activity in commerce or where the payment of wages at rates below those prescribed by this Act or where the employment of oppressive child

⁷⁵ Harry S. Truman, Special Message to the Congress Presenting a 21-Point Program for the Reconversion Period, *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN: 1945, at 263, 269-70 (1961).

⁷⁶ Harry S. Truman, Message to the Congress on the State of the Union and on the Budget for 1947, *reprinted in* PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: HARRY S. TRUMAN: 1946 36, 58 (1962).

⁷⁷ U.S. DEPT. OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANNUAL REPORT 51-52 (1947).

labor would burden or obstruct or tends to burden or obstruct commerce or the free flow of commerce.”⁷⁸ The standards of “competing with any activity in commerce,” reminiscent of the extraordinarily broad commerce power approved by the Supreme Court in *Wickard v. Filburn*,⁷⁹ and of obstructing commerce, modeled after the National Labor Relations Act (“NLRA”),⁸⁰ made it perhaps the broadest scope of coverage ever proposed for the FLSA, especially since the National Labor Relations Board had never asserted jurisdiction over many of the employers that Senate Bill 1349 would have covered.⁸¹ The language would keep reappearing in FLSA bills for years. The bill also limited the exemption for retail and service employers to those with four or fewer establishments with a total annual sales volume of no more than \$500,000.⁸²

Despite this expansive amendment, the committee did not believe that most theretofore excluded workers would be brought into the act. For example, it estimated that the coverage of construction workers would be doubled; but since only one-fifth had been previously covered, three-fifths would remain uncovered. The committee was, however, also relatively unconcerned about the level of coverage: because a large proportion of the industry was unionized, wage rates below the minimum wage or time and a half did not appear to be a major problem.⁸³ In the event, even without

⁷⁸ S. 1349, 79th Cong. § 2(d) (1946).

⁷⁹ 317 U.S. 111 (1942).

⁸⁰ Ch. 372, § 1, 49 Stat. 449, 449 (1935) (codified as amended at 29 U.S.C. § 151 (1994)).

⁸¹ 1955 *Hearings*, *supra* note 17, at 7 (letter from Stuart Rothman, Solicitor of Labor, to Sen. Douglas discussing same language).

⁸² S. 1349 § 9.

⁸³ S. REP. NO. 79-1012, Pt. 2, at 92 (1946). Calculating the degree of unionization among construction workers has always been made difficult by the extraordinary fluctuations in employment within a year and by the fact that the construction unions represent many workers who are employed outside of the construction industry. In the late 1940s, total building trades union membership amounted to about 2.4 million. LEO TROY, *TRADE UNION MEMBERSHIP, 1897-1962* tbls.A-1, A-2, A-3 (1965). In 1951, the president of the AFL-CIO Building and Construction Trades Department estimated the degree of organization at 90 percent, but this figure was unrealistically high. *To Amend the National Relations*

the amendment, the WHD estimated that in 1947 one-third of construction workers were entitled to protection under the act.⁸⁴

Labor's weakness in 1946 was reflected in the fact that the full Senate passed the bill without the expanded coverage provision.⁸⁵ In the House, the Committee on Labor failed even to include expanded coverage in the bill it reported out.⁸⁶

This legislative failure prompted the Wage and Hour Administrator to reiterate his plea for expansion of coverage. In 1948, he declared that the "coverage provisions do not make possible the attainment" of the act's objectives of eliminating substandard labor conditions in industries producing goods for commerce or unfair competition in such industries resulting from such conditions. Moreover, the "unequal treatment of employees who work together in the same plant" resulting from individual worker-based coverage caused "dissatisfaction and friction." If, on the other hand, an employer voluntarily paid uncovered employees the same minimum or overtime wages as covered workers, it might be "at a disadvantage in competing with other plants producing for intrastate consumption which do not pay the minimum wage."⁸⁷

Despite the Senate labor committee's cavalier attitude toward the problem, litigation in the 1940s and 1950s brought by construction workers complaining that they had not been paid the minimum wage and overtime in conformity with the FLSA was voluminous. The court rulings on the scope of interstate commerce coverage of the construction industry were tortuous—"matters," as the Supreme Court fastidiously put it, "of the nicest degree."⁸⁸ A few examples

Act of 1947, with Respect to the Building and Construction Industry: Hearings Before the Subcommittee on Labor and Labor Management Relations of the Senate Committee on Labor and Public Welfare, 82d Cong. 57-58 (1951) (statement of Richard Gray).

⁸⁴ U.S. DEP'T OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANNUAL REPORT 80-81 tbls.13, 14 (1948).

⁸⁵ 92 CONG. REC. 3205 (1946).

⁸⁶ H.R. REP. NO. 79-2300 (1946).

⁸⁷ U.S. DEP'T OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANNUAL REPORT 89 (1948).

⁸⁸ *Mitchell v. H. B. Zachry Co.*, 362 U.S. 310, 321 (1960). Later opponents of more expansive coverage argued that many judicial decisions upholding coverage had been "ridiculous." 106 CONG. REC. S16,315-17 (1960) (statement

will suffice. During World War II, Brown & Root, Inc., a very large, profitable, anti-union, and—through its financing of the congressional election campaigns of Lyndon Johnson in particular and the Democratic Party as a whole—politically well-connected national construction firm, built an ammunitions depot for the U.S. Navy in Oklahoma.⁸⁹ A group of some 60 workers who had worked 10.5 to 11.5 hours daily every day for a year and one-half without receiving overtime compensation was rebuffed by the Tenth Circuit, which hair-splittingly ruled in 1949 that:

It is now well settled that employees engaged in the original construction of a new building or facility are not within the coverage of the Fair Labor Standards Act . . . , even though the building or facility, when completed, will be used for the production of goods for commerce or as an instrumentality of interstate commerce.

The reason for this rule is that since the new building . . . has not yet been dedicated to use in the production of goods for commerce, although it may be intended to be so used when completed, such work does not have such a close and immediate tie to the production of goods for commerce as to bring such worker within the coverage of the Fair Labor Standards Act⁹⁰

The DOL not only accepted, but elaborated on this logic. In 1949 the chief of the Interpretations Branch of the DOL's Office of the Solicitor testified before Congress that: "When the man is constructing a building in the first instance for a factory, that building may or may not be used for a factory. There is no way of telling."⁹¹ The perception that such limiting interpretations of FLSA's reach left little prospect of progressive enlargement of the universe of covered workers prompted the Democrats, after they

of Sen. Ellender).

⁸⁹ MARC LINDER, *PROJECTING CAPITALISM: A HISTORY OF THE INTERNATIONALIZATION OF THE CONSTRUCTION INDUSTRY* 119 (1994). Herman Brown, the owner, "hated Negroes and he hated unions"—the former because they were "lazy" and the latter because they "encouraged laziness in white men." ROBERT CARO, *THE YEARS OF LYNDON JOHNSON: THE PATH TO POWER* 469 (1982).

⁹⁰ *McDaniel v. Brown & Root, Inc.*, 172 F.2d 466, 471 (10th Cir. 1949).

⁹¹ *1949 Hearings*, *supra* note 36, at 61 (testimony of Harold Nystrom).

regained control of the Congress in the 1948 elections, to seek to expand FLSA's coverage statutorily. Viewing President Truman's re-election as a mandate to roll back the pro-employer policies of the Eightieth Congress, Democrats introduced bills not only to repeal Taft-Hartley,⁹² but to modernize the FLSA. In January 1949 administration bills were introduced in the Senate and House creating enterprise coverage by extending the coverage of the minimum wage and overtime provisions so that "every employer who is engaged in any activity affecting commerce" had to pay to each of his "employees employed in or about or in connection with any enterprise where he is engaged" the requisite sums.⁹³ Once again, "activity affecting commerce," was defined to include "any activity necessary to commerce or competing with any activity in commerce or where the existence of labor standards below those prescribed by this Act would burden or obstruct or tend to burden or obstruct commerce or the free flow of commerce."⁹⁴

With this formulation the administration was frankly trying to "define the scope to the furthest reaches of the commerce power." The provision was designed, as the solicitor of labor testified to Congress, to "reach employees in the States which unfortunately have no State laws to protect them."⁹⁵ Among the categories of construction workers whom the Truman administration intended to bring within the FLSA were those engaged in the original construction of new factories, airports, warehouses, office, loft, and other buildings or structures, "which will be used in commerce or production of goods for commerce although they will not become an integral part of existing facilities." In addition, employees constructing apartment houses, stores, and residences would have

⁹² R. ALTON LEE, *TRUMAN AND TAFT-HARTLEY: A QUESTION OF MANDATE* (1966).

⁹³ H.R. 2033, 81st Cong. §§ 6(a), 7(a) (1949); S. 653, 81st Cong. §§ 6(a), 7(a) (1949).

⁹⁴ H.R. 2033, 81st Cong. § 3(n); S. 653 § 3(n). The bills also excluded employees of retail and service establishments whose employer had neither more than four establishments nor a total sales volume of more than \$500,000. H.R. 2033, § 13(a); S. 653 § 13(a).

⁹⁵ *1949 Hearings, supra* note 36, at 26, 27 (testimony of William Tyson).

been covered "if a substantial portion of materials used come from other States."⁹⁶

The pro-labor Democrats had, however, overestimated their legislative strength. In the end, a coalition of Republicans and southern Democrats were able not only to eliminate this approach, but to insert language, designed to roll back coverage of local business, restricting the coverage of those engaged in the production of goods for commerce to employees working on such goods in closely related processes or occupations "directly essential" (in contradistinction to the previous "necessary" standard) to that production.⁹⁷

In the wake of Congress's failure to restructure coverage so as to harmonize the act's expansive socio-economic policy with the potentially almost limitless reach of the commerce power, the federal courts continued handing down decisions ordaining constricted and complex patterns of coverage. Even when construction workers prevailed—sometimes, to be sure, only after an appellate court overturned the trial court judge—the reasoning remained convoluted. The volume of reported federal litigation indicates that nonpayment of overtime compensation was a common practice even among large construction firms on large projects.

In 1952 the Sixth Circuit, in adjudicating another overtime claim, ruled that construction of an intrastate highway, which after completion would carry interstate traffic, fell outside the scope of the FLSA. A ruling in favor of coverage would, the court observed, mean that "every passable country road is within the same classification for practically every country road, however isolated and however local, at some point carries passengers or freight to or from some interstate destination." Against the background of such slippery-slope logic, the court found that such a "sweeping

⁹⁶ 1949 *Hearings*, *supra* note 36, at 123.

⁹⁷ This language was added to § 3(j). For the legislative history, see Paul Sanders, *Basic Coverage of the Amended Federal Wage and Hour Law*, 3 VAND. L. REV. 175 (1950). For the Wage and Hour Administrator's realistic interpretation of the restriction, see U.S. DEP'T OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, ANNUAL REPORT 221-22 (1950).

contention is not sustained by the sound and applicable law.”⁹⁸ In 1954, the Fifth Circuit chided the parties for even invoking the original construction doctrine in a case of “simply building housing units so that the people of the little town of Ville Platte, Louisiana, could have some place in which to live. Nothing . . . could be more local and less integrated in interstate commerce.”⁹⁹

The updated interpretive bulletin on FLSA coverage of the construction industry that the WHD issued in 1956 summarized several of the most important obstacles to individual employee coverage:

Unless the construction work is physically or functionally integrated or closely identified with an existing covered facility it is not regarded as covered construction because it is not closely enough related to or integrated with the production of goods for commerce or the engagement in commerce. For this reason the erection, maintenance or repair of dwellings, apartments, hotels, churches and schools are not covered projects. Similarly the construction of a separate, wholly new, factory building, not constructed as part or as an improvement of an existing covered production plant, is not covered.¹⁰⁰

The DOL experienced the difficulties in overcoming these obstacles in 1959, when it brought suit on behalf of 72 construction workers of a firm that built a new electronic organ factory that the Baldwin Piano Company of Cincinnati decided to locate in Arkansas in order to avail itself of “the favorable labor market and other advantages”¹⁰¹ The federal district court rejected the

⁹⁸ *Koepfle v. Garavaglia*, 200 F.2d 191, 193 (6th Cir. 1952).

⁹⁹ *Billeaudeau v. Temple Assoc., Inc.*, 213 F.2d 707, 710 (5th Cir. 1954). The plaintiffs were watchmen on the site who received a little more than half the minimum wage; they argued that they had received building materials shipped interstate.

¹⁰⁰ 21 Fed. Reg. 5439, 5440 (1956) (codified as amended at 29 C.F.R. § 776.26 (1997)). This interpretation is still valid as applied to individual employee coverage. Thus, where a small employer is exempt under enterprise coverage, its employees could still be individually covered under the jurisprudence developed by the courts under the pre-1961 FLSA and embodied at §§ 776.22b-.29.

¹⁰¹ *Mitchell v. Tune*, 178 F. Supp. 138, 140 (W.D. Ark. 1959).

Secretary of Labor's argument that the workers were engaged in the production of goods for commerce on the grounds that the new plant extended, enlarged, and improved the original plant so as to become integral and essential to the operation of the Ohio plant.¹⁰²

Even after the Congress added expansive enterprise coverage to the FLSA in 1961, courts had to strain mightily to find that workers were entitled to overtime payments in disputes that had arisen under the pre-1961 act. The Secretary of Labor had to file suit on behalf of workers whose employer had failed to pay overtime compensation for work building a woolen fabric manufacturing plant for Burlington Industries in 1959 and 1960. After a detailed discussion of the relationship between the customer's old and new plant, the trial judge concluded that the construction of the new plant was "an integral part of the sequence of activities leading to the production of a different fabric that was to be placed in the channels of commerce, not a mere localized activity insignificantly related thereto." Consequently, the work was "so 'directly essential' and 'closely related' to actual production in or for commerce as to be within . . . that proximity to commerce which the Act demands as a predicate to coverage."¹⁰³ The DOL also sued a general contractor specializing in the construction of manufacturing plants for having violated the overtime rights of its employees who built a plumbing brass factory for Crane Company in Arkansas to replace two others in Chicago and Los Angeles. In 1963, the Eighth Circuit reversed the lower court's dismissal of the action, ruling that it could not "conceive of any new construction more 'closely related' and more 'directly essential' to production of goods for commerce than the relocation-replacement construction of this factory, designed and dedicated to take the place of existing plants and which was to operate as an integral part of Crane's nation-wide business."¹⁰⁴

So deeply ingrained was the notion of individual engagement in interstate commerce as the basis of FLSA coverage that it was

¹⁰² *Id.* at 144.

¹⁰³ *Goldberg v. Barger Constr. Co.*, 210 F. Supp. 752, 755 (W.D.N.C. 1962).

¹⁰⁴ *Wirtz v. H. D. McDaniel*, 325 F.2d 75, 83 (8th Cir. 1963).

not obvious to all that the novel concept of enterprise coverage had displaced it. Even with regard to a case that had arisen after the 1961 act had gone into effect, a federal appeals court found it necessary to instruct at least one trial court judge that he had erroneously failed to find coverage because he had overlooked the fact that Congress had added enterprise coverage in 1961.¹⁰⁵

V. NATIONALIZING THE INTERSTATE COMMERCE SCOPE OF THE FLSA: FROM INDIVIDUAL TO ENTERPRISE COVERAGE

The amendment would continue to exempt the small independent tradesman who employs his friends and neighbors and whose sense of responsibility for their welfare and his position in the community are the best safeguards against his exploiting his employees.¹⁰⁶

Even where the DOL succeeded in persuading courts that construction workers were engaged in commerce or the production of goods for interstate commerce, the uncertainty of prevailing and the necessity of having recourse to strained interpretations not only made a mockery of the FLSA's objective of eliminating "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers,"¹⁰⁷ but also made it impossible to establish nationally uniform enforcement standards. In view of these socio-economically, politically, and administratively debilitating prospects, it was not surprising that even the Eisenhower administration, joined by a Democratic congressional majority, set out to enlarge the class of covered workers and to reduce the volume of litigation over the interstate commerce basis of coverage. As early as 1955, the *Economic Report of the President* observed that "only" 24 million of 44 million private-sector employees were covered by the FLSA

¹⁰⁵ *Childress v. Whitley Enters.*, 388 F.2d 742 (4th Cir. 1968).

¹⁰⁶ H.R. REP. NO. 79-2300, at 10 (1946) (publishing democratic minority views of proposed amendment to impose coverage on retail and service firms owning five or more establishments with a total annual sales of \$500,000 or more).

¹⁰⁷ Fair Labor Standards Act of 1938, ch. 676, § 2(a), 52 Stat. 1060, 1060 (1938).

in addition to 3.5 million covered under 20 state wage and hour laws. The President's Council of Economic Advisors was not an enthusiastic supporter of "minimum wage laws, which do not deal with the fundamental causes of low incomes or poverty. However, minimum wage laws can assist the comparatively small number of workers who are at the fringes of competitive labor markets." Despite its fears of "lower production and substantial unemployment" and inflation, the Council, impelled by the recognition that both federal and state laws excluded the lowest-paid workers, concluded that: "It would be well for both the Congress and the States to consider the question of bringing substantial numbers of workers excluded from the protection of a minimum wage, under its coverage."¹⁰⁸

In 1955 the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, which was chaired by Paul Douglas, an internationally well-known labor economist and former University of Chicago professor, held hearings on bills proposing to amend the FLSA by increasing the minimum wage and coverage. The subcommittee considered Senate Bill 662, which sought to expand coverage by defining, once again, as an "activity affecting commerce" "any activity in commerce, necessary to commerce or competing with any activity in commerce or where the payment of wages at rates below those prescribed by this Act would burden or obstruct or tend to burden or obstruct commerce or the free flow of commerce."¹⁰⁹ The bill operationalized this definition, which had been appearing in FLSA bills for years, by creating enterprise-based coverage: the amended minimum wage and overtime provisions required employers "engaged in any activity affecting commerce" to pay minimum wage and overtime to all their employees.¹¹⁰ The bill did not expressly include construction employees (who had never been expressly excluded), but did cut back the exclusion of employees in retail and service establishments to those employed by an employer having four or fewer establish-

¹⁰⁸ ECONOMIC REPORT OF THE PRESIDENT 58-59 (1955).

¹⁰⁹ S. 662, 84th Cong. § 3(d) (1955).

¹¹⁰ S. 662 §§ 5(a), 6(a).

ments with a total annual sales volume of not more than \$500,000.¹¹¹

That legislative movement would eventually occur was signaled by the testimony of President Eisenhower's Secretary of Labor, James Mitchell, who based his remarks on the recommendation in the *Economic Report*. Without redefining the FLSA commerce coverage, he testified that it would be possible to incorporate multistate enterprises and other firms engaged "to a major extent" in commerce or production of goods for commerce. But Mitchell also revealed the administration's recognition of the necessity to shift to enterprise coverage.¹¹² "No sound reason appears why the act should not apply throughout these businesses which are controlled on an interstate basis. The claim may rightly be made that industries of such interstate character are already covered under the present language of the act. However, coverage of these industries is spotty due to the fact that it is on an individual-employee basis rather than on an enterprise basis."¹¹³ Mitchell's realism was in part driven by the insight that the "unequal treatment" inherent in the requirement that individual employees be engaged in commerce worked an "injustice" not only to the employees, but also to "the fairminded employer who treats all of his employees with evenhanded justice with respect to the act's requirements. He is placed at a competitive disadvantage with the employer who limits the benefits of the act to some of his employees."¹¹⁴

Although no legislation emerged from Congress in 1955, the flurry of similar bills introduced during the remaining legislative sessions of the first and second Eisenhower administration made it apparent that expanded coverage based on a more modern and realistic conception of national commerce was inevitable. Alone the fact that retailing was no longer local—supermarkets had increased their share of total food retail sales from less than one-fifth at the time of the FLSA's enactment in 1938 to more than one-half by

¹¹¹ S. 662 § 9.

¹¹² 1955 Hearings, *supra* note 17, at 45.

¹¹³ 1955 Hearings, *supra* note 17, at 43-44.

¹¹⁴ 1955 Hearings, *supra* note 17, at 47.

1960—necessitated a reorientation of commerce coverage.¹¹⁵ Enterprise coverage was acceptable to the administration, but the question of how far the definition of interstate commerce could be pushed was still open. In 1957, when the chairman of the Subcommittee on Labor Standards of the House Committee on Education and Labor, Augustine Kelley, introduced House Bill 4575 which repeated the same expansive definition used by Senate Bill 662 two years earlier,¹¹⁶ Secretary Mitchell, rejected it as “broader than any language ever used by the Congress for application of the commerce clause” Nevertheless, he proposed an administration alternative (enterprise “substantially engaged” in interstate commerce) accompanied by a very narrow wedge of inclusion for firms employing 100 or more employees and receiving more than \$1 million in materials from out of state. These very modest changes would have added about 2.5 million covered workers including 200,000 in 100 construction firms.¹¹⁷ Although the AFL-CIO found the administration’s approach disappointingly limited, the fact that even the unions were, at least verbally and tactically, “willing to support continued exemptions for small-business firms” on the grounds that “the Main Street grocery store” should not be subject to the same federal regulatory power as a large chainstore betokened the possibility of eventual compromise.¹¹⁸

That the Kennedy administration would eventually engage the issue was prefigured by Senator Kennedy’s prominent role in galvanizing support for such legislation in the Eighty-Sixth Congress. As the chairman of the Labor and Public Welfare Committee, he had introduced in 1959 Senate Bill 1046, which proposed coverage that was in two respects significantly broader than the provision that was ultimately enacted. First, going beyond Senate Bill 662 of 1955, Kennedy’s bill defined the key term, “activity affecting commerce,” as including “any activity in commerce, necessary to commerce, or competing with any activity

¹¹⁵ H.R. REP. NO. 87-75, at 8 (1961).

¹¹⁶ H.R. 4575, 85th Cong. § 3(c) (1957).

¹¹⁷ *Fair Labor Standards Act: Hearings Before a Subcommittee of the House Committee on Education and Labor*, 85th Cong. 3-4 (1957).

¹¹⁸ *Id.* at 34 (statement of Andrew Biemiller, Director of Legislative Dept., AFL-CIO).

in commerce, or where the payment of wages at rates below those prescribed in the Act, or the employment of child labor prohibited by this Act, burdens or obstructs or tends to burden or obstruct commerce or the free flow of commerce.”¹¹⁹ Second, among the specifically enumerated categories of employers engaged in activity affecting commerce was that of construction enterprises whose annual gross sales volume was at least \$50,000—a virtually nominal threshold.¹²⁰ A bill, identical in these respects, was introduced in the House of Representatives by James Roosevelt, the former president’s son.¹²¹

These proposals for a significant expansion in coverage were driven by the data, which the DOL prepared periodically and were presented at the hearings, revealing the sectoral distribution of the included and excluded workers. In 1957, for example, overall, only 24 million or 55 percent of 44 million private-sector wage and salary workers were both covered by and not specifically excluded (on some other grounds) from the minimum wage provision of the FLSA. (This denominator excluded an additional 23 million proprietors, self-employed, unpaid farm family workers, government employees, and executive, administrative, and professional employees). This proportion varied from 99 percent in mining and 95 percent in manufacturing to 17 percent in services, 3 percent in retail trade, and 0 in agriculture and domestic employment. Of 2,909,000 construction workers, the DOL estimated that only 44 percent were covered and not excluded. Failure to meet the FLSA’s definition of interstate commerce accounted for almost all the 1,616,000 excluded construction workers: 1,567,000 fell into this category, whereas only 49,000 were excluded on some other grounds.¹²² The DOL also estimated that Senate Bill 1046 would

¹¹⁹ S. 1046, 86th Cong. § 2(c) (1959).

¹²⁰ S. 1046 § 2(c).

¹²¹ H.R. 4488, 86th Cong. § 3(s), (t) (1959).

¹²² In contrast, overall, 27 percent of all excluded workers were excluded for reasons other than a failure to meet the interstate commerce definition. Calculated according to *Amend the Fair Labor Standards Act: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 86th Cong. 56-57 tbls. 1, 2 (1959) (attached to statement of Stanley Rutenberg, Director of Research, AFL-CIO) [hereinafter *1959 Hearings*].

have offered minimum wage protection to about 40 percent of all excluded workers. In construction, the low exemption threshold of \$50,000 would have brought in about 85 percent of all excluded workers. To be sure, whereas almost one-half of all the additional workers entitled to the minimum wage had been receiving less than the proposed minimum of \$1.25, only 10 percent of the newly covered construction workers would have fallen into that group. But a much larger proportion of construction workers would have become newly entitled to time and one-half for overtime.¹²³

In a special legislative message in May 1960, during the last congressional session of his presidency, Eisenhower characterized an expansion of coverage (to include three million more workers) as the most urgently needed change in the FLSA.¹²⁴ After his nomination as the Democratic presidential candidate in the summer of 1960, Kennedy successfully pushed Senate Bill 3758, which contained coverage based on an "enterprise engaged in an activity affecting commerce," through the Senate.¹²⁵ Kennedy's bill originally covered construction enterprises with annual gross sales in excess of \$50,000, but after considerable and complicated legislative maneuvering, the threshold was ultimately set at \$350,000.¹²⁶

The corresponding House bill lacked the same expansiveness (the original bill did not even include construction among the enterprises engaged in an activity affecting commerce), and the congressional conference committee failed to reach a compromise,

¹²³ 1959 *Hearings*, *supra* note 122, at 56-57 tbls. 1, 2. Charts 1-3 present the tabular data in the form of graphs. 1959 *Hearings*, *supra* note 122, at 17-19. The data on overtime coverage was not presented. For reasons that are not clear, although the aggregate data was similar four years earlier, the DOL estimated that in 1953 only 614,000, or 24 percent, of all 2,565,000 construction workers were covered by the FLSA. 1955 *Hearings*, *supra* note 17, at 49 tbl.1.

¹²⁴ *Special Message to the Congress on the Legislative Program*, reprinted in PUBLIC PAPERS OF THE PRESIDENTS OF THE UNITED STATES: DWIGHT D. EISENHOWER: 1960-61, at 385, 392-93 (1961) (May 3, 1960).

¹²⁵ S. 3758, 86th Cong. § 2(s), (t); S. REP. NO. 86-1744 (1960).

¹²⁶ 106 CONG. REC. at S16,214 (daily ed. Aug. 11, 1960) (explanation of Sen. Goldwater). Goldwater himself had unsuccessfully proposed to amend the bill to provide for a \$500,000 coverage threshold. Amendment to S. 3758 (June 29, 1960).

in large part, because the two strong fair labor standards advocates among the seven House conferees (Roosevelt and John Dent) were outnumbered by conservatives and southern Democrats.¹²⁷ Rather than attempt to reach an agreement under these unfavorable conditions, Kennedy preferred to wait until after the election.¹²⁸

Barely two weeks after taking office, the Kennedy administration, through Representative Roosevelt, introduced House Bill 3935 to extend coverage to several million additional workers by including those employed in certain specified classes of enterprises in which employees handled, sold, or otherwise worked on goods that had been moved in or produced for commerce. Construction establishments were covered under this definition if their annual gross volume of sales amounted to at least \$350,000; the sales-volume threshold for retail and service enterprises was set at \$1 million.¹²⁹

Conservatives, sensing the potential for eventual universal coverage, bitterly opposed the enterprise coverage approach to interstate commerce. Senator Barry Goldwater, its most vociferous foe, already in 1960 had to “resist to his utmost the term ‘activity affecting commerce’” because he could “see no end to the Federal Government’s following through.” The new basis of coverage was “probably the opening wedge . . . to completely negating” the Tenth Amendment to the constitution, “the keystone of our Republic. If that goes, we go.”¹³⁰ Even under the guise of vindicating states rights,¹³¹ the chief opponents in 1961 in the Senate, Goldwater and Everett Dirksen, were unable to mask the fact that despite their solicitude for small local businesses—“It does not take a very large construction business to do an annual volume of

¹²⁷ H.R. 12677, 86th Cong. § 2(c) (1960); H.R. REP. NO. 86-1933, at 21-22 (1960).

¹²⁸ Robert Leiter, *Coverage Confusion Under the Fair Labor Standards Act*, 13 LAB. L.J. 139, 145 (1962).

¹²⁹ H.R. 3935, 87th Cong. § 2(b) (1961); 107 CONG. REC. 1823-25 (1961).

¹³⁰ 106 CONG. REC. 16,212 (1960).

¹³¹ Senator Goldwater asserted that he was “not sitting here as a complete advocate of States rights” because although he believed that minimum wage regulation should be left to the states, he had “also told the States that if they did not act in this field, the Federal Government will have to act in this field.” 1959 *Hearings*, *supra* note 122, at 30.

\$350,000”¹³²—what they were purportedly seeking to shelter such firms from was not so much federal regulation as precisely the unmistakable nationalization of the labor market and the economy overall:

The dollar volume standards . . . are designed to create the impression that the minimum wage and overtime pay requirements are directed exclusively at “big business” and that “small business” falling below these dollar standards will continue to be free from the act’s requirements and will thereby be unaffected by the economic effects of the extended coverage. Actually, this is mere surface appearance; the reality is otherwise. A small business, in all of its activities, competes directly with large enterprises in the same industry; it also competes with all other industries in the same labor market for the available supply of labor. If the larger enterprises are compelled by law to pay higher wages, small business operating in the same labor market must pay the same rates in order to secure or retain employees. Thus, the exemptions or the freedom from coverage the committee bill seems to extend to some small business is nothing but delusion.¹³³

In other words, Goldwater was arguing a variant of the dictum that “[t]he laws of trade are stronger than the laws of men.”¹³⁴ The twist here was that because covered and exempt sectors were communicating vessels, the laws of the market would in effect bring about the universalization of coverage that the legislature could not. Goldwater’s concern seemed to lie with the alleged market-mediated impact of the legal regime on small businesses. In fact, however, Goldwater did not believe in the reality of the underlying economic model that he postulated. His real objective

¹³² S. REP. NO. 87-145, at 101 (1961). Goldwater had noted a year earlier that a “substantial segment of those in the construction industry would satisfy these tests, because many of them have at least one employee who receives some materials from out of the State, and do a gross annual business of at least \$350,000.” 106 CONG. REC. at 16,213.

¹³³ S. REP. NO. 87-145, at 77.

¹³⁴ 1 WILLIAM COOK, A TREATISE ON THE LAWS OF CORPORATIONS vi (4th ed. 1898).

was to protect larger businesses from the “unfair and arbitrary” and “harshly discriminatory” dollar-volume criterion that would privilege the smaller competitor “across the street” not to have to pay the minimum wage and overtime. Since Goldwater was himself the owner of a larger retail enterprise, his passion about the competitive disadvantage was not surprising.¹³⁵

As enacted, the statute incorporated the \$350,000- and \$1,000,000-dollar-volume threshold for construction and retail-service enterprises, respectively,¹³⁶ and defined an “enterprise engaged in commerce or production of goods for commerce” as meaning “any of the following in the activities of which employees are so engaged, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person.”¹³⁷ Congress estimated that about one million of the 4.1 million newly covered employees—leaving 16

¹³⁵ 106 CONG. REC. at 16,213.

¹³⁶ Fair Labor Standards Act Amendments of 1961, Pub. L. No. 87-30, § 2(c), 75 Stat. 65, 66 (1961). The \$350,000 exemption level for construction appeared in the same new definitions section as § 3(s)(4). In addition to exempting retail and service enterprises doing less than \$1 million of business, the amendments excluded any employee employed in an establishment with sales of less than \$250,000 even if it was part of an enterprise with sales of more than \$1 million. § 9, 75 Stat. at 71.

¹³⁷ § 2(c), 75 Stat. at 66. Five years later a covered enterprise was definitionally simplified to mean “an enterprise which has employees engaged in commerce or the production of goods for commerce, including employees handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person” Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, § 2(c), 80 Stat. 830, 831 (1966). In 1974, Congress amended the last part of the provision again to read, as it still does: “or employees handling, selling, or otherwise working on goods or materials” Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, § 6(a)(5), 88 Stat. 55, 59 (1974). The point of substituting “or” for “including” was to emphasize that the clause “was intended as an additional basis of coverage.” S. REP. NO. 93-690, at 17 (1974). Congress added “materials” to “make clear the Congressional intent to include within this additional basis of coverage the handling of goods consumed in the employer’s business, as, e.g., the soap used by a laundry.” *Id.*

million nonsupervisory private-sector employees still outside the reach of the FLSA—were construction workers.¹³⁸

The crucial point about enterprise coverage was and remains that the law did not treat firms situated on opposite sides of the dollar-volume threshold as mirror images of each other: whereas the test was designed to create expanded, blanket, coverage in the larger firms for all employees, regardless of whether they were individually engaged in commerce or the production of goods for commerce,¹³⁹ it did *not* create a corresponding blanket small business exemption for the smaller firms. Small firms remained covered, as they had always been, with respect to those employees who were engaged in commerce or the production of goods for commerce. The advent of enterprise coverage did not affect individually based coverage at all in firms below the enterprise-coverage threshold.

A construction employer sought to have enterprise coverage declared unconstitutional on the grounds that Congress lacked the power to regulate firms engaged in handling goods that have left the stream of interstate commerce and come to rest within the state in which they are exclusively used. But the court upheld the innovation to the extent that the employer's activities "exert a substantial impact upon commerce among the several states, which commerce is integrally related to the national economy and the general welfare of the workers therein."¹⁴⁰

The expanded enterprise coverage of the 1961 amendments did not, however, afford protection to all workers. The \$350,000

¹³⁸ S. REP. NO. 87-145, at 31 (1961).

¹³⁹ The Supreme Court erred in stating that the effect of the introduction of enterprise coverage "was to extend protection to the fellow employees of any employee who would have been protected by the original Act, but not to enlarge the class of employers subject to the Act." *Maryland v. Wirtz*, 392 U.S. 183, 188 (1963). Enterprise coverage did significantly enlarge the class of employers subject to the FLSA by encompassing for the first time employers whose employees are engaged in "handling, selling, or otherwise working on goods that have been moved in or produced for commerce by any person." § 2(c), 75 Stat. at 66. For tactful recognition of the Supreme Court's misunderstanding, see *Dunlop v. Indus. America Corp.*, 516 F.2d 498, 501 n.6 (5th Cir. 1975); *Wirtz v. Melos Constr. Co.*, 408 F.2d 626, 628 n.5 (2d Cir. 1969).

¹⁴⁰ *Wirtz v. Mayer Constr. Co.*, 291 F. Supp. 514, 517 (D.N.J. 1968).

coverage threshold for construction enterprises still excluded 616,000 nonsupervisory construction employees as of 1964. Of this number, 423,000 or 69 percent were also not covered by state minimum wage laws.¹⁴¹ The Eighty-Ninth Congress of 1965-66, the executor of President Johnson's Great Society, completed the work of extending coverage to virtually all construction workers by establishing zero-dollar enterprise coverage.¹⁴²

Three identical administration bills were filed on May 18, 1965 by Representatives Powell (the chairman of the House Education and Labor Committee), Roosevelt, and Dent, which would have enlarged coverage by creating an across-the-board threshold of \$250,000 in annual sales for enterprise coverage.¹⁴³ The hearings that began a few days later provoked hardly any response from construction employers. The only testimony came from the National Electrical Contractors Association, whose public relations director stated that the industry was composed primarily of small businesses employing fewer than 10 workers. He never mentioned the lower coverage threshold at all, instead focusing on the proposed double pay for overtime, which at \$9.42 "would seriously be personally attractive enough to me to make me want to enter the industry tomorrow, on the union side."¹⁴⁴ The first appearance of first-dollar coverage for construction employers was House Bill 10518, which Representative Roosevelt introduced on August 17, 1965. The bill established this expanded coverage for enterprises engaged in laundering, cleaning, and repairing clothing or fabrics as well.¹⁴⁵ The House Committee on Education and Labor reported the bill out a few days later. The report offered no explanation for

¹⁴¹ U.S. DEPT. OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT 4 tbl.3 (1966).

¹⁴² § 102(c), 80 Stat. at 832.

¹⁴³ H.R. 8259, 89th Cong. § 202 (1965). *See also* H.R. 8260, 89th Cong. (1965); H.R. 8261, 89th Cong. (1965).

¹⁴⁴ *Minimum Wage-Hour Amendments, 1965: Hearings Before the General Subcommittee on Labor of the House Committee on Education and Labor, 89th Cong. 1662-63 (1965).*

¹⁴⁵ H.R. 10518, 89th Cong. § 102(c) (1965).

the change, stating merely that: "There is no dollar volume test for laundries, drycleaning, or construction enterprises."¹⁴⁶

The minority members of the committee stressed that the new coverage threshold "thrusts deeply into the 'small business' segment of the American economy," which all administrations were "dedicated to protecting against the threat of ultimate obliteration." The minority was too preoccupied with yet another "emasculat[i]on of the interstate commerce clause" to focus on the lack of a dollar-volume test for construction. Indeed, it pessimistically viewed the "few meager dollar volume limitations" as having "thinly disguised" the disappearance of that clause. Projecting the trajectory of reduced coverage thresholds, the minority "predict[ed] that eventually, and the time is not far off, even these limitations will be eliminated, and the National Government will become the regulator of all business, private as well as public, local as well as interstate, unless those of us who are concerned to protect the Federal-State character of our Government effectively call a halt."¹⁴⁷ More than two decades would pass before this exhortation would bear fruit.

The process of enacting amendments to the FLSA, which was complicated by the strong resistance mounted against the inclusion for the first time of some farm workers, was prolonged into the next session. In 1966, the main bill was House Bill 13712, introduced on March 16, 1966 by Representative John Dent. A former union official and long-time vigorous advocate of minimum wage regulation, once again included zero-dollar coverage for construction in his bill.¹⁴⁸

The sole congressional voice in opposition to the full coverage of construction in 1965-1966 was Representative Dave Martin of Nebraska, a Republican member of the subcommittee of the House Education and Labor Committee that considered the FLSA amendments, who was himself a small business owner. His animus, however, was hardly confined to the construction provision. Rather, he regarded the whole bill as a "continuation of the socialistic trend

¹⁴⁶ H.R. REP. NO. 89-871, at 10 (1965).

¹⁴⁷ *Id.* at 76-77, 79-80.

¹⁴⁸ H.R. 13712, 89th Cong. § 102(c) (1966); Telephone Interview with Rudy Oswald, Retired Chief Economist of the AFL-CIO (Dec. 4, 1997).

which started in these United States some 30 years ago.”¹⁴⁹ Regardless of his ideologically confused nomenclature, Martin had accurately foreseen in 1961 that the purpose of the new commerce coverage language was “to get the concept accepted that retail businesses should be included, and then, eventually, every single retail store in the United States”¹⁵⁰

At one of the minimum wage hearings Martin referred to the “inequity” that laundries, drycleaners, and construction businesses would “not have any exemption from total sales” and would “automatically come under the provisions of the minimum wage law.”¹⁵¹ That these businesses were “completely covered by the law” would, Martin asserted, “work a severe hardship” on small laundries and drycleaners

as well as the construction industry and in small towns. I am thoroughly familiar with this because I am in the business. In smaller towns we have these fellows who go out, smaller contractors, carpenters, with one employee. In the summer months when the weather is good and it is proper for construction, they got in and work 10, 12, 14 hours a day and they work on Saturdays. They do not pay any attention to overtime. This is traditional. Yet they are not going to have any exemptions. They are fully covered and are subject to the severe penalties of time and a half and you are going to find . . . that it is going to raise the cost of housing and remodeling, and so on, in many of your localities throughout the entire country. It is not a fair shake for these people not to give them the same exemptions that you give others.¹⁵²

Dent was eager to respond to this attack. His answer with respect to the laundry industry was straightforward and was situated on the national organizational level: for the first time ever, “a complete agreement has been obtained from all” sectors of the

¹⁴⁹ 107 CONG. REC. H4646 (daily ed. Mar. 23, 1961) (statement of Rep. Martin).

¹⁵⁰ H.R. REP. NO. 87-75, at 77 (1961).

¹⁵¹ *Minimum Wage: Hearings Before the House Rules Comm.*, 89th Cong. 83 (1966) (statement of Sen. Martin).

¹⁵² *Id.* at 11-12.

industry—commercial, home, and linen. “No one has received a letter from a responsible laundry association against this legislation.” Dent’s approach to construction was, in contrast, personal and anecdotal: “In the construction field, where I am having construction done right now, I cannot get a big contractor to do a remodeling job. I am paying \$4.60 an hour for carpenters and \$2.10 for labor. They are not even union; they are not organized. And my town is as small as yours. . . . You are talking of the past when you refer to wages below \$1 an hour. You are not talking about the present day.”¹⁵³ The absence of any reference to organizational agreement with employers’ associations may, possibly, have been even more significant than its presence in the case of laundries—as suggestive of employers’ indifference to the commands of the state at a time when the commands of the labor market made minimum wage and overtime regulation moot. In the mid-1960s, as construction wage rates rose strongly in conjunction with the Vietnam War-driven military-industrialization of the economy to the irritation of nonconstruction firms as well, and construction employers offered scheduled overtime hours as a method of recruiting workers in a tight labor market,¹⁵⁴ avoiding the minimal requirements of the FLSA was hardly a high priority for construction employers.¹⁵⁵

Martin was also alone in seeking to remove the first-dollar coverage provision for laundries and construction from the bill on the House floor. In offering his amendment on May 25, 1966,

¹⁵³ *Id.* at 12. Martin was aware of the involvement of employers’ organizations. Later in the hearing he explained to another congressman that “the Dent bill, was not written, I must admit, really, by the committee itself. We considered it after it was drawn up, but the subcommittee chairman after consultation with people in various industries and trade associations that are affected wrote up this legislation himself and then subcommittee was called into session and the bill was presented to us.” *Id.* at 83-84.

¹⁵⁴ *E.g.*, *Chicago Employer Groups Impose Overtime Ban in Effort to Restrain ‘Pirating’ of Workers*, CONSTR. LAB. REP., No. 546, Mar. 9, 1966, at A-3; Don Sider, *The Big Boondoggle at Lordstown*, FORTUNE, Sept. 1969, at 106, 109; BUSINESS ROUNDTABLE, COMING TO GRIPS WITH SOME MAJOR PROBLEMS IN THE CONSTRUCTION INDUSTRY 1, 7 (1975)(1974).

¹⁵⁵ See generally Marc Linder, *U.S. Construction Worker Wages During the Indochina War* (on file with author).

Martin pointed out that in the original administration bill of the previous May these industries had been included under the general dollar-volume provision: "But somewhere along the line, it was removed." Once again playing his foil, Dent emphasized that all the laundry and cleaning employers' groups had "endorsed this legislation unanimously." If, as Martin asserted, segments of the coin-operated laundry industry opposed the provision, Dent saw all the more reason not to "exempt an industry that automates" Moreover, Dent found on his own examination that "most of the coin-operated laundries, where they have employees, are owned by persons who play golf regularly, who go to Florida regularly, and have come here to Congress crying about being put out of business, riding here in Cadillacs." Finally, Dent refuted Martin's claim of inequity by replying that "the best measure of fairness has to come from those affected. If those affected are not protesting, then we cannot accept the charge of unfairness." At that point the House rejected Martin's amendments.¹⁵⁶

Dent's rule-of-thumb is plausible—but only if the affected are aware of what the legislature has in store for them. At the time of the 1989 FLSA amendments, that proviso would be invalidated: it is doubtful whether a single affected worker was aware of the exemption of small businesses from enterprise coverage.

Congress unabashedly boasted of the expanded coverage that the new amendments created. The Senate report declared that its bill would bring under coverage 7.2 million of the 17.7 million uncovered private nonsupervisory employees.¹⁵⁷ When the leading construction trade journal reported in September 1966 that the additional coverage of eight million was the greatest extension in the history of the FLSA, and that the added coverage of 583,000 construction workers had been achieved by "dropping all dollar volume restrictions," the *Engineering News-Record* did not even hint that this "legislative plum" to the AFL-CIO would be problematic for employers.¹⁵⁸ Indeed, despite the evidence of any

¹⁵⁶ 112 CONG. REC. 11369-71 (1966).

¹⁵⁷ S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3005, 3007.

¹⁵⁸ *Minimum Wage Boosted by Congress*, ENG'G NEWS-RECORD, Sept. 15, 1966, at 312. See also CONSTR. LAB. REP., No. 587, Dec. 21, 1966, at A-6; U.S.

public lobbying in the formal legislative history, one AFL-CIO official recalled that while most construction firms were indifferent to the change, some actually supported it on the grounds that it disposed of a problem that had arisen under the 1961 enterprise coverage dollar-volume threshold: they did not know at the beginning of the year whether they would be covered.¹⁵⁹

As a result of the first-dollar enterprise coverage, the 1966 amendments "extended coverage to . . . the entire construction industry,"¹⁶⁰ entitling virtually all construction workers to the minimum wage and premium overtime.¹⁶¹ For the next two decades, only one-half of one percent of the three to five million construction workers were excluded. Presumably the only reason that even a minuscule 17,000 to 22,000 workers annually fell into this category¹⁶² was that Congress defined a covered enterprise as having "employees . . . handling, selling, or otherwise working on goods that have been moved in or produced for commerce . . ."¹⁶³ Regardless of whether Congress thought about the

DEPT. OF LABOR, WAGE AND HOUR AND PUBLIC CONTRACTS DIVISIONS, CONSTRUCTION INDUSTRY UNDER THE FAIR LABOR STANDARDS ACT AS AMENDED IN 1966 (1966).

¹⁵⁹ Telephone Interview with Rudy Oswald (Dec. 4, 1997). In 1966, Oswald was an AFL-CIO staff economist; he later became chief economist before retiring recently.

¹⁶⁰ 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 4 (1981).

¹⁶¹ ARTHUR B. SMITH, JR., CONSTRUCTION LABOR RELATIONS 194 (1984) (noting that the 1966 amendments brought all construction firms within the FLSA regardless of dollar-volume and that the coverage tests are "liberal and easy to meet").

¹⁶² U.S. DEPT. OF LABOR, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT: 1988 REPORT TO THE CONGRESS REQUIRED BY SECTION 4(D)(1) OF THE FAIR LABOR STANDARDS ACT 58-69 tbl.A-2 (1989); U.S. DEPT. OF LABOR, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT: REPORTS TO THE CONGRESS REQUIRED BY THE FAIR LABOR STANDARDS ACT 25 tbl.7 (1991). In September 1989, shortly before Congress curtailed coverage for construction, only 68,000 or 1.3 percent of all nonsupervisory employees in the industry were not subject to the overtime provision. *Id.* at 31 tbl.10. It is unclear why this figure was three times greater than the number excluded from the minimum wage.

¹⁶³ Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601,

question and literally meant that enterprise coverage required an employer to employ at least two employees, the DOL and the courts have consistently interpreted it in that manner.¹⁶⁴

VI. TRIAL RUN FOR THE 1989 SMALL-BUSINESS EXEMPTION: THE 1977 FLSA AMENDMENTS

Small businesses are the most vibrant segment of our economy. They are responsible for the lion's share of job growth and ingenuity.¹⁶⁵

In spite of this clear thrust toward universal coverage in the 1960s, the reversal of progressive reductions in the coverage threshold in 1989 was not unprecedented. A Democratic-controlled Congress initiated the process in 1977 when it increased the dollar volume for retail and service enterprises in stages from \$250,000 to \$362,500 from 1978 to 1981.¹⁶⁶ Neither the House nor Senate bills nor committee reports contained such a provision, which was added as a last-minute floor amendment in both Houses.¹⁶⁷

The differences among the various amendments revealed congressional ambivalences on the subject of privileging small employers to impose unfair labor standards on their employees that were remarkably absent from the 1989 debates. In the House, congressmen explicitly viewed the three proposals in 1977 as embodying more and less radical programs. Representative Michael

§ 102(c), 80 Stat. 830, 831 (1966).

¹⁶⁴ Employment Standards Administration, Wage and Hour Division, *Fact Sheet No. 14: Coverage Under the Fair Labor Standards Act* (visited Apr. 19, 1998) <<http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs14.htm>>; *Rhude v. Jansen Construction Co.*, 369 F.2d 806, 807 (5th Cir. 1966); *Robertson v. Dailey Electric Supply Co.*, 369 F. Supp. 1069, 1071 (N.D. Tex. 1974).

¹⁶⁵ H.R. REP. NO. 104-586, at 61 (1996).

¹⁶⁶ Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, § 9(a), 91 Stat. 1245, 1251 (1977).

¹⁶⁷ Former Representative Michael Blouin, who played a significant part in the debates in 1977, stated that the fact that the amendment was added in the floor debates indicated that the issue was too difficult to resolve in committee even if the floor debate was choreographed. Telephone Interview with Michael Blouin (Dec. 12, 1997).

Blouin, a Democrat from Iowa, offered the first amendment, which would have required the Secretary of Labor annually to adjust the dollar-volume threshold for retail and services enterprises by the same percentage by which the price index increased. Blouin, who was concerned that inflation had subverted the \$250,000 threshold, proposed to confine the increase to a prospective application to businesses that he estimated employed no more than seven employees. His reason for not raising the level immediately to the \$475,000 range that inflation-indexing would have suggested was the "real inequity" of "uncover[ing]" four million workers who had become entitled to the minimum wage. Although Blouin believed that Congress could deal with the four million uncovered workers for the future, it is unclear how he envisaged solving the problem caused by every creation of an enlarged sector of lawful unfair labor standards—namely, that "no one wants to force a smaller concern into a negative, competitive situation against a bigger concern that can afford the added impact of higher wages when the smaller company cannot."¹⁶⁸

Republican Representative John Ashbrook had no patience with Blouin's long-term approach. Instead, he proposed an immediate increase of the threshold to \$500,000 and application to all businesses. Ashbrook intended to avoid "wage slicing" by prohibiting employers who had been covered from decreasing the wage of any employee who had received the minimum wage while the employer was so covered¹⁶⁹—a clause that Congress would thenceforth self-congratulatorily call "preservation of coverage."¹⁷⁰ Democratic Representative Jake Pickle of Texas liked to think of his amendment as a compromise between the other two in that his neither extended beyond retail and service businesses nor applied indexing. Driven by complaints that he had received from gas station operators among his constituents whose profit margins had shrunk even without having been covered by the minimum wage, Pickle sought to protect them from business failure as inflated gasoline prices pushed their sales above the threshold,

¹⁶⁸ 123 CONG. REC. 29,467-68 (1977).

¹⁶⁹ *Id.* at 29,468.

¹⁷⁰ § 9(a), 91 Stat. at 1251.

subjecting them to the FLSA. More generally, he argued that the \$250,000 threshold was “grossly unfair to small businesses. It must be updated or we will drive out of business thousands of small businesses” Like other proponents of an increase, he distorted the history of the FLSA by claiming that “[t]here has always been a basic exemption for small business under the minimum wage law.”¹⁷¹ This conflation of a business’s intrastate character with small size served to justify Pickle’s indifference to the fate of the workers whom he intended to uncover:

the only real argument that can be made against my amendment is that it might take a lot of people out from under coverage of the Minimum Wage Act. I admit that. . . . But it is also a fact that many of these same people were brought under the act simply because of inflation. We are not removing new people from coverage, but rather putting them back in the same status they would have been [in] prior to the increase of wages and prices since 1969 or 1973. . . .

The committee would want you to believe that we are ruthlessly removing millions from the Wage and Hour Act, that it is a march backward. That is not so. Over 80 percent of the present workers covered are drawing over \$3 per hour now—and would not be affected. All we are doing is restoring the equivalent level of 10 years ago.¹⁷²

Pickle’s lack of concern as to the future impact was unjustified since employers would have been legally free under his amendment to cease paying the minimum wage even to those previously covered. His position did, however, have the virtue of consistency in one respect: by excluding construction and the other first-dollar-coverage industries from his proposal, he was able to avoid the obvious objection that Congress had not intended to link the proportion of covered workers to some inflation-adjusted sales volume standard. But even with regard to the retail and service industries, the fact that the Congress in 1961 and 1966 had planned to drive down the thresholds over time, strongly suggested that its

¹⁷¹ 123 CONG. REC. at 29,469.

¹⁷² *Id.* at 29,470.

objective was not a stationary proportion of employee coverage, but a progressively rising one as more modern conceptions of interstate commerce permitted the legislature to make plausible the federal regulatory role over labor markets that had once appeared peculiarly committed to local—or, more realistically,—no governmental control at all.

In an instrumental sense, however, Pickle's distorted legislative history was irrelevant: the FLSA, like any other statute, is not a constitution requiring a complicated amendatory process or supermajority favoring change. A majority in each Congress is free to rewrite future history by altering that body's intent. That the new majority found it inadvisable to declare the new pro-employer bias all too bluntly, instead hiding behind an erroneous or perhaps even mendacious rewriting of legislative history, suggests that the residual force of the older impulse toward universal coverage was still potent. The success in 1977 insured that it would no longer be potent by 1989.

After the House defeated Ashbrook's amendment and passed Pickle's,¹⁷³ the Senate took up the same question in debating various amendments to Senate Bill 1871. Senator John Tower was the first to take up the cudgels for "small, small businesses"—those retail and service establishments which range from the traditional 'Mom and Pop' stores to those which may employ . . . 15 or 20 workers."¹⁷⁴ Unable to buttress his claim that "[t]hroughout the history of the minimum wage law, Congress has recognized the need to provide some sort of relief for these smaller businesses," Tower was constrained to concede that the original exemption for intrastate commerce did not involve a "dollar volume test."¹⁷⁵ Unable to deal with the universalist thrust underlying the creation of first-dollar coverage for construction and laundries in 1966, Tower evaded the issue by claiming that: "From what I have been able to determine, there was very little discussion of this action

¹⁷³ *Id.* at 29,471-72.

¹⁷⁴ *Id.* at 32,893.

¹⁷⁵ *Id.* at 32,894. Congress in 1938 excluded "any employee engaged in any retail or service establishment the greater part of whose selling or servicing is in intrastate commerce." Fair Labor Standards Act of 1938, § 13(a)(2), 52 Stat. 1060, 1067 (1938).

during floor debate.”¹⁷⁶ To provide a rationale for his proposed restoration of the \$1 million threshold from 1961—which Senator Harrison Williams called “a giant step backward in terms of the whole scope . . . and coverage” of the FLSA¹⁷⁷—Tower stood the original purpose of the act on its head. Whereas the Congress in 1937-1938 had striven to weaken if not eliminate wage cutting as a competitive tool that kept inefficient firms afloat, Tower argued that the exemption was necessary to “offer some assurance to these very small firms that they will be able to maintain a position of competition; that they will not be swallowed up by huge companies or forced out of business altogether.”¹⁷⁸ Tower sought to justify his expulsion of 4.8 million workers from protection—“only 1 million” of whom were below the minimum wage—by asserting that even some small employers earned less than the minimum wage.¹⁷⁹ Tower received his most vigorous support from Senator Goldwater, who, reminiscing about how he had considered \$300,000 good sales when he first went into business (“Today we do \$31 million”), would have raised the threshold to \$2 million.¹⁸⁰

Senator Leahy then proposed an alternative amendment under which the threshold would have been raised to \$500,000; thereafter it would have been raised by the same percentage by which the minimum wage was raised. Leahy, too, was little concerned with the minimum-wage workers whom his proposal would have expelled from the FLSA: after all, “the vast majority are part-time unskilled workers who are in marginal jobs.” And in any event, the exemption would be doing them a favor since “[i]t would be tragic if their employment prospects would disappear because the small business employers could no longer afford to keep them hired.”¹⁸¹ Because Tower was convinced that his side had been dealt a “stacked deck”—“organized labor has dictated that there can be no exemption for any small businesses”—he agreed to accept Leahy’s

¹⁷⁶ 123 CONG. REC. at 32,894.

¹⁷⁷ *Id.* at 32,896.

¹⁷⁸ *Id.* at 32,894.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.* at 32,895.

lower threshold.¹⁸² In a further effort to secure Democratic votes, Tower and Leahy then accepted a grandfather amendment offered by Senator Pell, which prohibited newly uncovered employers from lowering the wage of any employee who had previously received the minimum wage.¹⁸³

At this point Senator Harrison Williams offered what was perhaps the most historically and analytically accurate accounts of the function of the threshold. One of the staunchest congressional advocates of labor standards, in 1971 Williams had introduced a bill in the Senate that would have eliminated the enterprise coverage dollar-volume test, thus including within coverage all enterprises engaged in commerce.¹⁸⁴ Measured against the FLSA's "principal thrust and purpose" to expand coverage, the proposal to increase the dollar-volume test to reflect price increase

misconceives the history and purpose of the enterprise definition in the act. In 1961, Congress established a \$1,000,000 enterprise test of coverage to assure that the act would reach all employees of firms engaged in interstate commerce. However, individual employers [sic] who were, themselves, engaged in interstate commerce were still entitled to the minimum wage, even if their employer did not meet the enterprise test.

At the same time, Congress adopted a separate dollar test for retail and service establishments [which] were given a complete exemption from minimum wage and overtime provisions, even with regard to their employees who were individually engaged in interstate commerce, if the establishment had a gross annual dollar volume of less than \$250,000.

Five years later, in 1966, the Congress purposefully reduced the dollar volume test for coverage under the enterprise definition . . . as a means of expanding the act's coverage. As this was done, it became unnecessary and

¹⁸² *Id.* at 32,894, 32,895.

¹⁸³ *Id.* at 32,896.

¹⁸⁴ S. 1861, 92d Cong. § 2(f) (1971); *Fair Labor Standards Amendments of 1971: Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92d Cong. 17 (1971).

redundant to maintain the lower dollar volume test of coverage in the retail and service establishment exemption in section 13(a)(2) Accordingly, in conjunction with the reduction of the enterprise dollar test, the act was amended to delete the dollar test for the retail and service establishment exemption. That exemption, under present law, depends upon the dollar test under the enterprise provision . . . in section 3(s).

Thus, the proposed amendment would, in effect, not only create an exemption for 400,000 workers employed in enterprises, but it would also reduce coverage to an unprecedented degree, by removing from coverage 3.8 million employees of retail and service establishments.

There is no predicate for this drastic reduction in . . . coverage It is not needed as a means of providing protections for "mom and pop" stores. That is already done explicitly by the act.¹⁸⁵

Tower evaded a discussion of the history of the relationship between the enterprise coverage thresholds and the exemption thresholds. He charged in rebuttal that instead of denying workers a raise by increasing the threshold, Congress would be denying them a job altogether by failing to exempt small businesses.¹⁸⁶

An increase in the enterprise threshold was foreordained when Senator Dale Bumpers, a Democrat from Arkansas, proposed a compromise, raising the level in stages to \$325,000 by 1980. Bumpers would have accepted a higher level, but recognized the "incalculable damage to millions of employees" that it would do. The fact that the House had already passed a bill with a \$500,000 level made it clear to Bumpers that some figure between his and that figure would become law. Yielding to the same realism, Williams immediately expressed his support.¹⁸⁷ Pro-labor supporters were also able to secure a "step-grandfather clause," permitting newly uncovered employers not to pay the higher minimum wage to existing employees, but requiring them to pay those workers no

¹⁸⁵ 123 CONG. REC. at 32,896.

¹⁸⁶ *Id.* at 32,897.

¹⁸⁷ *Id.* at 32,899.

less than the old lower minimum wage and overtime.¹⁸⁸ True to Bumpers' prediction, from the conference between the two Houses emerged a compromise provision under which the exemption level was raised in stages to \$362,500 effective 1981.¹⁸⁹

VII. EXPANDING THE CLASS OF EXEMPT SMALL BUSINESSES: THE 1989 AMENDMENTS

I regret that today we give up territory that Congress has fairly claimed, that we take a backward step from the measures Congress designed to protect the lowest paid and weakest group of wage earners in the Nation.¹⁹⁰

If a Democratic administration and a Democratic Congress found no way to avoid an increase in the enterprise coverage threshold as the price to pay for increasing the minimum wage in the 1970s, it should have been a foregone conclusion that the two would, at the very least, have to be yoked to each other during the Reagan years—if that most anti-labor presidency since the 1920s ever supported an increase in the minimum wage on any terms. Nevertheless, despite these unpropitious circumstances, Senator Edward Kennedy and Representative Augustus Hawkins, the chairmen of the Senate and House labor committees, introduced short bills at the beginning of the last Congress of Reagan's presidency in 1987 to raise the minimum wage to restore the purchasing power that had been eroded since the last increase to \$3.35 in 1981. In addition to increasing the wage to \$4.65 by 1990, they provided for indexation, which had long been sought but never achieved by labor supporters: the minimum wage was to be revised annually so as to equal 50 percent of the average private, nonsupervisory, nonagricultural hourly wage. The bills manifestly

¹⁸⁸ *Id.* at 32,900. The final vote on the whole bill was 63 to 24. *Id.* at 32,908.

¹⁸⁹ Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, § 9(a), 91 Stat. 1245, 1251 (1977).

¹⁹⁰ *Mitchell v. H. B. Zachry, Co.*, 362 U.S. 310, 310 (1960) (Douglas, J., dissenting).

embodied maximalist demands since they contained no other provisions.¹⁹¹

That a minimum wage increase unaccompanied by an increase in the enterprise coverage dollar-volume threshold was politically unacceptable became clear at a hearing later that year before the House Committee on Small Business. Titled, *Minimum Wage Increase*, the hearing highlighted “horror stories . . . from small businessmen who are virtually making less than their employees.” To mitigate this inversion of the natural class order, congressmen immediately proposed raising the threshold to \$500,000 or \$600,000.¹⁹² Because 55 to 60 percent of the membership of the National Federation of Independent Business (“NFIB”), one of the most potent congressional lobbyists, had annual sales of less than this amount, this threshold would have conveniently exempted more than half of that organization’s members. Ominously, Sar Levitan, arguably the most vociferous academic proponent of the minimum wage, when asked his opinion about such a step, responded that it “might be worth considering.” Unsurprisingly, the committee displayed no interest in his further remark that, because some \$500,000-per-year businesses were “prosperous and highly profitable” and thus “not struggling to make a living,” he would need more information before judging a universal \$500,000 exemption.¹⁹³ The next year the House Committee on Small Business issued a report recommending a study of the impact of this exemption since retail and service firms with less than \$362,500 in sales employed the largest number of uncovered workers—6 million. To be sure, the committee was concerned with the impact on the “many employers whose gross volume of sales . . . has gone above \$362,500” and had thus “‘slipped under’ minimum wage coverage,” rather than with the consequences for their employees.¹⁹⁴

¹⁹¹ S. 837, 100th Cong. (1987); H.R. 1834, 100th Cong. (1987).

¹⁹² *Minimum Wage Increase: Hearing Before the House Committee on Small Business*, 100th Cong. 29 (1987) (statement of Rep. Bilbray).

¹⁹³ *Id.* at 32-33.

¹⁹⁴ *The Minimum Wage and Small Business: A Staff Report of the Committee on Small Business*, 100th Cong. 28-29 (1988).

By March 1988 it became clear that the maximalist demands were unrealizable. At a mark-up session of House Bill 1834, the House Subcommittee on Labor Standards not only voted to drop the indexing feature, but approved an amendment, submitted by Representative Bob Wise, a Democrat, by 6 to 3, to increase the enterprise coverage threshold to \$500,000. The three no votes came from Republicans, who voted for an even more expansive amendment of Representative James Jeffords—who would soon play a key role in the exemption debates—to raise the level to \$1 million.¹⁹⁵

At the mark-up session of the full House Committee on Education and Labor on March 16,¹⁹⁶ Jeffords offered another amendment to House Bill 1834 concerning enterprise coverage. It would have raised the threshold to \$500,000 and extended it to all enterprises with the exception of public agencies.¹⁹⁷ Jeffords, who later received the Guardian of Small Business Award from the NFIB,¹⁹⁸ described his goal as “trying to . . . basically, get us one set of rules to cover small businesses so that they will know as to whether they are or are not exempt, and to reduce the amount of confusion and therefore the amount of potential violations.” In contrast, merely raising the threshold, as Wise’s amendment did, “did not undo many of the complicated differentiations among different types of businesses”—the “host of special rules that make compliance and enforcement much too difficult.” In this context

¹⁹⁵ *House Panel to Take Up Minimum Wage Legislation*, DAILY LAB. REP., Mar. 3, 1988, at A-7; *House Subcommittee Approves Minimum Wage Increase by Vote of 6-3*, DAILY LAB. REP., Mar. 4, 1988, at A-14. Jeffords’ amendment limited the exemption to companies with 20 or fewer employees. *Id.*

¹⁹⁶ *See generally House Labor Panel Reports Out Bill Increasing Minimum Wage*, DAILY LAB. REP., Mar. 17, 1988, at A-10.

¹⁹⁷ Amendment to Committee Print of House Bill 1834 Offered by Mr. Jeffords, § 3(a) (on file with author). The amendment, which is marked “JEFFOR378” and dated “3/15,” is included in a file, “Full Cmte. Mtg., March 16, 1988, H.R. 1834, Fair Labor Standards Act (continued),” which Silvia Riley, an employee of the House Committee on Education and the Workforce,” made available in Room 2181 of the Rayburn House Office Building on Jan. 14, 1998, to Bruce Goldstein, who photocopied it. In 1988 Riley had been the Republican Clerk of the committee.

¹⁹⁸ LAB. L.J., Feb. 1997, at inside cover (1994 award).

Jeffords mentioned that merely “engaging in laundering or cleaning or repairing of clothing triggers coverage, as does being in the construction business.”¹⁹⁹

Chairman Hawkins opposed the amendment as “highly defective and highly destructive. It turns the clock back, actually, several years.” He contended that some industries, such as industrial laundries, did not want to be exempt by a higher dollar-volume threshold because they wished to avoid “cutthroat competition.” Hawkins also argued that many health care workers would lose minimum wage coverage. Finally, he urged rejection of an across-the-board exemption on the grounds that small businesses received subsidies and other government assistance.²⁰⁰ Even Representative Wise, who had proposed increasing the enterprise coverage threshold to \$500,000, based his opposition to Jeffords’ amendment on the “concern . . . that it would eliminate some of the traditional areas where minimum wage has applied.”²⁰¹

Republican Representative Steve Bartlett voiced his support for the expansion of the threshold by embellishing on the reasons advanced by Jeffords. He asserted, without empirical corroboration, that because there were too many different rules, “you won’t find a small business that is employing the small business exemption. It is not usable because it is not understandable.”²⁰²

Following the 14-19, virtually straight party-line vote rejecting Jeffords’ amendment,²⁰³ the full committee approved the increase

¹⁹⁹ Stenographic Transcript of Hearings Before the Committee on Education and Labor, House of Representatives, Markup of H.R. 1834, Minimum Wage Legislation Wednesday March 16, 1988 at 55-56. [hereinafter *Stenographic Hearing Transcript*]. This transcript, which was also included in the file, “Full Cmte. Mtg., March 16, 1988, H.R. 1834, Fair Labor Standards Act (continued),” apparently, like all mark-up transcripts, may not be duplicated. The quotations in the text are taken from Bruce Goldstein’s extensive and verbatim notes.

²⁰⁰ *Id.* at 60-61.

²⁰¹ *Id.* at 62.

²⁰² *Id.* at 63.

²⁰³ *Id.* at 68-71. Rep. Penny, a Democrat from Minnesota, not only voted for the Jeffords amendment, but spoke in favor of it on the grounds that small businesses should be subject to state minimum wage laws. *Id.* at 65-67.

in the enterprise test to \$500,000 for retail and services businesses alone.²⁰⁴

The House Education and Labor Committee in reporting out the bill took numerous liberties with historical truth. The committee declared that by "proposing an adjustment in the definition of an enterprise engaged in commerce," it "continues to support the principle of a true small business exemption." Apart from the fact that Congress lacked a tradition of articulating, let alone enacting, a small business exemption, the committee's account of the "history of periodically adjusting the enterprise threshold test" conveniently omitted Congress's act of "adjusting" it down to \$0 for the construction and laundry industries. Instead, it stressed that "[i]n recent years the movement has been upward"—suppressing the fact that the downward and upward "adjustment" embodied radically different labor standards policies. Since the vast majority of U.S. workers were employed in large enterprises, the committee's belief that the \$500,000 level "preserv[ed] coverage for the vast majority of workers" was misleading. Then in a tour de force of double talk, the House committee report argued that the "hold harmless" provision prohibiting newly exempt employers from reducing existing employees' wages below the previous minimum wage "will insure that no employee will be adversely affected by the Committee amendment."²⁰⁵ The committee failed to explain in what sense it had not "adversely affected" workers who, unlike their relatives, friends, neighbors, acquaintances, and most of the working class, would no longer be entitled to the current minimum wage. Moreover, all workers employed in the labor market penumbra of such exempt firms would feel the downward pressure of their lawfully unfair labor standards.

In the following months, members of Congress were "bombarDED" with claims that an increased minimum wage would injure small businesses.²⁰⁶ By June, when the Senate Labor Committee met in executive session, even Kennedy was constrained to offer a

²⁰⁴ H.R. 1834, 100th Cong. § 3 (1988) in H.R. REP. NO. 100-560, at 1, 2 (1988).

²⁰⁵ H.R. REP. NO. 100-560, at 11 (1988).

²⁰⁶ *Backers of Minimum Wage Increase Seek Support Among House Members*, DAILY LAB. REP., May 6, 1988, at A-11.

substitute bill that not only scaled back the minimum wage increase, but raised the exemption level to \$500,000.²⁰⁷ Kennedy was presumably retreating in the face of Republican amendments, mobilized by Senator Dan Quayle, to increase the level to \$600,000 for all businesses.²⁰⁸ In the event, Quayle and the other Republicans decided not to press their amendments, which had no chance of passage in committee, waiting instead for the floor debates.²⁰⁹ Chairman Kennedy, in reporting out a bill with the higher \$500,000 enterprise threshold, took a different justificatory tack than his House counterpart. Without explaining why, he declared that the committee took the position that “with the increase in the minimum wage there should be a commensurate increase in the Retail-Service Enterprise Test.” The committee boasted of having achieved an almost mathematical equality—35.8 percent and 37.9 percent, respectively. Unlike the House committee, the Senate committee refrained from claiming that the higher exemption had not adversely affected any worker; it even conceded that 1.15 million workers would be added to the group of the exempt.²¹⁰

Although the stage had been set for floor debates in both Houses over more far-reaching exemptions, they failed to materialize. After Senate Democrats withdrew the bill in September in the face of a successful Republican filibuster, the House never debated the bill at all in 1988.²¹¹

In the wake of Vice-President Bush’s election as president, Hawkins and Kennedy continued to accommodate political realities. House Bill 2 and Senate Bill 4, which they introduced on January 3, 1989, both retained their earlier bills’ higher \$500,000 enterprise

²⁰⁷ *Minimum Wage, Plant Closing Bills Are Focus of Attention in Senate*, DAILY LAB. REP., June 23, 1988, at A-5.

²⁰⁸ *Senate Labor Panel to Vote on Minimum Wage, House Republicans Weigh Compromise Offer*, DAILY LAB. REP., June 21, 1988, at A-12; *Senate Panel to Vote June 29 on Minimum Wage Compromise*, DAILY LAB. REP., June 24, 1988, at A-8.

²⁰⁹ *Senate Labor Committee Clears Bill to Raise Minimum Wage to \$4.55 an Hour*, DAILY LAB. REP., June 30, 1988, at A-1.

²¹⁰ S. REP. NO. 100-430, at 24 (1988).

²¹¹ 134 CONG. REC. 25,290 (1988). No proposals for a higher or broader exemption were discussed during the Senate debate.

coverage threshold for retail and service employers.²¹² Following testimony by Secretary of Labor Elizabeth Dole to the labor committees in both Houses of Congress on March 3 and 4 that President Bush would not sign a bill increasing the minimum wage unless the amendments extended what she erroneously called the "small business exemption" (at the \$500,000 level) to "all businesses,"²¹³ the Senate committee on March 13 reported out a bill containing "a revised enterprise test . . . almost identical to the provision sought by the Administration." Covering up the fact that construction workers, for example, would, for the first time in almost a quarter-century, lose their universal coverage, the committee chose to describe the radical change euphemistically: "the test for small business enterprises is altered to a uniform \$500,000 in gross annual sales, eliminating several of the separate tests." The committee stressed that "this more streamlined version of a threshold test . . . goes a long way toward simplifying this section."²¹⁴

This emphasis on uniformity and streamlining accommodated the concerns of Senator Jeffords, who a year earlier, as a member of the House, had unsuccessfully proposed a similar amendment. Jeffords purportedly articulated the change as a mere "housekeeping" measure designed to "harmonize" coverage.²¹⁵ Since Jeffords

²¹² H.R. 2, 101st Cong. § 3(a) (1989); S. 4, 101st Cong. § 3(a) (1989).

²¹³ *Minimum Wage Restoration Act of 1989: Hearing Before the Senate Committee on Labor and Human Resources*, 101st Cong. 26 (1989) (statement of Elizabeth Dole, Secretary of Labor).

²¹⁴ S. REP. NO. 101-6, at 29 (1989). The reports in the *Daily Labor Report* overlooked this change. *Senate Panel Oks Minimum Wage Hike, Rejects Administration's Proposal*, DAILY LAB. REP., Mar. 9, 1989, at A-14; *House Subcommittee Reports Bill Reports Bill to Raise Minimum Wage*, DAILY LAB. REP., Mar. 10, 1989, at A-9.

²¹⁵ Telephone Interview with Mark Powden (Dec. 4, 1997). In 1988-89, Powden had been Jeffords's legislative director; at the time of the interview, he was staff director of the Senate Labor and Human Resources Committee, of which Jeffords is chairman.

was not viewed as an enemy of labor,²¹⁶ his sponsorship of this change enhanced its appearance as a neutral measure.

The Senate committee also suggested that the higher threshold for enterprise coverage would not lead to a net reduction in the total number of workers covered because the newly excluded employees would be approximately equal to the number of employees "added to the coverage of the Act by the removal of the section 13(a)(2) and 13(a)(4)."²¹⁷ Although the report nowhere explained this step, it was referring to the bill's conforming amendment that proposed deletion of sections containing exclusions of employees of certain local retail and service employers.²¹⁸ This clear statement of the additional coverage that would result from the deletion, which Jeffords had also proposed in his unsuccessful 1988 amendment,²¹⁹ is significant because it refutes the claim made by small employers and Republicans in 1990 and later that a drafting error had produced the deletion as a result of which some workers retained individual coverage.

The one respect in which the Senate provision did not conform to the Bush administration's requirements was the preservation of first-dollar coverage for public hospitals. This exception was the result of expeditious lobbying by the American Federation of State, County and Municipal Employees.²²⁰ That success suggests the possibility that prompt and coordinated lobbying by the construction unions to retain universal coverage might have produced the same result.²²¹

The House bill, reported out on March 20, which continued to include the higher \$500,000 coverage threshold, lacked the across-

²¹⁶ Telephone Interview with Jim Riley (Dec. 9, 1997). Riley was chief majority counsel to the Labor Standards Subcommittee of the House Education and Labor Committee from the mid-1980s to 1995, and is currently a Federal Mine Safety and Health Review Commission commissioner.

²¹⁷ S. REP. NO. 101-6, at 35.

²¹⁸ S. 4, 101st Cong. § 3(c)(1) (1989); S. REP. NO. 101-6, at 7.

²¹⁹ Amendment to Committee Print of H.R. 1834 Offered by Mr. Jeffords, § 3(c).

²²⁰ Telephone Interview with John Zalusky (Dec. 9, 1997). Zalusky was an AFL-CIO economist at the time and involved in the FLSA negotiations.

²²¹ Telephone Interview with John Zalusky (Jan. 26, 1998).

the-board extension.²²² The committee's explanation of the increase differed from the one that it had issued a year earlier only in having deleted the misleading claim that "the vast majority of workers" remained covered. Instead, it inserted another misleading claim—namely, that the \$500,000 level was less than "the historic \$1,000,000 threshold" from 1961.²²³ Since that level had already been reduced to \$250,000 by 1966, it is unclear in what sense the threshold that had prevailed for only a few years could qualify as "historic."

But almost immediately following the issuance of the House report on March 20, a "deal" was struck that the committee would support floor amendments embodying the extension of the \$500,000 threshold to industries other than retail and service.²²⁴ On March 21, the House Rules Committee recommended passage of a House Resolution, according to which Representatives William Goodling and Austin Murphy, the ranking Republican on the Education and Labor Committee and the chairman of the Labor Standards Subcommittee, respectively, would be permitted to offer for debate an amendment in the nature of a substitute that included the higher across-the-board threshold.²²⁵

The House debate on March 22-23, 1989, took place as choreographed by the deal. Representative Murphy, bowing to the "political reality" of an offer by the Bush administration to do what Reagan had refused for eight years—namely, to sign an increase in the minimum wage—met the other "[c]oncerns of the business community" by agreeing to a \$500,000 "exemption ceiling for all businesses" except hospitals.²²⁶ In contrast, Representative Hawkins recorded his surprise—disingenuously, since he had already acquiesced in the higher threshold a year earlier—that his

²²² H.R. REP. NO. 101-11, at 3 (1989).

²²³ *Id.* at 14.

²²⁴ Telephone Interview with Jim Riley (Dec. 9 1997), who emphasized that, like many such deals, this one was—and had to be—concluded within a few hours.

²²⁵ H.R. REP. NO. 101-13, 4-5 (1989). Interestingly, the provision in Goodling's amendment was labeled "Small Business," whereas in Murphy's it was called "Change in Enterprise Test."

²²⁶ 135 CONG. REC. 5142-43 (1989).

maximalist demand had not sailed through the Reagan administration: "I never dreamed, as the author of this little bill merely calling for some adjustment in the [minimum rate] rate based on the erosion that inflation has caused, that the bill would have picked up such baggage as it has—the tip credit, the small business exemption, the training wage. Unfortunately that is so."²²⁷

No member of the House spoke against the increase in, or expansion of, the enterprise threshold. Among the very few speakers who even mentioned the issue, two Democrats, including one of the sponsors of the Murphy amendment, misstated the scope of the proposed enterprise coverage provision. Representative Thomas Ridge, the co-sponsor, stated that: "As I interpret the exemption, even agribusiness of \$500,000 or less is included in this particular exemption"²²⁸ And Representative Bill Richardson, who admonished his colleagues not to "break the backs of small business owners who provide employment for many minimum wage workers," opined that "many of the small farm and cattle ranches in my district will be exempted from minimum wage requirements."²²⁹ Although none of their more knowledgeable colleagues corrected them, their understanding was incorrect: since "[v]irtually all" farm workers are individually engaged in the production of goods for commerce,²³⁰ those working for farmers with annual sales below the enterprise coverage threshold remain subject to individual coverage. Only in the extraordinary case of farms that produced crops to be sold to consumers exclusively within the same state would the farm workers be excluded from coverage.²³¹ The misinterpretation was, to be sure, largely aca-

²²⁷ *Id.* at 5155.

²²⁸ *Id.* at H860.

²²⁹ *Id.* at H849.

²³⁰ Wage and Hour Div., *Fact Sheet No. 012: Agricultural Employers Under the Fair Labor Standards Act (FLSA)* (visited Apr. 19, 1998) <<http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs12.htm>>.

²³¹ "Goods are produced 'for' such commerce where the employer intends, hopes, expects, or has reason to believe that the goods . . . will move" in interstate commerce. If such movement "can be reasonably anticipated by the employer" when his employees work on them, "it makes no difference whether he himself or a subsequent owner . . . of the goods put the goods in interstate . . . commerce." 29 C.F.R. § 776.21(a) (1997).

demic: 62 percent of nonsupervisory agricultural employees were already excluded from the minimum wage and 100 percent from overtime by various other provisions.²³² As expected, the House then voted 248 to 171 for the compromise, the negative votes coming largely from those opposed to an increase in the minimum wage.²³³

The debate in the Senate in April also generated no substantive discussion of the expanded enterprise coverage exemption. Despite the fact that Congress then passed a FLSA bill that embodied many of the preconditions that the Bush administration had laid down—including the almost universal \$500,000 threshold for enterprise coverage—the president vetoed it on June 13 on the grounds that the increase in the minimum wage (from \$3.35 to \$4.55 in three years) was “excessive.”²³⁴ Once the House proved incapable of overriding the veto (the 247 to 178 vote being very similar to the original vote),²³⁵ Democratic legislators were forced to accommodate the administration further, but not with respect to the enterprise coverage threshold.²³⁶

VIII. THE HIGH PRICE OF A SMALL INCREASE IN THE MINIMUM WAGE

[I]n 1989, the Senate agreed to increase the small business exemption from \$362,500 to \$500,000. The clear intention was to protect the jobs of those who work in the smallest companies from the backlash of a higher Federal wage.²³⁷

²³² 29 U.S.C. § 213(a)(6) (1994); S. REP. NO. 101-117, 22 tbl.2, 24 tbl.4 (1989). Agricultural workers are excluded principally by virtue of their employment by employers “who did not, during any calendar quarter during the preceding calendar year, use more than five hundred man-days of agricultural labor.” 29 U.S.C. § 213(a)(6)(A).

²³³ 135 CONG. REC. at 5256-57.

²³⁴ *Message to the House of Representatives Returning Without Approval the Fair Labor Standards Amendments of 1989*, in PAPERS OF THE PRESIDENTS OF THE UNITED STATES: GEORGE BUSH: 1989 724 (1990).

²³⁵ 135 CONG. REC. at 11,776.

²³⁶ S. REP. NO. 101-117 (1989); H.R. REP. NO. 101-260 (1989).

²³⁷ 137 CONG. REC. S1584-85 (1991) (statement of Sen. Bumpers).

The changes ultimately embodied in Public Law 101-157 (enacted on Nov. 17, 1989, and made effective April 1, 1990) included the increase of the enterprise coverage threshold to \$500,000 and its extension to all businesses except public and private hospitals, schools, and institutions for the aged.²³⁸ Under the heading, "Preservation of Coverage," the amendment also required any enterprise that on March 31, 1990 was subject to the minimum wage provision of the FLSA, but is, as a result of the amendment, no longer subject to it, "to pay its employees not less than the minimum wage in effect . . . on March 31, 1990" (\$3.35), and to pay its employees time and one-half for overtime hours.²³⁹

This "preservation of coverage" clause, which the committees had falsely characterized as a hold-harmless provision for the benefit of workers, was deeply flawed. To begin with, the requirement that employers continue to pay \$3.35 per hour in perpetuity became, as soon as the higher minimum wage went into effect on April 1, 1990, a government-enforced invitation to impose unfair labor standards; with time, as the wage level rose, it could only become even more grotesque. Newly exempt enterprises' ongoing obligation to pay overtime was subject to the same criticism in the sense that to minimum wage workers they were required to pay time and one-half only on that obsolete \$3.35 or whatever substandardly depressed wage rates they were paying their workers. In addition, even this diluted duty was undermined by employers' practice of going out of business and reopening as a new entity in order to extricate themselves from even this stepgrandfather clause. Such churning is a particularly prevalent ploy in construction,²⁴⁰ where large numbers of small firms without any self-detriment seasonally "go in and out of business" anyway.²⁴¹ DOL enforcement officials acknowledge that such disappearances and reappear-

²³⁸ Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 3(a), 103 Stat. 938, 938 (1989).

²³⁹ § 3(b), 103 Stat. at 939.

²⁴⁰ Telephone Interview with Rudy Oswald (Dec. 4, 1997). Oswald, now retired, was for many years the chief economist of the AFL-CIO.

²⁴¹ *The Family Friendly Workplace Act: Hearing Before the Subcommittee on Employment and Training of the Senate Committee on Labor and Human Resources*, 105th Cong. 9 (1997) (statement of Sen. Dodd).

ances have made a dead letter of the provision in construction.²⁴² Moreover, since the DOL is prohibited from requiring firms to keep records more than three years, it is, in its view, by now no longer able to prove that employers owe any residual obligation dating back to the period before April 1, 1990.²⁴³

But even apart from such tactics, the robustness of the so-called hold-harmless provision becomes moot over time: given the enormous turnover rate among small construction entities, as pre-1990 small firms go out of business forever and wholly unrelated new small ones are formed, the only ones who will be held harmless, as it were, are these post-March 31, 1990 start-up firms,

²⁴² Telephone Interview with Don Chleborad, Enforcement Officer, DOL (Nov. 21, 1997). Strong grounds exist for believing that the DOL has yielded too quickly on this point. Even in the more tenuous case of a bona fide buyer of a corporate employer, courts have held that such a successor may be held liable for the seller's FLSA liabilities where "the new business retains common aspects of the prior business sufficient to allow the legal conclusion of 'successorship'" and the successor knew of the FLSA violations at the time it bought the business. Criteria for testing retention of common aspects of the business include: substantial continuity of the same business operation; use of the same plant; the same or substantially same work force; the same jobs under the same working conditions; the same supervisors; the same machinery, equipment, and methods of production; and the same product manufactured or service offered. *Brock v. LaGrange Equipment Co.*, 107 Lab. Cas. ¶ 34,967 at 45,209 (D. Neb. 1987). *See also* *Steinbech v. Hubbard*, 51 F.3d 843, 846 (9th Cir. 1995); 29 C.F.R. § 825.107(a) (1997) (factors for determining whether an employer is a successor in interest under the Family and Medical Leave Act). The case of a small construction business owner who merely goes in and out of business would be much easier to resolve. First, it would be unnecessary to prove that he knew of the minimum wage or overtime liability. Second, if he merely closed down one sole proprietorship and opened another, his person would create the identity. Third, even if he closed down a sole proprietorship and incorporated or closed one corporation and reincorporated, if the business were otherwise unchanged, the requisite "degree of business continuity" would be proven. Since Congress's purpose was "Preservation of Coverage," permitting such alter ego transactions to wipe out residual overtime liability would make a mockery of congressional intent. Finally, if small construction companies customarily suspend operations during the winter anyway, it would, likewise, contravene congressional intent to recognize such temporary closures as terminating overtime coverage.

²⁴³ 29 C.F.R. § 516.5; Telephone Interview with Richard Brennan, DOL, Division of Policy and Analysis, (Dec. 8, 1997).

which are freed from FLSA obligations and free to compete with larger firms on the basis of lawfully lower wages. And even if construction labor market forces compel payment of wages in excess of the minimum wage, the more important issue is nonpayment of overtime, which is “a very big problem” even among covered employers.²⁴⁴ Finally, Congress drained whatever residual force remained in the “preservation of coverage” provision by failing to codify it as it had in 1977. Consequently, only the utmost diligence or serendipity would lead even a lawyer to stumble over it in the session law or the notes to the *United States Code*.²⁴⁵

Congressional justification in 1988-1989 of the increase in the enterprise coverage dollar-volume threshold as merely adjusting for inflation might have made sense if it historically had been Congress’s intent to maintain coverage at some fixed level. But the structure of the 1966 amendments, which lowered the threshold for retail and service enterprises from \$1,000,000 to \$500,000 and \$250,000 in two stages, clearly pointed in the opposite direction. One of the conservative Republican opponents of minimum wage regulation underscored this intent in 1966. Senator Paul Fannin, objecting to the lowering of the enterprise coverage threshold to \$250,000, quoted the 1961 Senate report to the effect that the \$1 million threshold established in that year for retail and service enterprises was designed to insure that “small local business” would not be affected. He then asked rhetorically: “Is it possible that in the short space of 5 years our opinions on this vital point have changed 75 percent? Is it now felt that a small store with, say, six or eight employees, should be subject to the voluminous provisions of the Fair Labor Standards Act?”²⁴⁶

Creation of first-dollar coverage for construction and laundry enterprises was an unambiguous answer: in pushing out to the

²⁴⁴ Stephanie Armour, *More Workers Putting in Free Overtime Hours*, USA TODAY, Jan. 14, 1998, at 5B (quoting John Fraser, Acting Wage and Hour Administrator). Charles Ciccone, *The Small Business Exemption in the Fair Labor Standards Act: Number of Employees Subject to the 1989 Amendments*, in CRS REPORT FOR CONGRESS 5, 6 (Cong. Res. Serv., 91-307 E, Apr. 2, 1991), totally overlooks the question of overtime in construction.

²⁴⁵ 29 U.S.C. § 203, at 60 (1994).

²⁴⁶ S. REP. NO. 89-1487 (1966), reprinted in 1966 U.S.C.C.A.N. 3002, 3043.

limits of its interstate commerce powers, Congress made clear not only that it regarded as engaged in activities affecting commerce more and more businesses that it once classified as merely local, but that the "small" in "small local business" would have to dwindle in tandem with the "local." Congress's attempt in 1989 to justify the increase and extended application of the enterprise threshold level on the grounds that "a single small business threshold" was obviously superior to the existence of "several confusing standards to determine applicability of the Act" and "should make it much easier to determine which enterprises are covered and which are not,"²⁴⁷ overlooked the fact that nothing could be less confusing than the universal first-dollar coverage that had prevailed in construction for a quarter-century²⁴⁸—nothing, that is, except the universal exclusion associated with repeal of the FLSA, which was not yet on the practical agenda at that time.²⁴⁹

IX. HERE AN EXEMPTION, THERE AN EXEMPTION: TODAY
ENTERPRISE COVERAGE, TOMORROW INDIVIDUAL
COVERAGE?

There is a certain number of marginal industries which for one reason or another cannot pay a wage which . . . all of us might believe to be a desirable wage. Society must choose whether it wishes to have those marginal industries continued on a basis of what might be termed marginal wages, or whether it wishes to eliminate them from

²⁴⁷ H.R. REP. NO. 101-260, at 39, 18 (1989).

²⁴⁸ Confusion did not, however, disappear entirely. The judge in *Donovan v. Doyon Drywall, Inc.*, 1982 U.S. Dist. LEXIS 13705 (M.D. Fla. 1982), proceeded from the misunderstanding that in order to meet the enterprise coverage test, construction employers had to do at least \$250,000 of business. Since the employers did reach that level, the error was harmless.

²⁴⁹ Despite the expanded small business exemption, Senator Hatch still believed that small business people would suffer as a result of the passage of the amendments. He therefore (unsuccessfully) proposed an amendment prohibiting the 101st Congress from increasing the business costs of any small business (defined as employing 50 or fewer people or having gross receipts of less than \$1 million) by enacting legislation requiring additional paperwork, capital expenditures, compliance costs, or taxes. 135 CONG. REC. 15,228 (1989).

industry and their production taken off the market, and support them on relief or by other means.²⁵⁰

The provision in the 1989 FLSA amendments dealing with enterprise coverage included “conforming amendments,” which deleted §§ 213(a)(2) and (4) of the FLSA.²⁵¹ Section 213(a)(2) had, beginning in 1961, excluded even from individual coverage under the minimum wage and overtime provisions any employee in any retail and service establishment more than one-half of whose sales were made intrastate if the establishment was either exempt from enterprise coverage or was in a covered enterprise but the establishment’s annual sales were less than \$250,000.²⁵² As of the time of the 1989 amendments,²⁵³ section 213(a)(2) stated that the minimum wage and overtime provisions did not apply to “any employee employed by any retail or service establishment . . . if more than 50 per centum of such establishment’s annual dollar volume of sales of goods or services is made within the State in

²⁵⁰ 1937 *Hearings*, *supra* note 50, at 658 (testimony of Noel Sargent, secretary, National Association of Manufacturers).

²⁵¹ Fair Labor Standards Amendments of 1989, Pub. L. No. 101-157, § 3(c)(1), 103 Stat. 938, 939 (1989).

²⁵² Fair Labor Standards Amendments of 1961, Pub. L. No. 87-30, § 9(a)(1), 75 Stat. 65, 71 (1961). From 1938 to 1949, the provision referred simply to retail and services establishments “the greater part” of whose sales was in intrastate commerce. Fair Labor Standards Act, §213(a)(2), 52 Stat. 1060, 1067 (1938). The use of 50 percent as a marker of local businesses was inserted in 1949 to “obviate” Supreme Court decisions and rulings by the Wage and Hour Administrator that Congress deemed to “sweeping.” Fair Labor Standards Amendments of 1949, ch. 736, § 11, 63 Stat. 910, 917 (1949); H.R. REP. NO. 81-1453 (1949), *reprinted in* 1949 U.S. Code Cong. Serv. 2251, 2263-64.

²⁵³ When the 1966 amendments lowered the retail and service enterprise coverage dollar-volume threshold to \$250,000 as well, the separate but identical dollar-volume for establishment exemption from all coverage became redundant; it was finally deleted as of 1977, from which time forward the enterprise coverage dollar-volume threshold also determined the establishment threshold. 29 U.S.C. § 213(a)(2) (1964, 1970, 1976, repealed 1989). For a good overview of the history of the changes in § 213(a)(2), see Conrad Fritsch, *Exemptions from the Fair Labor Standards Act, Retail Trade and Services*, 4 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 1, 13-18 (1981). The very complex regulations are found at 29 C.F.R. §§ 779.300-343 (1997).

which the establishment is located, and such establishment is not in an enterprise described in section 203(s). . . ."²⁵⁴

This exclusion relieved such locally oriented retail and service establishments of minimum wage and overtime obligations vis-à-vis an estimated 3,415,000 employees as of September 1988.²⁵⁵ The obvious purpose and effect of the deletion of this exclusion were, as President Bush's Secretary of Labor observed in her statutorily required annual (1990) report to Congress on minimum wage and overtime coverage,²⁵⁶ to entitle employees of such formerly doubly and wholly exempt enterprises to minimum wage and overtime payments "insofar as they are individually engaged in commerce, in the production of goods for commerce or an activity which is closely related and directly essential to such production, in a workweek."²⁵⁷ That the intent behind the combined increase in the threshold and deletion of the former exclusions was not to exempt all small firms entirely is clear from the statement in the final House committee report that the amended enterprise test in conjunction with the deletion of §213(a)(2) would "exempt *most* small businesses from the FLSA if their annual volume of sales . . . is less than \$500,000."²⁵⁸

About the time the higher minimum wage of \$3.80 was to go into effect in April 1990, small business owners and congressional Republicans began claiming that a drafting error had vitiated the increase in and expansion of the enterprise coverage exemption.

²⁵⁴ 29 U.S.C. § 213(a)(2) (repealed 1989). The other section that Congress repealed, 29 U.S.C. § 213(a)(4) (repealed 1989), excluded from minimum wage and overtime coverage employees of an exempt retail establishment (under § 213(a)(2)) if it was recognized as a retail establishment despite making or processing at the retail establishment the goods that it sells "Provided, that more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located."

²⁵⁵ S. REP. NO. 101-117, at 23 tbl.2 (1989). 29 U.S.C. § 213(a)(4) affected only 8,000 employees.

²⁵⁶ 29 U.S.C. § 4(d)(1) (1994).

²⁵⁷ U.S. DEPT. OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, MINIMUM WAGE AND MAXIMUM HOURS UNDER THE FAIR LABOR STANDARDS ACT 4 (1991).

²⁵⁸ H.R. REP. NO. 101-260, Pt. 1, at 39 (1989) (emphasis added).

As an official of the chief lobbyist on this matter, the National Restaurant Association ("NRA"), declared: "This was absolutely a mistake"²⁵⁹ They complained that no one had foreseen that the deletion of §213(a)(2) would mean that individual coverage would be preserved for some workers individually engaged in commerce or production of goods for commerce even in enterprises falling below the enterprise coverage threshold.

The NRA spearheaded claims by small businesses that the deletion of § 213(a)(2) "in effect, repealed the small business exemption" that had been in existence since 1961, making it "virtually useless in most instances." The NRA complained that a restaurant that had, under prior law, been exempt both under enterprise coverage and with regard to individual coverage by virtue of § 213(a)(2), was now for the first time, even if it did less than \$500,000 of business, liable for the minimum wage vis-à-vis "employees who handle or process cash, checks, and credit card charge slips, take telephone reservations from customers calling from out-of-state, unload goods shipped from another state, and deliver mail to the post office."²⁶⁰

A few months after the 1989 amendments had gone into effect, some legislators began trying to undo the survival of individual coverage in firms exempt from enterprise coverage. On July 20, 1990, Representative Penny and 17 others introduced a bill to amend the FLSA so as to confine coverage only to employees of enterprises engaged in commerce or in the production of goods for commerce.²⁶¹ A few days later, Representative Murphy introduced his "Fair Labor Standards Technical Amendments," which

²⁵⁹ *White House Pushing To Modify Minimum Wage*, LAB. REL. REP., Dec. 10, 1990, at 463, 464.

²⁶⁰ *Id.* at 464. The DOL takes the position that "a waitress or cashier who handles a credit card transaction would in all probability be subject to the Act." Wage and Hour Div., *Fact Sheet No. 002: Restaurants and Fast Food Establishments Under the Fair Labor Standards Act (FLSA)* (visited Apr. 19, 1998) <<http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs2.htm>>. On the very widespread violations in restaurants unrelated to the exemption of small businesses from enterprise coverage, see Brian Tumulty, *Work Violations Rob Employees: Unpaid Overtime Is the Worst Problem, Agency Says*, IDAHO STATESMAN, Dec. 20, 1997, at 1a.

²⁶¹ H.R. 5340, 101st Cong. (1990).

would have achieved the same end.²⁶² No action was taken on these efforts to deprive workers of individual coverage, but on October 17, 1990, Secretary of Labor Dole informed Senate Majority Leader George Mitchell that the so-called conforming amendment had the "inadvertent effect" of bringing individual employees of small firms under the law for the first time."²⁶³ The next day, the House considered two unrelated issues left over from the 1989 bill. Representative Murphy, the chairman of the Labor Standards subcommittee, sought to "accommodate two separate groups of employers" with regard to matters that the 1989 act had not made "clear" or had "failed to exempt." Representative Bartlett tried to use the occasion to persuade his colleagues that these points were only "two of the four mistakes, drafting mistakes, that were made in the passage of the Minimum Wage Act of 1989."²⁶⁴ Bartlett considered it "important for Members to understand" that these other two "mistakes . . . were generally acknowledged to be mistakes." Who had made these "mistakes" and how, Bartlett did not reveal, although he certified they had not been made by Murphy or Goodling, the ranking Republican. Unable to state comprehensibly (or grammatically) what in fact Congress had done, Bartlett, who urged that "the mistakes . . . be corrected . . . at some point" that session, asserted that:

[T]he words of the committee report in section 3, section 3 amends the enterprise test to exempt most small businesses from the FLSA [i]f their annual volume of sales or business done is less than \$500,000. Nevertheless, the drafting of the 1989 act, drafted the small business exception which had been in effect since 1961 to totally remove the exemption from small business, not a result that anyone so far as I know had intended, and clearly not the intent of that act.²⁶⁵

Although it is admittedly impossible to know what Bartlett meant, others soon made it clear. On the last day of the 101st

²⁶² H.R. 5382, 101st Cong. (1990).

²⁶³ *White House Pushing To Modify Minimum Wage*, LAB. REL. REP., Dec. 10, 1990, at 464.

²⁶⁴ 136 CONG. REC. H10,563 (1990).

²⁶⁵ *Id.* at H10,564.

Congress, Senator Dale Bumpers, Democrat of Arkansas, on behalf of himself and 16 Democratic and Republican colleagues, introduced the last bill in the Senate, which would have eliminated individual coverage, retaining minimum wage and overtime coverage only for employees employed in an enterprise engaged in commerce or in the production of goods for commerce.²⁶⁶ Bumpers immediately returned to the issue in the next session. Early in 1991, two southern Democrats, Dale Bumpers in the Senate and Mike Espy in the House, introduced bills identical with the earlier proposal. These proposals were disingenuous in the sense that their sponsors falsely advertised them as a mere technical correction designed to restore the status quo ante 1989. In fact, they were a radical break with a half-century of FLSA coverage: they would not merely have reinstated the limited exemptions for local retail and service establishments under §§ 213(a)(2) and (4), but would have eliminated individual-based interstate commerce coverage entirely in all businesses with less than \$500,000 of sales in all industries.²⁶⁷

In explaining the basis of his proposal, Bumpers distorted the history of the FLSA. First, he claimed that: "Since the enactment in 1938, the Fair Labor Standards Act has provided an exemption for small businesses. . . . Unfortunately, under current law, that exemption does not exist for all practical purposes."²⁶⁸ Both of these claims are incorrect. The FLSA from the outset excluded from coverage firms, regardless of size, not engaged in interstate commerce or production of goods for commerce. The exemption from enterprise coverage, which did not begin until 1961 and which Congress increased and expanded in 1989, continues to exist for retail and service firms, but Congress expressly meant to trade it off for inclusion of those employees who are individually engaged in commerce.

The other Democratic senator from Arkansas, David Pryor, supplemented the distortion with respect to its operation. He asserted that "through an unintended deletion of a section of the

²⁶⁶ S. 3271, 101st Cong. (1990).

²⁶⁷ S. 349, 102d Cong. (1991); H.R. 1237, 102d Cong. (1991).

²⁶⁸ 137 CONG. REC. S1584 (1991).

. . . FLSA . . . , all businesses that had employees engaged in interstate commerce would be covered in full”²⁶⁹ This claim is false: no employer forfeits its enterprise coverage exemption with respect to employees not engaged in interstate commerce merely because other employees are so engaged. Senator D’Amato offered the most extreme attack by falsely asserting that the “deletion error” not only had left the DOL with “no choice but to determine that all businesses with employees engaged in interstate commerce are not covered under the small business exemption,” but that it “will place hardships upon small businesses that have been unheard of in over 50 years of labor law.”²⁷⁰ A determination by the DOL that some employees are individually covered in no way affects a small business’s exemption from enterprise coverage vis-à-vis its other employees. Outside of the retail and service sector, newly uncovered construction firms also refute D’Amato’s claim since very few if any of their employees are individually engaged in interstate commerce.

The success of small business lobbyists’ in securing 48 senatorial co-sponsors for Bumpers’ bill sufficed to persuade the Democratic leaders of the Labor Committee that they would “have to negotiate some kind of compromise with him to try to limit the damage.”²⁷¹ In the event, the adamant rejection by Representative William Ford, the new chairman of the House Education and Labor Committee, of a proposal that would expel so many workers from coverage doomed the initiative.²⁷²

The allegation that no one realized the consequences of deleting § 213(a)(2) or that it was a drafting error is directly contradicted by the contemporaneous legislative history. During the debate over

²⁶⁹ *Id.* at S1585.

²⁷⁰ *Id.* at S2241.

²⁷¹ Sarah Fox, Background on Bumpers’ Minimum Wage Amendment 6 (July 19, 1991) (on file with author). Fox wrote this internal memo while she was chief majority counsel of the Senate Labor and Public Welfare Committee.

²⁷² Telephone Interview with Ross Eisenbrey (Dec. 18, 1997). In 1988-89, Eisenbrey was legislative director to Representative William Ford, the second ranking Democrat on the House Education and Labor Committee and ex-officio member of the Subcommittee on Labor Standards. Eisenbrey is currently Associate Director for Legislative Affairs at the DOL.

House Bill 2 on March 23, 1989, for example, Representative Goodling, a senior Republican member of the Labor Committee, inserted into the record the DOL's estimate of the economic effects of the increase in the small business exemption. This Bush administration DOL document is important because it refutes the claim that no one understood that the deletion of the exemptions in §§ 213(a)(2) and (4) meant that individual coverage would survive the exemption from enterprise coverage. The DOL unambiguously stated that the increase in the enterprise threshold to \$500,000 "would exempt additional jobs from the minimum wage, as additional establishments would revert to individual coverage.

...²⁷³

Still more pertinent to understanding the purpose of the deletion is its author. Jeffords, a Republican, as a member of House labor committee in 1988 and the Senate labor committee in 1989, proposed the deletion of § 213(a)(2) in tandem with his plan to raise, universalize, and make uniform the various dollar-volume tests.²⁷⁴ One purpose of the deletion was to simplify the small business exemption rules and to reduce the number of violations.²⁷⁵ The other purpose was to accommodate pro-labor members who were concerned about the loss in coverage that would result from the higher and expanded threshold. Jeffords expressly viewed the deletion of § 213(a)(2) and (4) as bringing into coverage about as many workers as the higher threshold would exclude—3 million. He and his staff characterized this trade-off as a "wash."²⁷⁶ When he explained his proposal to the House Labor Standards subcommittee in 1988, to be sure, the "members' eyes glazed over" in reaction to the complexities, but "what everyone

²⁷³ 135 CONG. REC. 5244 (1989).

²⁷⁴ James Riley, the chief counsel and staff director of the House Subcommittee on Labor Standards in the late 1980s, speculated that Jeffords used the across-the-board \$500,000 threshold as a "cover"—to appear to be "carrying water for the president," and thus not to be "suspect" to the Republicans. Telephone Interview with James Riley (Dec. 9, 1997).

²⁷⁵ *White House Pushing To Modify Minimum Wage*, LAB. REL. REP., Dec. 10, 1990, at 465.

²⁷⁶ FOX, *supra* note 271, at 3; Telephone Interview with Mark Powden (Dec. 4, 1997).

understood was that it was a 'wash.'"²⁷⁷ Most importantly, at the full committee mark-up hearing in 1988, although Jeffords conceded that "precise figures were not available" and that minimum wage coverage would decrease in some occupations, he definitively declared that "there is no question . . . that there will probably be a net increase in coverage."²⁷⁸

This clear contemporaneous record that the trade-off was public and known²⁷⁹ is, curious as it may seem at first blush, not inconsistent with evidence that some heavily involved employers' associations nevertheless did not understand that individual coverage survived.²⁸⁰ Staunchly pro-labor congressional staffers

²⁷⁷ Telephone Interview with Ross Eisenbrey (Dec. 18 1997). Independently, John Harvey, the chief labor counsel on the Senate Labor and Public Welfare Committee in 1989, stated that when he and Mark Powden, Jeffords' legislative director, went to the DOL to figure out exactly how many employees would be excluded and included by the amendments, the answer was that it was "a wash." Telephone Interview with John Harvey (Dec. 9, 1997).

²⁷⁸ *Stenographic Hearing Transcript, supra* note 199, at 57-58.

²⁷⁹ Harvey stated that he and Powden realized that small business was still subject to individual coverage. Telephone Interview with John Harvey (Dec. 9, 1997). Inconsistent with this account is the version furnished by James Riley, chief counsel and staff director of the House Subcommittee on Labor Standards. He stated that he and the other staffers who drafted the deletion "sort of pulled a fast one." Telephone Interview with James Riley (Dec. 9, 1997). As part of a "word game" in which staffers and opposing lobbyists are continually engaged, they were testing the skills of their opponents' lawyers: "If they're so much smarter, let them figure it out." *Id.* Stressing that the game was "not deceitful," Riley observed that staffers were "obstinate" and enjoyed showing how "clever" they were. *Id.* Eisenbrey strenuously discounted this version, but agreed that Riley did try to "pull the wool over the eyes" of the other side by writing a committee report that was not truthful. Telephone Interview with Ross Eisenbrey (Dec. 18, 1997). As a result of the incident, Murphy felt constrained to support the "correction" in 1990. *Id.* Eisenbrey did not find it inconsistent with his account that Riley had related that after the controversy had broken out, Murphy had smiled and said to Riley: "I see you're up to your old tricks again." *Id.*

²⁸⁰ Senator Kennedy conceded seven years later that: "It is clear that some Members of Congress thought they were voting for a blanket small business exemption when they voted to increase the threshold for the enterprise test to \$500,000. But those Members of Congress were ignoring the longstanding principle of individual coverage—which the 1989 act did not abandon, and with good reason." 142 CONG. REC. S7355 (1996).

freely admit that small business representatives were being honest when they protested that they had not understood that the trade-off resulted in the preservation of individual coverage. The majority counsel of the Senate Labor and Public Welfare Committee, for example, wrote that in mid-1990, a few months after the amendments had gone into effect, the NRA “lobbyists realized what they’d agreed to and started screaming bloody murder.”²⁸¹ A House labor committee staffer and later DOL legislative affairs director explained the ignorance as the result of the fact that some lobbyists are simply “lazy”; and although such “incompetence” is not extraordinary, he conceded that this issue had been a “pretty big one” for them to have missed.²⁸²

The suspicion that few legislators, lobbyists, or employers understood enterprise coverage and its relationship to individual coverage is confirmed by the fact that even a quasi-official source fell victim to a primitive misunderstanding. A 1991 study of “The Small Business Exemption in the Fair Labor Standards Act: Number of Employees Subject to the 1989 Amendments,” published by the Congressional Research Service, a department within the Library of Congress that analyzes the advisability of legislative proposals for congressional committees,²⁸³ cited, without correction, a complaint that a cashier working in a restaurant with less than \$500,000 in sales would be covered “because the cashier worked with a cash register that was ‘moved in or was produced for commerce’. . . .”²⁸⁴ In fact, the cashier would be no more covered than the waiter who served food on dishes produced for commerce, or the roofer, employed by a construction business doing less than \$500,000 of business, who used nails produced for interstate commerce. They would not be covered because their employers are not subject to enterprise coverage and they are not individually engaged in interstate commerce. If a relatively simple key concept in a statute as brief and straightforward as the FLSA is so mystifying to professional participants in the legislative process, the level of legislators’

²⁸¹ FOX, *supra* note 271, at 4.

²⁸² Telephone Interview with Ross Eisenbrey (Dec 18, 1997).

²⁸³ 2 U.S.C. § 166(d)(1) (1994).

²⁸⁴ Ciccone, *supra* note 244, at 2.

comprehension of something as impenetrable as the Internal Revenue Code can only be imagined.

Despite the failure of the Bumpers bill in 1991, the NFIB and NRA have continued to lobby Congress to broaden the exemption of small businesses. In 1996 they again prevailed upon legislators to renew the effort to eliminate individual coverage for employees of employers not subject to enterprise coverage. This insistence that small employers should be free to propagate unfair labor standards is remarkable in light of the astounding results that the NFIB has published from polls of its own members on this issue. When the NFIB asked its members—who typically employ five people and gross \$350,000 in sales annually²⁸⁵—in 1987: “Should the exemption for minimum-wage laws for small retail and service firms be increased?,” 47 percent were opposed and 9 percent undecided. Even in 1995, five years after the \$500,000 enterprise coverage threshold had gone into effect, 23 percent were opposed and 10 percent undecided when asked: “Should all small businesses with less than \$500,000 in annual gross sales be exempt from FLSA requirements?”²⁸⁶ Little wonder that in 1996 Representative John La Falce, formerly chairman of the House Committee on Small Business and then its ranking minority member, found that small businesses are not “notably concerned about” an increase in the minimum wage. He related that when the SBA brought to the attention of tens of thousands of small business owners in connection with the 1995 White House Conference on Small Business that bills had been introduced to increase the minimum wage, “the top 403 recommendations coming from the regional conferences to be considered at the National Conference did not include the minimum wage issue. This was not even on the radar screen of the small business community.”²⁸⁷

²⁸⁵ *The Family Friendly Workplace Act: Hearing Before the Subcommittee on Employment and Training of the Senate Committee on Labor and Human Resources*, 105th Cong. 65 (1997) (statement of Senator Dodd).

²⁸⁶ NFIB, *Mandate* (visited Apr. 19, 1998) <<http://www.nfibonline.com/cgi-bin/search.pl/mandatesearch/>>.

²⁸⁷ *Small Business and Entry-Level Employees: How to Increase Take-Home Pay and Keep America Working: Hearing Before the House Committee on Small Business*, 104th Cong. 5 (1996).

Nevertheless, the legislative push to increase the minimum wage in 1996 prompted renewed efforts to eliminate individual coverage. Representative Goodling, the chairman of what was formerly the House Labor Committee and which the Republican majority renamed Committee on Education and Workforce Development, offered a “poison pill amendment”²⁸⁸ that would, again, have totally eliminated individual coverage with respect to the minimum wage and overtime.²⁸⁹ Despite the fact that Goodling himself in 1989 had inserted into the *Congressional Record* the DOL report that clearly stated that the small businesses losing their § 213(a)(2) exemption would revert to individual coverage, in 1996 he asserted that the legislation had “inadvertently” produced that result; indeed, he went so far as to claim that such individual coverage was precisely “what they tried to correct in 1989.”²⁹⁰

The one respect in which Goodling’s logic was unassailable was the argument that it was “silly” for the law to treat differently two people working next to each other performing exactly the same duties except that one made interstate telephone calls and the other only in-state calls.²⁹¹ The Wage and Hour Administrator had made the same argument after World War II, President Truman repeated it, President Eisenhower’s Secretary of Labor echoed it in the 1950s, and the legislators who amended the FLSA in 1961 finally crafted a remedy for this anomaly. That remedy for this obsolete residue of federalism was enterprise coverage—precisely the institution that Congress began whittling away in 1977 and that Goodling wished to eliminate for as many firms as possible. The difference between him and the earlier advocates was manifest: whereas they wished to create uniformity by conferring coverage

²⁸⁸ 142 CONG. REC. H5506 (1996) (statement of Rep. DeLauro).

²⁸⁹ *Id.* at H5534.

²⁹⁰ *Id.*

²⁹¹ *Id.* at H5541.

on both intra- and interstate commerce workers,²⁹² Goodling's goal was coverage for neither.

In an era in which employers and politicians ceaselessly admonish workers that no one, big or small, is immune from the competitive forces of one globally interconnected economy, which imperiously demands dislocations and belt-tightening, it is grotesque to base the national wage and hour law of the world's largest economy on an antiquated distinction between intrastate and interstate commerce "that would serve only an 18th-century economy"²⁹³ To condition an entitlement to overtime on whether a roofer happens to unload a truck that just crossed a state border with shingles manufactured in another state degrades industrial policy to a childish game.²⁹⁴ No political-economic or moral reason can justify FLSA protection for the maids who clean houses while denying it to those who repair the roofs on the self-same houses—especially since only the roofers work for profit-making commercial enterprises. Goodling, if he focused on it, would presumably resolve this anomaly by leveling the maids down

²⁹² Goodling's predecessors were, however, not completely consistent: the 1961 amendments, after all, were the origin of the § 213(a)(2) and (4), which deprived employees of local retail and service establishments, which fell below the enterprise coverage threshold, of minimum wage and overtime protection even if they were individually engaged in interstate commerce.

²⁹³ *United States v. Lopez*, 514 U.S. 549, 574 (1995) (Kennedy, J., concurring). For well-reasoned arguments that eighteenth-century discourse and early nineteenth-century and some early-twentieth-century Supreme Court decisions embodied much more expansive understandings of the congressional power to regulate commerce, see 1 WILLIAM CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 17-292 (1978)(1953), Robert Stern, *The Commerce Clause and the National Economy, 1933-1946*, 59 HARV. L. REV. 645, 647-53 (1946).

²⁹⁴ FLSA applies to construction "employees who are regularly engaged in ordering or procuring materials and equipment from outside the State or receiving, unloading, checking, watching or guarding such goods while they are still in transit. For example, laborers on a not covered construction project who regularly unload materials and equipment from vehicles or railroad cars which are transporting such articles from other States are performing covered work." 29 C.F.R. § 776.23(d)(1) (1997). "Similarly, employees who regularly use instrumentalities of commerce, such as the telephone, telegraph and mails for interstate communication" are subject to the FLSA. *Id.* § 776.23(d)(2).

to the roofers' excluded status, but only universal coverage avoids the distributive injustice of making impoverished workers subsidize wealthier consumers or employers.

The so-called preservation of coverage provision in Goodling's amendment was much narrower than that adopted in 1989: it would have required newly uncovered employers to pay the old lower minimum wage and overtime only to employees who had been, but were no longer, entitled to the minimum wage.²⁹⁵ Despite this blatant contraction of coverage, Goodling boasted that he had "grandfathered all of these people who are now inadvertently receiving this money." And even if Goodling had not preserved their entitlement to the obsolete minimum wage, the number of affected employees would, he argued, not be significant anyway: "if we look at all the exemptions that are presently in the law, we will find that there are not that many [employees] left"²⁹⁶ Goodling seemed oblivious of where the logic of his (empirically unsound) argument led—namely, to the recognition that the problem he was seeking to solve could also not have been significant. What he had not overlooked, however, were the possibilities that the amendment would open up for small employers: "He acknowledged that some employers might use the opportunity to cut the pay of new hires below the minimum wage, 'if they can find people willing to work for it.'"²⁹⁷

Even if the Goodling amendment had not been defeated 229 to 196,²⁹⁸ President Clinton, who pronounced the initiative "a giant fraud on the American people," threatened to veto the minimum wage bill: "Eliminating the minimum wage is no way to increase it. We must not tolerate sweatshops and a repeal of wage protections for millions of Americans as a condition of assuring a living wage for some workers."²⁹⁹ The sentiment was as economically and morally sound as it was historically disingenuous: Democrats

²⁹⁵ 142 CONG. REC. H5534.

²⁹⁶ *Id.* at H5535.

²⁹⁷ David Hess, *GOP Move Could Scuttle Wage Hike, Would Exempt Millions of Jobs*, BERGEN RECORD (N.J.), May 23, 1996, at A10.

²⁹⁸ 142 CONG. REC. at H5543.

²⁹⁹ *Republicans Want Wage Hike Limits*, ST. LOUIS POST-DISPATCH, May 23, 1996, at 1A.

had been agreeing to that compromise since 1977 when they voted to reverse the pattern set in 1961 and increased the enterprise coverage threshold. The same historical caveat is applicable to the impeccable logic behind Clinton's threat to veto the counterpart amendment in the Senate a month later: "It doesn't matter the size of your employer, you can't raise a family on \$4.25 an hour."³⁰⁰

The Democrats' spirited pro-labor defense of residual individual coverage in small businesses exempt from enterprise coverage should, finally, not deflect attention from the marginal importance of individual coverage for marginalized workers. The apprehension of retail and service employers exempt from enterprise coverage that DOL enforcement agents might, in the course of investigating them, discover violations with respect to employees individually engaged in interstate commerce may, to be sure, deter such firms from committing minimum wage and overtime violations.³⁰¹ But given the meager level of DOL enforcement in general, vindication of rights under the FLSA must rely on workers' self-reliance. And here the preservation of individual coverage in otherwise exempt firms is much too arcane and convoluted to expect many workers to be aware of, let alone understand, what legislators and lobbyists had not.

X. DOES THE FLSA NOW HAVE OR HAS IT EVER HAD A SMALL-BUSINESS EXEMPTION?

"The legislative history [of OSHA] . . . clearly shows that every amendment or other proposal which would have resulted in any employee's being left outside the protections afforded by the Act was rejected. The reason for

³⁰⁰ *Minimum Wage Bill Faces Veto over GOP Amendments, Clinton Says*, DAILY LAB. REP., July 2, 1996, at D13.

³⁰¹ Sarah Fox related that the Field Labor Directors Association, which represents managers and supervisors in DOL regional offices, had advised the Senate Labor Committee that the removal of individual coverage would impede enforcement even with respect to workers subject to enterprise coverage because proving individual coverage does not require access to employers' records to determine whether they are producing \$500,000 worth of business. FOX, *supra* note 271, at 5.

excluding no employee, either by exemption or limitation on coverage, lies in the most fundamental of social purposes of this legislation which is to protect the lives and health of human beings in the context of their employment.³⁰²

Without any doubt, Congress knows how to write a small-business exemption into a labor-protective statute when it so desires. For example, Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act define a covered "employer" as employing 15 or more employees.³⁰³ The Age Discrimination in Employment Act sets the threshold at 20 employees.³⁰⁴ The Worker Adjustment and Retraining Notification Act does not apply to employers with fewer than 100 employees.³⁰⁵ Other federal and state statutes also use such employee size-class thresholds to exempt small businesses from regulation and thus deprive their employees of the relevant protections.³⁰⁶ Congress chose not to create such an express small-business exemption in the FLSA in 1938 despite the example of the Social Security Act, which in 1935 imposed unemployment taxes only on employers of at least eight employees.³⁰⁷ Nor did Congress in the intervening years amend the FLSA to add a general employee-size-based exemption, although it has in a very few instances established such a criterion excluding employees of employers in certain industries.³⁰⁸

Congress's reasons for creating small-business exemptions vary from statute to statute. The basis for privileging owners of small businesses to discriminate against black (or other nonwhite or

³⁰² 29 C.F.R. § 1975.3(b) (1997).

³⁰³ 42 U.S.C. § 2000e(b) (1994); 42 U.S.C. § 12111(5)(A) (1994). Originally, Congress set the threshold under Title VII at 25 or more employees.

³⁰⁴ 29 U.S.C. § 630(b) (1994).

³⁰⁵ 29 U.S.C. § 2101(a) (1994).

³⁰⁶ For a catalog, see Clark Judge, *Thresholds of Pain*, WALL ST. J., Aug. 10, 1994, at A8.

³⁰⁷ Social Security Act, ch. 531, § 907(a), 49 Stat. 620, 642 (1935).

³⁰⁸ For example, forestry workers are excluded from overtime if their employer employs fewer than nine workers. 29 U.S.C. § 213(b)(28) (1994). Agricultural employees are excluded from minimum wage and overtime if their employers did not use more than 500 man-days of agricultural labor in any calendar quarter in the previous calendar year. *Id.* § 213(a)(6)(A).

female) workers was an analogy between such workplaces and private social settings: the legislature would no more compel him to rub shoulders with a black person in the shop he owned than it would require him to invite that person to dinner at his home. "[W]hen a small businessman who employs 30 or 25 or 26 persons selects an employee," Senator Cotton declared, "he comes very close to selecting a partner; when a businessman selects a partner, he comes dangerously close to the situation he faces when he selects a wife."³⁰⁹ In contrast, when legislators, unsuccessfully, sought to insert an employer size-exemption in the Occupational Safety and Health Act ("OSHAct"), proponents argued that coverage was unnecessary: the close employer-employee relationship means that small employers keep close contact with their workers and have an obvious interest in the safety.³¹⁰

Thus whereas at least some legislators were willing to concede that small employers might discriminate against black workers, and openly advocated grandfathering in such prejudice at close quarters, they denied that employees of small employers were exposed to significant safety or health risks. Unlike the situation with regard to discrimination, small-business advocates were constrained to deny their opponents' empirical premise that an exemption from the OSHAct "would almost give a license to kill."³¹¹ Neither of these justifications, however, applies to the FLSA. No legislator has argued that small employers should be privileged to exploit their workers because it would be sociopsychologically presumptuous of Congress to prohibit employers from taking advantage of workers with whom they rub shoulders every day. By the same token, no legislator has asserted that FLSA coverage is superfluous because small employers have an obvious interest in paying their workers

³⁰⁹ 110 CONG. REC. S13,085 (1964) (statement of Sen. Cotton).

³¹⁰ 118 CONG. REC. H31,314 (1972) (statement of Rep. Rousselot). In 1972, the House and Senate both voted in favor of a rider to an appropriations bill that would have created a small-employer exemption, but President Nixon pocket vetoed the bill. 118 CONG. REC. at 31,307-20, 37,203. In order to stave off further congressional action, OSHA in 1977 issued a regulation creating an exemption from paperwork requirements for employers of 10 or fewer employees. 29 C.F.R. § 1904.15.

³¹¹ 118 CONG. REC. at 21,103 (statement of Rep. Flood).

well: the whole point of the exemption is to enable them to accumulate and reinvest the difference between the minimum wage and overtime that they are not required to pay and the lower wage that the unfettered labor market permits. One important reason that even Democrats and liberals have accepted a small-business exemption from the FLSA must be that they reject the analogy to the OSHAct—they must deny that the exemption “would almost give a license to starve.”

Despite this aberrant statutory history, pro-employer partisans have taken absolutist positions on the question of whether the FLSA provides a small-business exemption. Senator Dole belonged to the fringe of the pro-employer extreme by virtue of adding a chronological component: “There has always been a basic exemption for small business under the Minimum Wage law.”³¹² In fact, however, it is more accurate to state that the dollar-volume thresholds for enterprise coverage, which were not introduced until 1961, did “not establish, and w[ere] not intended to establish, a ‘small business exemption,’” and that the (erroneously labelled) “Exemptions” section of the FLSA, “does not include—and has never included—any general exemption for small businesses.”³¹³

Representative Goodling, in pleading for adoption of his amendment to eliminate individual coverage under the FLSA, cited the aforementioned statutes as proof that “the small-business exemption . . . is what we do in every piece of legislation.”³¹⁴ If Congress were to insert a general small-business exemption into the FLSA, there is no doubt that the Supreme Court would hold that Congress faces no insuperable constitutional due process or equal protection obstacles in choosing to permit small employers to subject their workers to the kinds of exploitation and discrimination that it has otherwise outlawed. Indeed, on the very day that the original FLSA bill was introduced in 1937, the Supreme Court rejected such a challenge to the Unemployment Compensation Act

³¹² 123 CONG. REC. S32,907 (1977).

³¹³ FOX, *supra* note 271, at 1, 2. On how exclusions of employees in § 13 came to be misleadingly labelled exemptions, see Marc Linder, *Closing the Gap Between Reich and Poor: Which Side Is the Department of Labor On?* 21 N.Y.U. REV. L. & SOC. CHANGE 1, 4-6 (1993-94).

³¹⁴ 142 CONG. REC. H5535 (1996).

of Alabama, which in conformity with the unemployment tax provisions of the Social Security Act, did not tax employers of fewer than eight employees:

[T]his is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from small ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.

[I]t cannot be assumed that the legislature could not rightly have concluded that generally the number of employees bears a relationship to the size of the payroll and therefore to the amount of the tax, and that the large number of small employers and the paucity of their records of employment would entail greater inconvenience in the collection and verification of the tax than in the case of larger employers.³¹⁵

The Supreme Court's deference to legislative economic policy decisions of this type long antedated the New Deal and remains robust.³¹⁶

To be sure, the original FLSA bill required the Labor Standards Board (which was ultimately never established) to provide by regulation that payment of substandard wages or maintenance of substandard hours by "any employer employing less than [blank] employees shall not be deemed to constitute a substandard labor condition" Yet even this concession to small employers was to be withdrawn when the board found that "the maintenance of the appropriate labor standard by such class of employers is necessary or appropriate in order to carry out the purposes, or prevent the circumvention" of the FLSA.³¹⁷ Congress, however, promptly

³¹⁵ *Carmichael v. Southern Coal and Coke Co.*, 301 U.S. 495, 510-11 (1937).

³¹⁶ *E.g.*, *Middleton v. Texas Power & Light Co.*, 249 U.S. 152, 159 (1919) (upholding state workers compensation statute that did not apply to employees of employers of five or fewer employees).

³¹⁷ S. 2745, 75th Cong. § 6(a) (1937).

decided not to proceed further with even such a conditional across-the-board exemption for small employers as defined by the number of employees or any other size criterion. The floor debate in the Senate two months later revealed the political-economic and moral reasons for eschewing a general small-business exemption.

After an amendment was proposed exempting any firm employing 10 or fewer persons, Senator Black explained that the original bill had left the employee-threshold blank both because he was unsure as to whether there should be such an exemption and because he believed that the Education and Labor Committee and the whole Senate should debate the issue.³¹⁸ Black then noted that numerous statutes (such as the unemployment tax provision of the Social Security Act enacted by Congress just two years earlier) exempted employers with fewer than eight workers, while some state compensation laws set the threshold at three or five workers. Some people had taken the position that enforcement problems suggested the wisdom of exempting very small employers, while others—in particular, large employers—believed that “the law should apply to all employers, whether they employ 1 or 20 or 5,000 persons.” Ultimately the committee decided that “the law should apply to all alike.”³¹⁹

The discussion leading up to the vote on the exemption amendment was dominated by the following dialogue between Senator Robert Wagner and Senator David Walsh:

Mr. WAGNER. Would not the effect of the amendment be that the character of competition which we are seeking to prevent, namely, exploitation as against efficiency, would continue, because the small sweatshop, employing

³¹⁸ Black did not draft the bill, which was drafted by two New Deal insiders, Thomas Corcoran and Benjamin Cohen. Their April 30, 1937 draft left the number of employees blank. “Confidential Revised Draft April 30, 1937,” § 5(a), National Archives, Labor Dep’t Records, Labor Standards—1937 File, Fair Labor Standards Bill File. In their May 20, 1937 draft, which is otherwise identical with the actual bill, the number “15” is written in the blank, but it is unclear by whom. “Confidential Revised Draft May 20, 1937,” § 6(a), National Archives, Labor Dept. Records, Labor Standards—1937 File, Fair Labor Standards Bill File.

³¹⁹ 81 CONG. REC. 7863-64 (1937).

just a few persons, would continue to pay low wages in competition with the employer who pays reasonable wages?

Mr. WALSH. The Senator from New York is absolutely correct. If this bill . . . has any merit at all . . . it is that it is designed to protect and prevent the exploitation of men and women wage earners in small establishments. Those working in establishments having less than 10 employees number approximately 200,000. The bill is on the theory that such workers cannot organize, cannot enjoy collective bargaining, cannot have the benefit of the large units of employees who can organize and bring the pressure of a great labor organization to bear against the employer in order to obtain decent wages and reasonable hours of employment.

. . . The theory upon which the bill has merit . . . is that small-wage earners in small industries scattered all over the country in competition with large industries, because of their locality, because of the fact that they cannot organize, because of the objections of their employers to organized labor unions, have no power of asserting their human right to social justice.

What is social justice? Social justice means that we as legislators should extend to the unfortunate human beings those social rights which they could demand if they had the power of unity of action. Social justice means that government will take a hand in helping to uphold and support individuals and small groups of individuals who have not the power of pressure possessed by labor organizations.

. . .

. . . Senators can visualize the kind of men who operate sweatshops in the great cities of the country suddenly dividing their 60 or 70 or 80 employees into units of 8 or 9, with a brother-in-law or cousin or aunt or uncle in alleged ownership of the establishment, and thus evading . . . the application of the law; then sending their goods

into the central markets in competition with large employers who obey and respect the law.³²⁰

Fully aware that the exemption for firms with fewer than 10 or fewer employees would have exempted a large proportion (more than one-half) of the estimated universe of covered employers, employing only about one-twentieth of all covered employees,³²¹ the Senate, scarcely two months after the original bill had been introduced, rejected the amendment by a vote of 52 to 31.³²² This fleeting and unenacted existence of a real small-business exemption, taken together with intense congressional concern over the possibility that the Supreme Court would invalidate any statute that sought to regulate non-interstate commerce, strongly suggests that any exemptions of local and small businesses were not grounded in the firms' size per se, but merely used size as an indicator that they were not "seriously competing with and having a substantial effect upon the flow of interstate commerce."³²³ Consequently, by the mid-1940s, once the Supreme Court had made it clear that it would uphold a much broader exercise of the commerce power, it was foreseeable that Congress would eventually provide wage and hour protection to ever larger numbers of workers employed in firms formerly deemed "local and small."

XI. THE ECONOMIC BASIS OF THE SMALL-BUSINESS EXEMPTION

Congress made it clear that by fixing a dollar volume test it was not concerned with profit, but with impact on commerce measured by inflow of money.³²⁴

Even if the boosterist claim that small firms are a job growth machine were valid, the mere creation of jobs in firms that on average offer lower wages, fewer and inferior nonwage financial

³²⁰ *Id.* at 7885-86.

³²¹ 81 CONG. REC. at 7800-01. The proportions are not precise because the data referred to employers with 1-5 and 6-20 employees.

³²² *Id.* at 7887-88.

³²³ *Id.* at 7648 (statement of Sen. Black).

³²⁴ Mack Player, *Enterprise Coverage Under the Fair Labor Standards Act: An Assessment of the First Generation*, 28 VAND. L. REV. 283, 331 (1975).

benefits, worse working conditions, fewer opportunities for acquiring greater skills, and less job security is no reason to require their employees to subsidize them to the detriment of larger firms. A recent study of wage levels by size of employer indicates that the average hourly wage earnings of full-time workers in firms with 500 or more workers were 43 percent to 28 percent higher than those in firms with fewer than 100 employees between 1983 and 1993. This gap is an understatement because it excludes presumably lower-paid part-time workers, who are more prevalent in small firms. If wage data were available for firms with fewer than 10 workers, the wage gap would presumably be even wider.³²⁵ The fact that wage levels rise directly with firm size is closely linked to the fact that unionization rates are similarly differentiated.³²⁶

Promoting small construction businesses by exempting them from labor standards laws not only deprives workers of the protections of those mandates, but also subjects them to other substandard conditions that are, to be sure, not unlawful, but are manifestly consequences of this sector's small and stagnant character. Health insurance is a prime example. As the Small Business Administration concedes: "Most companies without coverage are in the retail trade and construction industries. . . . More than 50 percent of all small construction companies with fewer than 10 employees . . . are without insurance plans."³²⁷ In 1993, only 22 percent of employees of construction firms with fewer than 10 employees were covered compared with 61 percent in firms with more than 500 employees.³²⁸ In general, small firms offer markedly fewer benefits than their larger competitors. Only one-fifth of workers in firms with 1-24 employees had pension plans compared to almost nine-tenths of those in firms with 500 or more workers.³²⁹

³²⁵ Richard Boden, *Changes in Wages and Worker Attributes by Firm Size, 1983-1993*, BUS. ECONOMICS, July 1997, at 37.

³²⁶ THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT 262 tbl.4.15, 271 tbl.4.19 (1984) (data for 1978 and 1979).

³²⁷ THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT: 1994 68 (1995).

³²⁸ *Id.* at 92 tbl.2.15.

³²⁹ THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT 266

Moreover, empirical confirmation of disproportionate job creation in small firms would not in itself be grounds for according them preferential legal treatment: "The relevant question is what market failure the preferential policies are expected to address. The small business sector is not obviously undersized because of product or labor market imperfections" ³³⁰

In raising the dollar-volume threshold of and incorporating construction employers into the exemption, Congress ignored and contradicted the recommendation of its Minimum Wage Study Commission, which it established in 1977 to report on the social, political, and economic ramifications of the FLSA with particular reference to exemptions. ³³¹ The commission in 1981 urged the complete elimination of the exemption for retail and service enterprises because such a move was consistent with the FLSA's major objective of placing a floor under all workers' wages. The change would not only have brought under the act the largest group of excluded nonsupervisory workers, but would have imposed only a "minimal" cost on employers since three-fourths of the workers were already receiving the minimum wage and one-half of the exempt firms would not experience higher wage costs. ³³²

It is by no means unimaginable that a majority of the Congress will one day decide to impose the same type of discriminatory yet constitutional universal small-employer exemption on the FLSA that it has incorporated into more recently enacted labor-protective statutes. But if and when the national legislature decides that the same small employers whom it has privileged, for example, to withhold a livelihood from workers against whose race, ethnicity, or gender they are prejudiced, must also be permitted to operate otherwise unlawful sweatshops, this ill-advised step should be done openly and not in some convoluted fashion through the use of exemptions from exemptions, which even many legislators and lobbyists are intellectually incapable of grasping. The Congress

tbl.4. (1984) (data for 1979).

³³⁰ STEVEN DAVIS, JOHN HALTIWANGER, & SCOTT SCHUH, *JOB CREATION AND DESTRUCTION* 171 (1996).

³³¹ Fair Labor Standards Amendments of 1977, Pub. L. No. 95-151, § 2(e)(1)(H), 91 Stat. 1245, 1247 (1977).

³³² 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 121 (1981).

should be required to state directly to the affected workers that it has chosen to sacrifice them on the altar of an unproven, ideologically driven speculation—namely, that the smallest firms grow into large ones and provide the bulk of new employment in the United States—and to confine minimum wage and overtime coverage and the ban on oppressive child labor to those firms that, as a result of the operation of market forces, are more likely to comply with fair labor standards anyway.

A direct criterion of labor use intensity (such as the number of workers) may, as the Minimum Wage Study Commission noted in 1981,³³³ be more rationally related than annual sales to the purported objective of the exemption. Its straightforwardness would, in any event, subject legislators to more focused scrutiny of the impact. Neither criterion, however, can claim to be optimally suited to the purpose of the small-business exemption, which is to relieve small firms that are not profitable enough both to accumulate capital for expansion and to offer standard working conditions of the obligation to pay fair wages. Both sales and number of employees suffer from overbreadth: neither size criterion is unambiguously positively correlated with profitability. As the Minimum Wage Study Commission noted: "The most common rationale . . . to justify the existing minimum wage exemptions . . . is the perceived relationship between small size and low profit rates."³³⁴

If profitability is the criterion that Congress is targeting, why should small but profitable firms not be required to pay the minimum wage? Why should small firms that have remained small for many years not forfeit the presumption of being rising stars of job creation? Why should larger firms that by virtue of contraction have fallen into the status of small businesses be entitled to impose unfair labor standards on their workers? Even advocates of a small-business exemption acknowledge the need to differentiate. In the words of a Republican congressman: "If we are going to grant a small-business exemption under the Federal minimum-wage requirement, it ought to apply only to businesses that are in a

³³³ *Id.* at 112-13.

³³⁴ *Id.* at 112.

startup mode during that first year or two of operation when the survival of the small business is so tenuous.”³³⁵ Such an apprentice-entrepreneur approach would be a quasi-counterpart to the so-called training or opportunity wage that Congress enacted in 1989 and 1996, permitting employers to pay newly hired teenage workers the out-of-date lower minimum wage for the first 90 days.³³⁶

If, as advocates of small business assert, “[s]mall size, in and of itself, does not dictate low profitability,”³³⁷ why do such firms require any government-enforced subsidies from their employees? This question is so much the more appropriate since boosters suggest that many workers of “start-up firms” are themselves so entrepreneurial that they willingly accept “as little cash wages as the workers need to survive. All workers are [independent] contractors so as to reduce cash flow during the critical early start-up period. It is difficult to criticize these firms for abusing the law, for, if they had to pay cash wages, unemployment insurance, and Social Security, they probably would soon exhaust their cash resources and go out of business.”³³⁸ By freeing small employers from the mandates of fair labor standards,³³⁹ Congress has privileged them to impose such entrepreneurialism on workers too risk-averse to forgo wages in order to catapult themselves to millionaire-status in the service of the next Bill Gates.

Bruce Kirchhoff, a former chief economist of the SBA and one of the foremost academic boosters of small business, concedes that in addition to “potential creative destroyers that need encouragement” and “eventually come into the tax system,” “some small-firm owners are dishonest and have no intention of ever entering the tax system. They and their firms remain in the underground economy

³³⁵ 142 CONG. REC. H5539 (1996) (statement of Rep. Frank Riggs).

³³⁶ 29 U.S.C. § 206(g) (1994). The training or opportunity small business exemption would still be more capacious because it does not require employers to pay even the lower minimum wage to new employees.

³³⁷ BRUCE KIRCHHOFF, *ENTREPRENEURSHIP AND DYNAMIC CAPITALISM: THE ECONOMICS OF BUSINESS FIRM FORMATION AND GROWTH* 30 (1994).

³³⁸ *Id.* at 112.

³³⁹ DAVID BIRCH, *JOB CREATION IN AMERICA: HOW OUR SMALLEST COMPANIES PUT THE MOST PEOPLE TO WORK* 17 (1987), also praises the “aggressive, ambitious people who are in the shop weekends and labor at low wages for a chance at a piece of the action.”

for their entire existence." Nevertheless, Kirchhoff not only offers no method of distinguishing between the two for enforcement purposes, he fears that "efforts to force compliance could easily create additional barriers to entry of new firms." Consequently, with regard to the 2 million firms that purport to have no employees at all, he holds that "the problem of firms failing to comply with the intent of the unemployment insurance and Social Security laws is a trade-off between allowing for 4 percent noncompliance or instituting more enforcement, thereby discouraging potential growth firms from starting. The present system seems acceptable when analyzed this way."³⁴⁰ To make it even more acceptable, Kirchhoff transmogrifies criminal violations of the Internal Revenue Code into a neutral "opt[ing] out of the formal employer role."³⁴¹ If boosters are not too embarrassed to condone outright illegalities for the greater good of small businesses, no wonder they fervently support lawful exemptions from minimum wage and overtime obligations.

Kirchhoff's framework demonstrates that the FLSA exemption for small construction employers is not an isolated or idiosyncratic development in public policy. It fits in snugly with the self-help measures that employers, especially in construction, have increasingly adopted over the last 20 years to rid themselves of the costs of what they view as financially obnoxious government-mandated social and labor protections. In order to evade employment taxes, for example, construction employers have been pioneers in—as a congressional committee entitled a hearing on the subject in 1991—*Exploiting Workers by Misclassifying Them as Independent Contractors*.³⁴² As the president of the Building and Construction Trades Department, AFL-CIO, recently testified to Congress: "Every day, we see construction sites where there are scores, or even hundreds of workers, and yet every single worker is being

³⁴⁰ KIRCHHOFF, *supra* note 337, at 112-14. The 4 percent figure refers to national noncompliance with respect to 4 percent of all employees.

³⁴¹ KIRCHHOFF, *supra* note 337, at 107.

³⁴² *Exploiting Workers by Misclassifying Them as Independent Contractors: Hearing before the Employment and Housing Subcommittee of the House Committee on Government Operations*, 102d Cong., 1st Sess. (1991).

treated as an independent contractor.”³⁴³ The WHD reports that construction contractors’ practice of misclassifying employees as independent contractors for FLSA purposes is one of the most common in the United States.³⁴⁴ That larger firms resort to illegalities in order to be able to impose the same unfair labor standards that their smaller rivals are lawfully privileged to offer is hardly surprising in a competitive industry.³⁴⁵ Indeed, labor market standards appear to be so debased in residential construction that only a “severe shortage” can force builders to “adopt[] all manner of tactics” including even “paying overtime.”³⁴⁶

Small firms, however, generally make more intensive use of so-called independent contractors than large firms. A survey commissioned by the SBA found that in 1989 the number of days worked by independent contractors as a proportion of all days worked by “regular employees” were 84 times greater in firms with fewer than 25 employees than in firms with 500 or more.³⁴⁷

Since the Census Bureau derives its sample of construction employers with payroll from the “list of all construction companies in the active records of the Internal Revenue Service . . . which were subject to payment of Federal Insurance Contributions Act (FICA) taxes,”³⁴⁸ a rise in the number of construction establish-

³⁴³ *Employment Classification Issues: Hearings Before the Subcommittee on Oversight of the House Committee on Ways and Means*, 104th Cong. 311 (1996) (statement of Robert Georgine).

³⁴⁴ U.S. Wage and Hour Div., *Fact Sheet No. 013: Employment Relationship Under the Fair Labor Standards Act (FLSA)* (visited Apr. 19, 1998) <<http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs13.htm>>.

³⁴⁵ *Roofing Company Pays \$857,000 in Back Wages*, LAS VEGAS REV. J., Nov. 5, 1997, at 2D (residential roofer failed to pay overtime); see also *Drywall Settlement May Spur Other Workers*, 141 LAB. REL. REP. 400, 403 (1992) (dozens of suits filed against most of the major drywall contractors in southern California for violating the overtime provision of the FLSA).

³⁴⁶ Lew Sichelman, *Labor Shortage: Nationwide Problem Impacts New-Home Quality and Completion*, SAN DIEGO UNION-TRIB., Oct. 19, 1997, at H-1.

³⁴⁷ U.S. SMALL BUSINESS ADMINISTRATION, *THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT 63* (1991). The figures were 2.52 percent and 0.03 percent respectively.

³⁴⁸ U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: SUBJECT SERIES: LEGAL FORM OF ORGANIZATION AND TYPE OF

ments without payroll as a share of all establishments serves as an indicator of the spread of the independent contractor scam. Indeed, this proportion has steadily increased in the construction censuses from 52.5 percent in 1972 to 70.2 percent in 1992.³⁴⁹ Among special trade contractors, establishments without payroll accounted for 75.6 percent of all (1.5 million) establishments in 1992. Since it is implausible that, for example, in 67.9 percent of roofing establishments only the owner works,³⁵⁰ presumably hundreds of thousands of special trade contractors are classifying their workers as nonemployees. The explosion of firms that report having no employees and the concomitant phenomenon of "[e]very independent contractor becom[ing] a zero-employee firm"—both of whom "choose to avoid government payments for benefits they think they do not need"—are, for Kirchhoff, positive manifestations of a "changing society. . . . And change is the stuff of dynamic capitalism."³⁵¹

Relegating workers to employment in the subminimum wage sector thus reveals itself to be part and parcel of the same approach

OPERATION vi (1992).

³⁴⁹ Why it declined slightly from a high of 71.8 percent in 1987 is unclear. The figures in 1967, 1977, and 1982 were 53.6, 59.9, and 66.9 percent respectively. Calculated according to U.S. BUREAU OF THE CENSUS, CENSUS OF CONSTRUCTION INDUSTRIES, 1967: TYPE OF OPERATION AND LEGAL FORM OF ORGANIZATION 1-3 tbl.1 (1970); U.S. BUREAU OF THE CENSUS, 1972 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: UNITED STATES SUMMARY—STATISTICS FOR CONSTRUCTION ESTABLISHMENTS WITH AND WITHOUT PAYROLL 1-2 tbl.A1 (1975); U.S. BUREAU OF THE CENSUS, 1982 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: U.S. SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 3 tbl.1 (1984); U.S. BUREAU OF THE CENSUS, 1987 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: U.S. SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 7 tbl.1 (1990); U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: U.S. SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 27-5 tbl.1 (1996).

³⁵⁰ Calculated according to U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: U.S. SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 27-5 tbl.1 (1996).

³⁵¹ KIRCHHOFF, *supra* note 337, at 111.

that encourages self-employment for the unemployed.³⁵² Those who see small firms as Schumpeterian creatively destructive engines of job growth praise them as peculiarly suited to the U.S. economy, which "is a seething mass of pushing, shoving, and manipulating firms that are attempting to acquire market share and win profits." In such an economy workers figure as "probably the most flexible resource. . . . They can be hired, fired, transferred, trained, and retrained."³⁵³ Excluding more and more workers from mandatory labor standards regimes serves as a kind of proto-deregulatory experiment; and if the new devotees of entrepreneurialism favor macroeconomic "turbulence, not equilibrium,"³⁵⁴ depriving workers of protections such as the minimum wage and overtime appears optimally suited to the intensification and acceleration of their degradation into mere "flexible resources."

Exempting small employers from compulsory fair labor standards as a means of promoting capital accumulation³⁵⁵ and their expansion into larger enterprises would make sense from this neo-entrepreneurial perspective only if experience demonstrated that small firms typically grow into large ones. In fact, however, the typical pattern is that only a tiny minority of firms doing less than \$500,000 of business annually develop into larger businesses even when they are legally privileged to impose unfair labor standards on their workers. Even Bruce Phillips, the director of the Office of Economic Research of the SBA, a federal agency whose mission is advocacy, concedes that perhaps 5 percent of firms of such size

³⁵² MARC LINDER, *FAREWELL TO THE SELF-EMPLOYED: DECONSTRUCTING A SOCIOECONOMIC AND LEGAL SOLIPSISM* 94-96 (1992); *see generally* U.S. DEPT. OF LABOR, *UNEMPLOYMENT INSURANCE SERVICE, SELF EMPLOYMENT PROGRAMS FOR UNEMPLOYED WORKERS* (1992).

³⁵³ KIRCHHOFF, *supra* note 337, at 144.

³⁵⁴ KIRCHHOFF, *supra* note 337, at 144.

³⁵⁵ Marx noted that the subversion of the customary standard of living played an important role in the real world: "The forcible reduction on the wage below this value [of labor power] . . . transforms, in fact, within certain limits, the worker's necessary consumption fund into an accumulation fund of capital." 1 KARL MARX, *DAS KAPITAL: KRITIK DER POLITISCHEN ÖKONOMIE*, in 23 MARX & ENGELS, *supra* note 18, at 626.

grow, whereas "most vegetate" or go out of business.³⁵⁶ And in a study that Phillips published using the SBA's establishment longitudinal microdata based on Dun and Bradstreet files, he found that: "New construction firms face a lower chance of survival than firms in any other industry."³⁵⁷

But even if very small firms generated a disproportionately large volume of employment, two questions would have to be posed concerning this development. If, on the one hand, this growth takes place by means of displacement of the production, market share, or employment accounted for by higher-wage larger firms, why should the state intervene to achieve or reinforce such a debasement of labor standards? On the other hand, if small firms can generate large numbers of jobs without having to rely on a statutory exemption from fair labor standards, why is the state imposing a superfluous detriment on their employees?

Close observers of the roofing business confirm the inapplicability of neo-entrepreneurial theory to the industry. A roofing contractor in the Iowa City area—whom both the Roofers Union and the National Roofing Contractors Association characterize as a good employer—states that only one small roofing contractor among the scores that have come and gone during the previous 15 years became a larger and reputable employer. A combination of their exemption from the FLSA and their violation of the social security, unemployment and workers compensation laws, and OSHA regulations enables small contractors to submit bids 30 percent lower than larger reputable firms can and to monopolize the residential roofing sector. Since the small contractors' unlawfully lower labor costs are proportionally even lower than their bids,

³⁵⁶ Telephone Interview with Bruce Phillips (Dec. 2, 1997). These 5 percent ("gazelles") account for three-fourths of new jobs created by small businesses. William Dennis, Jr., Bruce Phillips, & Edward Starr, *Small Business Job Creation: The Findings and Their Critics*, BUS. ECONOMICS, July 1994, at 23, 25. The SBA formerly leased Dun & Bradstreet data files covering the years 1979 to 1990 that would have made it possible to do longitudinal cohort studies answering the question as to what happens to such firms. When the Congress cut off the funding for the data program, the SBA had to return to the data files.

³⁵⁷ Bruce Phillips & Bruce Kirchhoff, *Formation, Growth and Survival: Small Firm Dynamics in the U.S. Economy*, 1 SMALL BUSINESS ECONOMICS 65, 70 (1989).

such contractors, who on average employ five to seven workers, can secure annual profits in the \$30,000-\$50,000 range on \$250,000 of business.³⁵⁸

Calculating the profitability of small firms on a national level was made impossible, ironically, by the Reagan administration, which terminated publication of Internal Revenue Service (IRS) data broken out for size-classes and sub-industries.³⁵⁹ In the last year (1980) for which the IRS published such data for sole proprietorships, which constitute 81 percent of all special trade contractors,³⁶⁰ net income as a percentage of business receipts declined almost monotonically—from 44 percent in firms with receipts between \$5,000 and \$10,000 to 4 percent in those with receipts between \$5 million and \$10 million. Firms with receipts between \$100,000 and \$250,000 and between \$250,000 and \$500,000 achieved quite solid profit margins of 14 percent and 11 percent, respectively.³⁶¹ This monotonic ordering could indicate that the smaller the firm the more the owner generated profits by scrimping on personal consumption,³⁶² but given small special

³⁵⁸ Telephone Interview with Kurt Tjemeland, T & K Roofing, Ely, IA (Dec. 2, 1997).

³⁵⁹ 1980 was the last year for which such data were published for sole proprietorships, and 1981 was the last year for which the IRS issued sole proprietorship income statistics in a separate publication as it had for many years. Thereafter the IRS published data only in very abbreviated form in an annual article in *SOI Bulletin*. IRS, STATISTICS OF INCOME—1981: SOLE PROPRIETORSHIP RETURNS iii (1982); Raymond Wolfe, *Sole Proprietorship Returns, 1982*, SOI BULLETIN, Summer 1984, at 17. The IRS refuses to run the data even for researchers who offer to pay for them. Telephone Interview with John Comisky, IRS, Statistical Information (Jan. 2, 1998).

³⁶⁰ Calculated according to U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: SUBJECT SERIES: LEGAL FORM OF ORGANIZATION AND TYPE OF OPERATION 6 tbl.1 (1995).

³⁶¹ Calculated according to IRS, STATISTICS OF INCOME 1979-1980: SOLE PROPRIETORSHIP RETURNS 169 tbl.11 (1982). The category "net income" is net of deficits. This perfect monotonicity was not a quirk of 1980. In 1972, for example, special trade contractors' net profit as a proportion of business receipts declined from 49.9 percent in the \$2,500-\$5,000 receipts class to 4.0 percent in the \$1 million-and-over class. Calculated according to IRS, STATISTICS OF INCOME 1972: BUSINESS INCOME TAX RETURNS 20 tbl.2.3 (1976).

³⁶² Bruce Phillips, Director of Economic Research, Office of Advocacy, U.S.

trade contractors' relatively meager capital investment expenditures, it is also possible that the profits are consumed instead of reinvested. This latter scenario of prodigality would indisputably contradict the purpose behind the FLSA exemption for small employers. But even the former scenario of prudent thrift would not support the exemption: for if small entrepreneurs can achieve the requisite level of profitability by temporarily cutting back on their own consumption, why should the state exempt them from this Faustian conflict between accumulation and consumption by imposing this "self-denial"³⁶³ on their employees? After all, it is entrepreneurs' very "abstinence," according to one strand of economic theory, that entitles them to part of their profit.³⁶⁴

The data that the IRS still publishes for corporations reveal a somewhat different pattern. But here, too, construction firms with business receipts between \$250,000 and \$500,000 are shown to be more profitable than most firms in larger size-classes.³⁶⁵

A unique study carried out by the Bureau of the Census in connection with the 1987 and 1992 Economic Census revealed how profitable many small businesses are. Based on a sample of the

Small Business Administration, suggested this interpretation. Telephone Interview with Bruce Phillips (Jan. 5, 1998).

³⁶³ JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 729 (W. Ashley ed., 1926) (1848).

³⁶⁴ EUGEN VON BÖHM-BAWERK, *GESCHICHTE UND KRITIK DER KAPITALZINS-THEORIEN* 241-61 (4th ed. 1921) (1884).

³⁶⁵ The IRS does not publish data, broken out for size-classes, on corporate special trade contractors; these data refer to all construction corporations. Net income (less deficits) as a proportion of total receipts amounted to 1.2 percent in corporations with \$250,000 to \$500,000 of business receipts. The highest proportion, in corporations with business receipts between \$5 million and \$50 million, was 1.6 percent. Calculated according to IRS, *STATISTICS OF INCOME—1992: CORPORATION INCOME TAX RETURNS* 49-50 tbl.5 (1995). The only data that the IRS currently publishes on special trade contractors broken out for size classes refer to assets size-classes. Net income as a proportion of total receipts in the smallest class (having less than \$100,000 in assets) amounted to 1.6 percent. This level exceeded that in the classes with \$100,000 to \$5 million in assets; the highest proportion, 3.3 percent, was found in corporations with \$100 million to \$250 million in assets. Calculated according to IRS, *SOURCE BOOK: STATISTICS OF INCOME: ACTIVE CORPORATION INCOME TAX RETURNS, JULY 1991-JUNE 1992* 28 (n.d.).

universe of more than 17 million firms in 1992, the Bureau determined that of firms with receipts between \$100,000 and \$199,999, 4.8 percent recorded net profit of \$100,000 or more, while 32.4 percent achieved net profit of \$25,000 to \$99,999. The corresponding proportions for firms with receipts between \$200,000 and \$249,999 were 9.3 percent and 27.4 percent, respectively; for those with receipts between \$250,000 and \$499,999, the proportions were 13.7 percent and 28.7 percent. If the universe is restricted to the 10 million "nonminority male-owned businesses"—special trade contractors are overwhelmingly white men—these proportions ran even higher. In the \$250,000-\$499,999 size-class, for example, 15.7 percent of the firms recorded net profit of \$100,000 or more, while 30.3 percent reported \$25,000 to \$99,999. (The corresponding proportions in 1987 had been very similar: 13.5 percent and 31.5 percent.) The total of 46 percent was only marginally lower than the 47.8 percent in the \$500,000-\$999,999 size-class.³⁶⁶ Why firms this profitable require state-enforced subsidies from their employees is unclear.³⁶⁷

³⁶⁶ Calculated according to U.S. BUREAU OF THE CENSUS, 1992 ECONOMIC CENSUS: CHARACTERISTICS OF BUSINESS OWNERS 224 tbl.27b (1992); U.S. BUREAU OF THE CENSUS, 1987 ECONOMIC CENSUSES: CHARACTERISTICS OF BUSINESS OWNERS 156-57 tbl.21b (1987). These proportions are understated because the denominator includes owners who did not respond to the question.

³⁶⁷ To be sure, not all of these firms had employees. The Census of Construction Industries cannot be used to calculate profit rates because it does not collect comprehensive data on costs, but it does permit comparisons among size-classes of employers with respect to a kind of profits category—value added minus payroll, rental cost for machinery, equipment, and buildings, and capital expenditures. A crude surrogate for the rate of profit results from dividing this figure by value added. In 1992, this "rate of profit" was 40.8 percent among special trade contractors doing \$250,000-\$499,999 of business and 40.4 percent among those doing more than \$10 million of business. Calculated according to U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: UNITED STATES SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 27-15 tbl.9 (1996). The corresponding figures for 1987 were 41.5 percent and 42.8 percent, respectively. U.S. BUREAU OF THE CENSUS, 1987 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: UNITED STATES SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 19 tbl.10 (1990). The minuscule difference between small and large firms suggests that the former require no state-enforced subsidies from their employees to become profitable

Despite such profits, the representative small construction employer has not used its exemption from mandatory fair labor standards to invest in additional capital equipment or to hire additional workers. The quinquennial Census of Construction Industries reveals that from 1987 to 1992, while the overall value of business done by special trade contractors rose by 8 percent, average annual capital expenditures in establishments doing less than \$500,000 of business declined 17 percent, from \$3,884 to \$3,239. The average number of employees employed by such establishments also declined—from 3.4 to 2.9.³⁶⁸ Admittedly, these census data cannot reveal whether individual employers doing less than \$500,000 of business expanded into larger size-classes. Nevertheless, the impact of the FLSA exemption should also be observable within the small business sector: new (or already existing) small businesses should be using the additional profit that the payment of lawfully substandard wages makes possible to hire more workers and invest in more capital equipment.

Why profitability on this scale fails to lead to capital investment and expansion is a question for small-business boosters to explore. Why employers raking in such profits should be entitled to government-enforced subsidies from their workers in the form of substandard wages is a troubling labor policy question that Congress has not troubled to answer. The burden rests with the national legislature to explain why condemning the vast majority of employees of such firms to vegetate in perpetuity in the backwaters of substandard labor conditions in order that a tiny minority of firms might advance is not an irrational industrial policy—especially since some of those few dynamic firms would have expanded even if they had been subject to the FLSA.

enough to accumulate competitively.

³⁶⁸ Calculated according to U.S. BUREAU OF THE CENSUS, 1987 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: UNITED STATES SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 19 tbl.10 (1990); U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: UNITED STATES SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 27-15 tbl. 9 (1996). Total capital expenditures among all special trade contractors declined 3 percent from 1987 to 1992; they increased in the largest entities. The monetary amounts are not adjusted for inflation.

Moreover, contrary to small business boosters, who assert that small business has become the job growth engine of the U.S. economy,³⁶⁹ the kinds of small firms that benefit from the FLSA small-business exemption have not produced any increase in their share of total jobs. Table 1 shows that the share of the total number of employees accounted for by the smallest establishments and enterprises³⁷⁰ in recent decades has actually declined marginally.³⁷¹

³⁶⁹ *E.g.*, BIRCH, *supra* note 339. For a critique, see DAVIS, HALTIWANGER, & SCHUH, *supra* note 330, at 57-81. CHARLES BROWN, JAMES HAMILTON, & JAMES MEDOFF, EMPLOYERS LARGE AND SMALL 24 (1990), argue that small firms' disproportionate share of new employment is an accident of birth—new firms happen to be born small. Since new businesses account for more than 100 percent of the net increase in employment, and new businesses rarely start out with 100 or more employees, it is almost inevitable that small firms will account for a disproportionate share of new employment. Once established, however, small firms are not on average very hardy.

³⁷⁰ Data for establishments are available for years prior to 1974, but not for the size-classes used here.

³⁷¹ The stagnant or declining share of the smallest establishments/enterprises could be masking the growth of such entities into larger ones; the stagnant or declining share could, however, also mask an even stronger decline caused by the reverse process of the shrinkage of larger entities into smaller ones. Only longitudinal studies of identified individual businesses could settle this question. If the long-term stagnant share of total employment accounted for by the smallest entities means that the number of jobs annually created and disappearing are in equilibrium, this sector cannot qualify as the especially dynamic growth machine that boosters have vindicated for it. Zoltan Acs & Bruce Phillips, *Why Does the Relative Share of Employment Stay Constant?* (Ms. Babson Entrepreneurship Conference, Apr. 16-20, 1997) (on file with author), concede the stagnant share of employment in small firms generally over time, but contend that it is the result of many of the highest growth small firms' becoming or being acquired by large firms. Even using longitudinal data, however, Kirchoff found that firms with 1 to 19 employees accounted for only 26 percent of the net employment increase between 1976 and 1986. Part (perhaps half) of this increase was accounted for by the growth in small firms that became large. KIRCHHOFF, *supra* note 337, at 125-28.

Table 1: % of Employees in Small and Large Establishments/-Enterprises, 1963-1995

Year	Establishments with . . . employees			Enterprises with . . . employees		
	1-4	5-9	500+	1-4	5-9	500+
1963				7.7	6.9	47.1
1967				6.8	6.7	46.8
1972				6.4	7.0	46.5
1974	7.2	8.2	24.3			
1977	7.4	8.8	22.5	6.2	7.0	47.5
1982	6.9	8.9	21.3	8.0	8.4	41.3
1987	6.7	9.1	19.4	6.0	7.5	43.3
1989	6.3	8.8	20.1			
1992	6.5	9.1	20.0	5.7	6.7	47.3
1994	6.3	8.8	19.8			
1995	6.2	8.6	19.9			

Sources³⁷²

Table 2, which displays the same data for the construction industry, reveals a different pattern. The increase in the share of employment accounted for by the smallest construction establishments during the years following the creation of the \$500,000 enterprise coverage threshold in 1990 is—despite some fluctuations over time—consistent with the hypothesis that the lawful privilege to impose unfair labor standards has promoted the competitiveness of such firms.

³⁷² See *infra* note 373.

Table 2: % of Employees in Small and Large Construction Establishments/Enterprises, 1963-1994

Year	Establishments with . . . employees			Enterprises with . . . employees		
	1-4	5-9	500+	1-4	5-9	500+
1963				n.a.	n.a.	n.a.
1967				12.7	12.3	13.5
1972				12.1	12.3	14.3
1974	10.9	12.2	10.0			
1977	13.8	14.6	11.4	13.8	14.3	17.9
1982	12.0	13.0	12.7	13.0	12.7	18.8
1987	11.5	14.1	6.7	12.5	14.5	11.7
1989	11.0	13.7	6.6			
1992	13.5	15.3	6.0	14.9	15.0	9.9
1994	13.3	15.1	5.7			
1995	12.8	14.6	5.6			

Sources³⁷³

³⁷³ **Establishments:** U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1974: U.S. SUMMARY 3, 8 tbl.1B (1977); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1977: UNITED STATES 3, 8 tbl.1B (1979); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1982: UNITED STATES 3, 8 tbl.1B (1984); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1987: UNITED STATES 3, 7 tbl.1b (1990); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1989: UNITED STATES 3 tbl.1b (1991); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1992: UNITED STATES 3, 6 tbl.1b (1994); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1994: UNITED STATES 3, 6 tbl.1b (1996); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1995: UNITED STATES 3, 6 tbl.1b (1997). **Enterprises:** U.S. BUREAU OF THE CENSUS, 1967 ENTERPRISE STATISTICS, PART 1: GENERAL REPORT ON INDUSTRIAL ORGANIZATION 164-67 tbl.3-1 (1972); U.S.

Aggregate data for the construction industry, however, are misleading since small entities are much less prominent in certain sectors than in others. Examining the special trades contractors, the stronghold of small businesses, sharpens the focus. In the years immediately following the increase in the enterprise coverage threshold from 0 to \$500,000, special trades contractor establishments with fewer than 10 employees raised their share of total employment every single year; the increase, from 27.0 percent in 1989 to 31.2 percent in 1993, amounted to 15.6 percent overall. In roofing, the monotonic increase from 24.3 percent to 28.8 percent in 1994 amounted to 18.5 percent.³⁷⁴ These increases much more robustly confirm the prediction that small firms legally privileged to superexploit their workers will secure a competitive advantage. These proportions and increases are, moreover, underestimates because the annual *County Business Patterns* data for single-establishment firms derive from employment tax filings with the IRS and thus exclude workers whom small employers disproportionately and increasingly treat as nonemployees.³⁷⁵ The quinquen-

BUREAU OF THE CENSUS, 1972 ENTERPRISE STATISTICS, PART 1: GENERAL REPORT ON INDUSTRIAL ORGANIZATION 142, 144 tbl.1 (1977); U.S. BUREAU OF THE CENSUS, 1977 ENTERPRISE STATISTICS: GENERAL REPORT ON INDUSTRIAL ORGANIZATION 146, 148 tbl.3 (1981); U.S. BUREAU OF THE CENSUS, 1982 ENTERPRISE STATISTICS: GENERAL REPORT ON INDUSTRIAL ORGANIZATION 93, 96 tbl. 3 (1986); U.S. BUREAU OF THE CENSUS, 1987 ENTERPRISE STATISTICS: COMPANY SUMMARY 17 tbl.3, 13 tbl.2 (1991); U.S. BUREAU OF THE CENSUS, 1992 ECONOMIC CENSUS—ENTERPRISE STATISTICS (visited Apr. 19, 1998) <http://www.census.gov/agfs/ent/view/us_emp.txt>.

³⁷⁴ Calculated according to U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1989: UNITED STATES 7 tbl.1b (1991); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1993: UNITED STATES 7 tbl.1b (1995); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1994: UNITED STATES 7 tbl.1b (1996). Roofing includes siding and sheet metal work. Data on the number of employees in each size class are not published for Iowa, but roofing establishments with 1 to 4 employees as a proportion of all such establishments rose from 56 percent to 63 percent from 1989 to 1995. U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1989: IOWA 3 tbl.1b (1991); U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1995: IOWA 3 tbl.1b (1997).

³⁷⁵ On the data source, see U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1992: UNITED STATES v (1994).

nially collected firm-level data reveal a similar pattern: the proportion of all employees accounted for by firms employing fewer than 10 employees rose from 30.9 percent in 1987 to 33.1 percent in 1992.³⁷⁶

Finally, the congressional policy exempting small employers from the general obligation to comply with fair labor standards is not entirely consistent with the overall federal policy promoting small business, which dates back to the beginning of the first Eisenhower administration:

The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts or subcontracts for property and services for the Government (including but not limited to contracts or subcontracts for maintenance, repair, and construction) be placed with small-business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation.³⁷⁷

Revealingly, for purposes of implementing this congressional policy and determining whether a business is small enough to be

³⁷⁶ Calculated according to U.S. BUREAU OF THE CENSUS, 1987 ENTERPRISE STATISTICS: COMPANY SUMMARY 19 tbl.3 (1991); U.S. BUREAU OF THE CENSUS, 1992 ECONOMIC CENSUS—ENTERPRISE STATISTICS (pre-publication data e-mailed by U.S. Bureau of the Census, Dec. 1, 1997) (on file with author).

³⁷⁷ 15 U.S.C. § 631(a) (1994) (enacted 1953).

eligible for government programs and preferences,³⁷⁸ the SBA has established size standards for a large number of industries. For general building contractors and heavy construction a small business is defined as having annual receipts of less than \$17 million, while special trade contractors must fall below \$7 million.³⁷⁹ This standard-setting is particularly significant since at the time the SBA knew that the average size of construction firms was three employees and \$300,000 in annual sales.³⁸⁰ If Congress had adopted such a small-business standard for the FLSA, fewer than 5,000 (or 1 percent of all) construction companies would be covered and 75 percent of all construction employees would be excluded from the statute.³⁸¹ Such an enormous breach in labor standards was apparently too much even for the Bush administration.

XII. THE QUANTITATIVE IMPACT OF THE EXEMPTION OF SMALL BUSINESSES

The Committee bill also updates the provision in Section 3(s) of the Act that prevents newly exempt employers from lowering their employees' wages below the previous minimum wage rate under which they had been covered. . . . This hold harmless provision will insure that not [sic] employee will be adversely affected by the Committee amendment.³⁸²

The typographic carelessness of the House Committee on Education and Labor in assuring workers that they would not suffer any disadvantage as a result of the higher \$500,000 exemption level for their employers was a bad omen for the assertion's truthfulness. But before its validity can be probed, its existence and meaning

³⁷⁸ 13 C.F.R. § 121.101 (1997).

³⁷⁹ 13 C.F.R. § 121.201.

³⁸⁰ 49 Fed. Reg. 5026 (1984).

³⁸¹ Estimated according to data in U.S. BUREAU OF THE CENSUS, 1992 ECONOMIC CENSUS—ENTERPRISE STATISTICS (pre-publication data e-mailed by U.S. Bureau of the Census, Dec. 1, 1997). Since the SBA threshold size class fell in the middle of one used by the Census Bureau, an estimate had to be made.

³⁸² H.R. REP. NO. 101-260, pt. 1, at 18 (1989).

must be known. Yet, even today many close observers of labor standards legislation are surprised to learn that a significant proportion of construction workers work in firms doing less than \$500,000 of business.³⁸³

Two years before Congress exempted small construction firms, the Bureau of the Census's *1987 Census of Construction Industries* ascertained that 1,256,597 employees were employed in establishments doing less than \$500,000 worth of business. They accounted for 25 percent of the slightly more than 5 million construction employees, while the 388,687 establishments falling below the \$500,000 threshold represented 71 percent of all construction establishments with payroll.³⁸⁴ The next economic census, carried out in 1992, two years after the small-business construction exemption had gone into effect, revealed that the 1,157,141 employees in such establishment still accounted for 25 percent of the estimated 4,668,280 construction employees, while the 413,435 establishments doing less than \$500,000 of business represented 72 percent of all establishments with payroll.³⁸⁵ In Iowa, a state with no overtime statute and a very weak minimum wage statute (which was, coincidentally, not enacted until 1989),³⁸⁶ fully 30 percent of all construction employees are excluded from the FLSA.³⁸⁷

³⁸³ E.g., Telephone Interview with Sarah M. Fox (Dec. 4, 1997).

³⁸⁴ U.S. BUREAU OF THE CENSUS, 1987 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: UNITED STATES SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 8 tbl.2 (1990).

³⁸⁵ U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: UNITED STATES SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 27-14 tbl.9 (1996).

³⁸⁶ IOWA CODE § 91.D (1997). Because the statute was enacted shortly before the 1989 amendments to the FLSA and has never been amended, it seems to apply only to retail and service employees of employers doing an annual business of between \$300,000 to \$500,000. *But see* Iowa Op. Att'y Gen. 1989-90, at 94 (Nov. 1, 1990) (on file with author). The regulations, which are largely taken verbatim from the FLSA regulations, suggest that coverage is greater and includes all construction firms falling below the FLSA threshold.

³⁸⁷ U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: GEOGRAPHIC AREA SERIES: WEST NORTH CENTRAL STATES IA-10 tbl.7 (1996).

In order to put the census data on the same enterprise basis as the FLSA coverage definition, the data from the only Bureau of the Census program that consolidates establishment data within enterprises can also be used.³⁸⁸ They reveal that in 1992,

³⁸⁸ Since the economic censuses conducted by the Bureau of the Census are based on establishments, whereas coverage under the FLSA is keyed to enterprises, it might seem that the establishment data in the text vastly overstate the effect of the small business exemption. Despite the definitional differences, however, the construction establishment-based employment data are very close approximations of enterprise-based coverage. The FLSA defines an enterprise as "the related activities performed (either through unified operation or common control) by any person or persons for a common business purpose, and includes all such activities whether performed in one or more establishments or by one or more corporate or other organizational units . . ." 29 U.S.C. § 203(r)(1) (1994). The Bureau of the Census defines a construction establishment "as a relatively permanent office or other place of business where the usual business activities related to construction are conducted." U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: SUBJECT SERIES: LEGAL FORM OF ORGANIZATION AND TYPE OF OPERATION v (1995). But these potentially significant differences are neutralized by the fact that the establishments of multi-establishment companies, which accounted for fewer than 2 percent of all establishments with payroll and fewer than 1 percent of all establishments, are, on average, so much larger than single-establishment firms and so far exceed the \$500,000 exemption level that no appreciable number of them could have fallen below that threshold. In 1992, the average value of construction work performed by establishments (with payroll) of single-unit companies was \$741,000 compared with \$10.5 million for establishments of multi-unit companies. *Id.* at 8 tbl.2. This disparity also applies to the generally small special trade contractors. In roofing, siding, and sheet metal work, for example, the average value of construction work done was \$567,000 and \$3.6 million, respectively. *Id.* at 11 tbl.2. The disparity is also found regardless of how many establishments the company owns. For example, in 1982, the average receipts of construction establishments of companies owning or operating only two establishments were more than seven times greater than those of single-establishment entities. U.S. BUREAU OF THE CENSUS, 1982 ENTERPRISE STATISTICS: GENERAL REPORT ON INDUSTRIAL ORGANIZATION 214 tbl.5 (1986). Since, therefore, virtually all establishments doing less than \$500,000 of business are single-establishment firms, employment data for such establishments are in effect enterprise-level data. The Census Bureau's definition of a "company" is similar to the FLSA definition of "enterprise": it includes all establishments under its ownership or control and, if a parent company, all establishments of its subsidiaries. U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: SUBJECT SERIES: LEGAL FORM OF ORGANIZATION AND TYPE OF OPERATION 4 (1995).

1,194,856 employees or 26 percent of all construction industry employees were employed in the 73 percent of all companies in the receipt size classes below \$500,000.³⁸⁹ Both of these proportions were one percentage point higher than in 1987.³⁹⁰

Since the most concentrated impact of the small-business exemption is on the so-called special trades contractors, which are on average smaller than other building companies, the corresponding data for this sector are presented here. In 1992, the average construction industry establishment with payroll did \$941,000 of business and employed eight employees; among special trades contractors the corresponding figures were \$600,000 and eight employees. The special trades are, in other words, both smaller and more labor intensive. Whereas in the construction industry as a whole, establishments with payroll employing one to four workers did \$198,000 of business, similarly situated special trade contractors did only \$140,000 of business; the corresponding figures for establishments employing five to nine employees were \$591,000 and \$436,000 respectively. Consequently, a larger proportion of special trades contractors are exempt and a larger proportion of their employees are excluded from the FLSA than for the industry overall: 76 percent of establishments and 825,790 employees or 30

³⁸⁹ U.S. BUREAU OF THE CENSUS, 1992 ECONOMIC CENSUS—ENTERPRISE STATISTICS (pre-publication data e-mailed by U.S. Bureau of the Census, Dec. 1, 1997).

³⁹⁰ U.S. BUREAU OF THE CENSUS, 1987 ENTERPRISE STATISTICS: COMPANY SUMMARY 60 tbl.5 (1991). The annual Bureau of the Census data series, *County Business Patterns*, yields similar results. According to the 1992 Census of Construction Industries, 5.0 employees worked on average in establishments doing \$250,000 to \$500,000 of business; conversely, establishments with 5 to 9 employees, did on average \$591,000 of business. Thus a close correlation obtains between doing \$500,000 of business and employing 6 to 7 employees. Since *County Business Patterns* uses size classes of 1-4 and 5-9, in 1994 approximately 900,000 employees were employed in construction firms with fewer than seven employees; they represented about 19 percent of all construction employees U.S. BUREAU OF THE CENSUS, COUNTY BUSINESS PATTERNS 1994: UNITED STATES 6 tbl.1b (1996). Similar proportions can be calculated from special tabulations for the Small Business Administration. THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT: 1994 182-83 tbl.A7, 206-07 tbl.A8 (data for 1990 and 1991).

percent of all employees.³⁹¹ On an enterprise basis, 31 percent of employees in 1992 were employed by the 77 percent of special trade contractor companies with less than \$500,000 in receipts.³⁹²

These figures represent the upper limit of the number of construction workers lawfully excluded from mandatory minimum wage and overtime compensation.³⁹³ Some employees of small construction firms may work under collective bargaining agreements that provide for such payments. Employers of others may make such payments voluntarily. A few may be covered because they are individually engaged in commerce by virtue of unloading trucks that crossed a state line to deliver materials.³⁹⁴ Still others may be covered by state laws.

The fact that many states lack a statutory minimum wage or, more importantly, a mandatory overtime law undercuts an argument put forward by liberal supporters of compromise with the Bush administration that most of the workers excluded by the higher

³⁹¹ U.S. BUREAU OF THE CENSUS, 1992 CENSUS OF CONSTRUCTION INDUSTRIES: INDUSTRY SERIES: UNITED STATES SUMMARY: ESTABLISHMENTS WITH AND WITHOUT PAYROLL 27-12, 27-15 tbls. 8,9 (1996).

³⁹² U.S. BUREAU OF THE CENSUS, 1992 ECONOMIC CENSUS—ENTERPRISE STATISTICS (pre-publication data e-mailed by U.S. Bureau of the Census, Dec. 1, 1997). Both proportions were the same in 1987. U.S. BUREAU OF THE CENSUS, 1987 ENTERPRISE STATISTICS: COMPANY SUMMARY 61 tbl.5 (1991).

³⁹³ The last set of coverage estimates that the DOL published, six months after the 1989 amendments had gone into effect, were implausible: the 75,000 construction employees excluded from the minimum wage and the 120,000 excluded from the overtime represented only 1.4 percent and 2.5 percent, respectively, of the total number of nonsupervisory employees in the industry. U.S. DEPT. OF LABOR, EMPLOYMENT STANDARDS ADMINISTRATION, MINIMUM WAGE AND MAXIMUM HOURS STANDARDS UNDER THE FAIR LABOR STANDARDS ACT, 27 tbl.7, 33 tbl.10 (1993).

³⁹⁴ "Workers employed on new construction not yet dedicated to interstate commerce are not covered unless they are engaged in ordering and purchasing, receiving and unloading materials from outside the state so as to make these activities a part of interstate commerce." Statement of the Director, Wage and Hour and Public Contracts Div. (Dec. 3, 1948), *reprinted in* 1 Lab. L. Rep. ¶25,150C.10, 37,366 (CCH, 1997). More recently the WHD stated that: "Of course, employees engaged at the construction site in receiving materials which are still moving [in] interstate commerce would be individually covered" 2 WAGE AND HOUR DIV., WAGE AND HOUR DIVISION FIELD OPERATIONS MANUAL ch. 11c10 (Apr. 24, 1994).

exemption level would be held harmless by their coverage under the state laws.³⁹⁵ The Bush administration itself used this argument. As former Secretary of Labor Dole claimed: "Most states have their own minimum wage laws (and some had higher minimum wage levels than that provided under Federal law) that would reach these small employers."³⁹⁶

In fact, as of October 1, 1997, seven states (Alabama, Arizona, Florida, Louisiana, Mississippi, South Carolina, and Tennessee) had no minimum wage statutes at all. In addition, eleven other state minimum wage laws prescribe a minimum wage rate far below the federal rate of \$5.15: Georgia (\$3.25), Indiana (\$3.35), Kansas (\$2.65), Kentucky (\$4.25), Minnesota (\$4.90 for enterprises with annual receipts of under \$500,000), Montana (\$4.00 for businesses with gross annual sales of \$110,000 or less), New Mexico (\$4.25), New York (\$4.25), Ohio (\$2.80 to \$4.25 depending on employer's annual sales volume), Texas (\$3.35), and Wyoming (\$1.60). Numerous states create coverage thresholds in the form of a minimum number of employees that exclude large numbers of employees: Arkansas (4), Georgia (6), Illinois (4), Indiana (2), Michigan (2), Nebraska (4), Vermont (2), Virginia (4), and West Virginia (6).³⁹⁷ Eighteen states have no overtime law at all. In the states that do have overtime statutes, the aforementioned coverage-restricting conditions also apply. Moreover, additional overtime coverage restrictions and exemptions further limit their applicability. For example, mandatory overtime does not apply to retail store employees in Kentucky, employees in retail or service businesses

³⁹⁵ When John V. Harvey, Jr., the chief majority counsel for Senate Labor and Public Welfare Committee in 1989, made this argument during an interview in 1997 and was informed that many states lack minimum wage and especially overtime laws, he admitted that he had also been unaware of that fact in 1989. Telephone Interview with John V. Harvey, Jr., Vice-President, Employee Relations, Owens-Corning, Ohio (Dec. 9, 1997).

³⁹⁶ Letter from Elizabeth Hanford Dole to Marc Linder (Jan. 14, 1998).

³⁹⁷ A Georgia state senator with plans to introduce legislation increasing the state minimum wage observed that: "Many Georgians will be shocked to learn that there are people around our state who are working for below the minimum wage because . . . the company they work for is not subject to the federal minimum wage law." *Senator Keys on the Minimum Wage*, AUGUSTA CHRON., Jan. 10, 1998, at C3.

with annual sales of less than \$500,000 in Missouri, or retail or service establishments in Vermont; employees are also excluded in enterprises with annual sales below \$250,000 in Nevada and \$150,000 in Ohio.³⁹⁸

Overall, then, the states have always offered and continue to offer only spotty back-up protection to workers excluded from the FLSA. Consequently, a large number of construction workers, especially those in the nonmechanical trades such as roofing, carpentry, and painting, and in (single-family) residential building in general,³⁹⁹ are no longer entitled to and do not receive premium wages for overtime.

XII. WHY WAS AND IS THE EXCLUSION OF CONSTRUCTION WORKERS IN SMALL FIRMS ALMOST UNKNOWN?

The Committee is aware that the low-wage worker, whose economic status is in large part determined by the FLSA, does not typically communicate with the Congress either by testifying on bills or by writing letters outlining his position on the legislation. [T]he Congress must represent the public conscience in the matter of low-wage workers and minimum wage legislation.⁴⁰⁰

Ignorance of the existence of the small construction firm exemption, at the time of its enactment and even today, is extraordinarily widespread. Although even many legislative leaders and their staffs were ignorant of the impact that the \$500,000 threshold would have on construction workers, Congress was not unaware of

³⁹⁸ U.S. DEPT. OF LABOR, WAGE AND HOUR DIV., DIV. OF EXTERNAL AFFAIRS, MINIMUM WAGE AND OVERTIME PREMIUM PAY STANDARDS APPLICABLE TO NONSUPERVISORY NONFARM PRIVATE SECTOR EMPLOYMENT UNDER STATE AND FEDERAL LAWS Oct. 1, 1997 (Oct. 15, 1997). It was not until December 1997 that the construction industry was added to the list of industries covered by Colorado's minimum wage and overtime regulation. Monique Tuttle, *New Colorado Minimum Wage Order Includes Construction Industry*, COLORADO EMPLOYMENT LAW LETTER (Dec. 1997).

³⁹⁹ Not surprisingly, homebuilding was, not so long ago, called *The Industry Capitalism Forgot*, FORTUNE, Aug. 1947, at 61.

⁴⁰⁰ S. REP. NO. 93-690, at 34 (1974).

the general wage-cutting consequences that restricted coverage would bring in its wake. During the debate over H.R. 2 in 1989, Representative Goodling inserted into the record the DOL's estimate of the economic effects of the increase in the small business exemption. The analysis presented by the Bush administration's DOL was subordinated to its speculation that increasing the minimum wage to \$4.25 would destroy 450,000 jobs. The higher exemption threshold figured, together with the increased tip credit and introduction of a so-called training wage, merely as "job loss offsets." In other words, the DOL viewed the disentanglement to the minimum wage solely as a positive development—as "sav[ing]" jobs. The higher dollar volume was estimated to exempt 1.1 million retail and service jobs from the minimum wage and two million jobs in the other affected industries, for a total of about three million lost jobs. The DOL viewed the new \$500,000 threshold as reducing job opportunity losses by a net of 4 percent or 18,000 jobs. This job-salvational effect would, according to the DOL, have been greater if state minimum wage laws had not intervened: they "effectively nullify" the increase in the coverage threshold by preserving minimum wage protection for about half the affected workers.⁴⁰¹ Thus instead of regarding the state laws as a safety net for workers expelled from the FLSA, the DOL perversely deemed them to be thwarting the effect that Congress had intended for the higher threshold as a compensation for the higher minimum wage.

Interviews with key congressional committee staff members and employer and union lobbyists reveal how widespread the ignorance of the exemption and its impact on construction workers was. The chief counsel and staff director of the Subcommittee on Labor Standards of the House Committee on Education and Labor in the late 1980s and early 1990s, James Riley, was crucially involved in drafting the amendments and writing the committee reports. Although he knew that the bill extended the \$500,000 coverage threshold to the construction industry, not even he realized at the time that the bill was taking away universal coverage from construction workers. Indeed, the only interest that the \$500,000

⁴⁰¹ 135 CONG. REC. 5243-44 (1989).

threshold sparked in the House committee was a speculative one: staffers worried that it might have been a "stalking horse" or trial balloon for Republican efforts to increase the coverage threshold under the Davis-Bacon Act. That law requires the payment of locally "prevailing" wages, as determined by the Secretary of Labor, under all federal building contracts over the virtually nominal level of \$2,000.⁴⁰² Although Republicans continued to seek an increase in the coverage threshold (in addition to repeal of the statute altogether), they in fact never used the higher FLSA threshold as a precedent. In retrospect, Riley conceded that "we probably shot ourselves in the foot" with the \$500,000 exemption, which "you've now discovered is hurting construction workers."⁴⁰³

Experienced DOL enforcement and compliance officers are well aware of the changes that the 1989 amendments wrought with respect to the construction industry, but the current acting Wage and Hour Administrator, a long-serving career civil servant, had not realized that construction had not been in the group of industries subject to the \$362,500 threshold in the years before 1989.⁴⁰⁴

Few people were closer to the lobbying concerning the FLSA in 1989 than Robert McGlotten, the legislative director of the AFL-CIO. For example, the AFL-CIO put out a news advisory on March 22, 1989, that McGlotten would be available to the media immediately after the House vote on the minimum wage in front of the House press gallery.⁴⁰⁵ Yet in an interview eight years later, when asked about the inclusion of construction in the \$500,000 small business exemption, Mr. McGlotten responded: "No one caught it.

⁴⁰² 40 U.S.C. § 276a(a) (1994).

⁴⁰³ Telephone Interview with Jim Riley (Dec. 9, 1997). John V. Harvey, Jr., the chief labor counsel on the Senate Labor and Public Welfare Committee, disagreed. With the hindsight knowledge of how many construction workers have been excluded from the FLSA, he still felt that everyone in 1989 recognized that the expanded exemption would bring about some such consequences if not precisely these. Telephone Interview with John V. Harvey (Dec. 9, 1997).

⁴⁰⁴ Telephone Interview with John Fraser (Dec. 8, 1997).

⁴⁰⁵ *News Advisory*, PR NEWswire, Mar. 22, 1989. On Nov. 1, 1989, McGlotten, on behalf of the AFL-CIO, wrote Representative Austin Murphy supporting the compromise with the Bush administration on amending the FLSA. 135 CONG. REC. H7868 (1989).

I'm hearing about it for the first time from you."⁴⁰⁶ Other insiders contradict this claim. John Zalusky, an economist with the AFL-CIO in 1989, called it "bullshit." Zalusky states that he foresaw and raised "bloody murder" about the consequences of the exemption, but was, despite his prediction that it would later "bite them in the rear," unable to persuade officials of the Building and Construction Trades Department of the AFL-CIO to focus on the issue.⁴⁰⁷ John Harvey, who was the chief labor counsel of the Senate Labor and Public Welfare Committee in the late 1980s, also characterized McGlotten's claim as "baloney."⁴⁰⁸

Jay Power, who was the AFL-CIO's chief lobbyist on the FLSA in 1989, stated that since the building trades unions did not express any interest in the issue, the inclusion of construction in the enterprise coverage exemption was "not that big a deal" for the AFL-CIO.⁴⁰⁹ Donald Elisburg, who had been the Assistant Secretary of Labor for Employment Standards in the Carter administration and has remained close to the AFL-CIO, emphasized that the building trades unions have always been so exclusively focused on the Davis-Bacon Act that they deferred to the AFL-CIO in all matters relating to the FLSA.⁴¹⁰ Construction unions'

⁴⁰⁶ Telephone Interview with Robert McGlotten (Nov. 25, 1997). "After nearly three decades at the AFL-CIO, the labor movement's top lobbyist" retired in 1995 to become a lobbyist for Philip Morris and other clients. *Labor's Private Weapon*, LEGAL TIMES, Apr. 24, 1995, at 5; *Highlights of Recent Lobby Registration*, LEGAL TIMES, Mar. 24, 1997, at 42.

⁴⁰⁷ Telephone Interview with John Zalusky (Dec. 9, 1997). Zalusky recently retired from the AFL-CIO. Zalusky added that his own union, the International Brotherhood of Electrical Workers, had complained but to no avail.

⁴⁰⁸ Telephone Interview with John V. Harvey, Jr. (Dec. 9, 1997). After working for General Electric, Harvey became the vice president for employee relations at Owens-Corning Glass. With respect to assessing plausibility and credibility, it is unclear why McGlotten would untruthfully characterize himself as having been an incompetent lobbyist in preference to stating that his immediate constituents, the building trades, were indifferent, or that the exemption was a necessary trade-off for an increase in the minimum wage.

⁴⁰⁹ Telephone Interview with Jay Power, AFL-CIO (Dec. 17, 1997). Power himself came to the AFL-CIO from the Carpenters Union.

⁴¹⁰ Telephone Interviews with Donald Elisburg (Nov. 1997). The building trades unions' lack of familiarity with the FLSA and exclusive focus on Davis-Bacon are corroborated by Zalusky and Terry Yellig, an attorney who represents

neglect of the FLSA has in large part been a function of their historical successes in securing far superior wage and hour provisions in their collective bargaining agreements than the FLSA offers. In that sense, the lack of coverage under FLSA could be regarded as a desirable organizing tool rather than a deficiency to be remedied by lobbying.⁴¹¹

Against this background, it is hardly astonishing that in 1991, when Zalusky was seeking to mobilize opposition to the Bumpers bill (which would have eliminated individual coverage in retail and service firms already exempted from enterprise coverage), his effort to explain why the exemption from enterprise coverage for small construction employers should be repealed "didn't really register" with Robert Georgine, the president of the Building and Construction Trades Department.⁴¹² The peripheral importance of the FLSA is underscored by the fact that the director of research of the Building and Construction Trades Department of the AFL-CIO not only had never heard of the small construction firm exemption, but expressed strong doubt that it even existed.⁴¹³ The vice president

the construction unions. Telephone Interview with Terry Yellig, Washington, D.C. (Jan. 26, 1998). Support for this view is also found in *1976 National Jobs Conference of the Building and Construction Trades Department AFL-CIO* 93-95 (1976), which devotes the chapter, "Labor Standards—Protect the Tradesman," to Davis-Bacon, without ever mentioning the FLSA.

⁴¹¹ This logic is, to be sure, contradicted by construction unions' traditional practice of organizing construction companies rather than workers. Until the extraordinary successes of the antiunion open-shop movement in the 1970s, "the building trades have organized relatively few workers, relying instead on the fact that the construction market has been dominated by union contractors who get their labor through union hiring halls." *Open-Shop Construction Picks Up Momentum*, BUS. WK., Dec. 12, 1977, at 108. See also Jerry Flint, *Building Unions Plan Organizing Campaign*, N.Y. TIMES, Dec. 1, 1977, at A18.

⁴¹² Telephone Interview with John Zalusky (Jan. 26, 1998). Robert Georgine, who is still president of the Building and Construction Trades Department, has no independent recollection of the debates over the 1989 FLSA amendments. Telephone Interview with Terry Yellig (Jan. 26, 1998).

⁴¹³ Telephone Interview with Adam Pagnucco (Nov. 24, 1997). Despite this obvious ignorance, the president of the Building & Construction Trades Department asserted in 1998 that: "Since the early 90s, we have been working on corrective strategies . . ." Letter from Robert Georgine to Marc Linder (Feb. 10, 1997) (on file with author). Georgine did not identify these "strategies."

in charge of organizing at the Roofers Union stated that he had never heard of the de facto exemption of small contractors from the FLSA. He suggested as the reason for his lack of familiarity with the exclusion the fact that the union did not organize residential roofing or small roofing contractors in general. He strongly suspected that the kinds of employers with which the union dealt had also never heard of the law.⁴¹⁴ In the field, the answer was the same. For example, the Roofers Union regional organizer in the Midwest (including Iowa) had never heard of the amendment.⁴¹⁵

Other unions of nonmechanical construction trades were similarly in the dark about the small-business exemption. The director of the legislative affairs for the United Carpenters and Joiners Union stated that he knew of the \$500,000 threshold, but did not realize that it applied to construction.⁴¹⁶ The general counsel of the Painters Union, though unfamiliar with the exemption, suggested that educating employees of small construction contractors as to their lack of an entitlement to overtime would be a good organizing tool.⁴¹⁷

Construction employers' associations were equally ignorant of the exemption. Neither the executive director for congressional affairs of the AGC, an organization of larger general contractors, nor the legislative affairs official at the antiunion Associated Builders and Contractors had ever heard of it.⁴¹⁸ The director of government relations at the National Roofing Contractors Association explained his ignorance of the threshold by reference to the composition of the organization's membership: because the 3,500

According to an attorney for the Building & Construction Trades Department, no such strategies existed precisely because the unions were unaware of the small-business exemption. Telephone Interview with Terry Yellig (Feb. 20, 1998).

⁴¹⁴ Telephone Interview with John Martini, United Union of Roofers, Waterproofers, and Allied Workers (Nov. 21, 1997). On the relatively low degree of unionization in single-family residential construction, see HERBERT NORTHRUP & HOWARD FOSTER, *OPEN SHOP CONSTRUCTION* 49-71 (1975).

⁴¹⁵ Telephone Interview with Carl Keeton (Nov. 26, 1997).

⁴¹⁶ Telephone Interview with Jim Kolb (Dec. 17, 1997).

⁴¹⁷ Telephone Interview with Dick Sigmond (Jan. 26, 1998).

⁴¹⁸ Telephone Interview with Jeff Shoaf (Nov. 24, 1997); Telephone Interview with Austin Fulk (Nov. 24, 1997).

members averaged \$3.5 million in annual business, the issue was, as so many other lobbyists and congressional staffers also put it, "below the radar" of larger contractors.⁴¹⁹

Ignorance of the small-business exemption from enterprise coverage is by no means restricted to employers and workers organizations. Seven years after the amendments were enacted, even the highly respected *Congressional Quarterly* disseminated false information about it. In reporting on the aforementioned unsuccessful efforts in 1996 to eliminate individual employee coverage in enterprises doing less than \$500,000 of business, the weekly magazine asserted that the 1989 amendment

ultimately ended up contracting the small-business exemption, not expanding it. . . . Since then, the Labor Department has interpreted the law to mean that any small-business employee engaged in interstate commerce in any way—including using materials produced in another state or answering out-of-state phone calls—had to pay the minimum wage and overtime. Wage and hour laws now apply to virtually all U.S. workers.⁴²⁰

Every single statement in this quotation is false.⁴²¹ Before 1990, virtually all construction firms, for example, were covered by the FLSA. From 1990 on, no construction firm doing less than \$500,000 in business has been subject to enterprise coverage. Only construction workers individually engaged in commerce or production of good for commerce would be covered. The DOL has not interpreted the FLSA to mean that any small-construction (or retail or service) business employee merely using materials produced in another state is entitled to the minimum wage or overtime: such an expansive interpretation is permissible only under

⁴¹⁹ Telephone Interview with Craig Brightup (Nov. 26, 1997). The largest roofing contractor in the United States, Centimark Corp., had revenues of \$175 million in 1996—three times greater than the second largest. Gary Tulacz, *The Top 600 Specialty Contractors*, ENR, Oct. 6, 1997, at 52.

⁴²⁰ Jonathan Weisman, *Exemption for Small Business. . . . Isolated, Attacked and Defeated*, CONG. Q., May 25, 1996, at 1462.

⁴²¹ Two weeks later the magazine repeated the false statement. Jonathan Weisman, *Senate May Reprise 1989 Fight Over "Training Wage,"* CONG. Q., June 8, 1996, at 1600, 1601.

the inapplicable enterprise coverage standard. In fact, DOL enforcement officers, all-too-well informed of the restrictiveness of the 1989 amendment, bemoan the fact that precious few small-business construction workers are still covered.⁴²² Finally, contrary to the magazine's assertion, millions of employees of small businesses are now uncovered in addition to the millions who had been previously uncovered.

The same article in *Congressional Quarterly* goes on to quote David Card, a labor economist who gained name recognition and helped shape national minimum wage policy in recent years with much criticized studies showing that an increase in the minimum wage can lead to increased rather than diminished employment.⁴²³ The magazine quoted Card as saying that "a company that grosses \$500,000 a year is very small, perhaps a two-man exterminator firm or a carburetor cleaner." This cavalier comment, based on empirical ignorance of how widespread and large such firms are, trivializes an important problem. Although he might be right that a McDonald's, if it were small enough to qualify for exemption from enterprise coverage, would suffer from publicity over lawfully paying subminimum wages, such exposure does not faze local roofers.⁴²⁴

So thick is the confusion as to what the 1989 amendments did—or perhaps, even more troublingly, what FLSA coverage and exemptions are all about—that in a letter that took many weeks to draft, former Secretary of Labor Dole explained the purpose behind the single-level small-business enterprise coverage threshold as

⁴²² Telephone Interview with Don Chleborad, DOL (Nov. 21, 1997). See also Telephone Interviews with Gail Coleman, Solicitor's Office, DOL (Nov. 25, 1997); Leif Jorgenson, FLSA attorney, DOL (Nov. 1997); Frank Laruffa, WHD, DOL (Nov. 1997).

⁴²³ DAVID CARD & ALAN KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995).

⁴²⁴ Weisman, *supra* note 421, at 1463. Card's claim that the exemption is irrelevant in the sense that any employer that "does not want to pay the minimum wage simply will not" regardless of whether it is exempt sounds plausible, but when he adds that the only penalty for failure to pay is merely paying the back wages due, he overlooks that in private suits brought by workers employers in the vast majority of cases will have to pay double the wages owed as well as the workers' attorney's fees. 29 U.S.C. § 216 (1994).

eliminating "the crazy quilt of exemptions, such as complete exemption for laundry firms."⁴²⁵ Apparently, the Secretary of Labor believed either that coverage of laundries was actually expanded by the 1989 amendments or that first-dollar coverage constituted a kind of exemption from exempt status.

At the other end of the disinformatinal spectrum, in 1996 Secretary of Labor Robert Reich disingenuously declared in a letter to the Speaker of the House, Newt Gingrich, that the proposal to eliminate individual coverage in firms exempt from enterprise coverage "invites a return to the sweatshop conditions that Americans abhor." Magnifying his hyperbole in an interview with *The New York Times*, Reich asserted that the exemption "would create an incentive to a lot of businesses to subcontract their work to new, tiny subcontractors paying 50 cents to a dollar an hour." That, he said, would provide "another incentive for illegal immigration"⁴²⁶ If any of these tactically opportunistic partisan assertions were accurate,⁴²⁷ they applied with much greater force to the original \$500,000 exemption in 1989, which the Democratic majority not only supported, but also described as a "true small business exemption."⁴²⁸ In this context, Senator Bond was generous in 1996 in characterizing as "odd" Democrats' complaints about the effort to exclude small-business employees from the minimum wage increase: "Many of them happily voted for similar poison" in 1989 when they agreed to exempt small businesses from enterprise coverage.⁴²⁹

⁴²⁵ Letter from Elizabeth Hanford Dole to Marc Linder (Jan. 14, 1998).

⁴²⁶ Adam Clymer, *Clinton Says He Will Veto Republican Plan in Wage Bill*, N.Y. TIMES, May 23, 1996, at B10.

⁴²⁷ If Reich was referring to manufacturing sweatshops, even if their owners were lawfully able to take advantage of the exemption from enterprise coverage, individual workers would still be covered because they produce for interstate commerce. As his own agency notes: "It has been the experience of the Wage and Hour Division that virtually all employees of manufacturers are covered by the Act's provisions." Wage and Hour Div., *Fact Sheet No. 9: Manufacturing Establishments Under the Fair Labor Standards Act (FLSA)* (visited Apr. 19, 1998) <<http://www.dol.gov/dol/esa/public/regs/compliance/whd/whdfs9.htm>>.

⁴²⁸ H.R. REP. NO. 101-260, pt. 1, at 18 (1989).

⁴²⁹ 142 CONG. REC. S7411 (1996).

If, in one disparaging view of the unscientific character of congressional policymaking, Congress engages in “legislation by anecdote,”⁴³⁰ the process culminating in the exclusion of small construction firms from enterprise coverage in 1989 was not only not guided by anecdotes, those who should have purveyed the anecdotes or antidotes to them were nowhere to be seen. Small contractors became, according to virtually all the participants, the inadvertent beneficiaries of Senator Jeffords’ drive to create a uniform dollar-volume threshold.⁴³¹ Although Jeffords did not have the construction industry specifically in mind, his goal of simplifying enforcement by means of uniformity could, in the abstract—that is, abstracting from the link to unemployment—have been achieved even more readily by bringing the other industries down to construction’s zero-dollar threshold. However, since wealth redistribution from workers to their small-business employers was one of the priorities of the general small business lobby, to which many legislators were committed, universal application of enterprise coverage would have been politically impossible. Uniformity had to be joined to an increase in the dollar volume. Because the outcome of a compromise was, in this sense, preordained, no one in construction had to spend political capital on this issue.

Contractors small enough to be eligible for the exemption did not lobby for it—former Secretary of Labor Dole, for example, does “not recall . . . any meetings with construction industry representatives to discuss the issue”⁴³²—nor did their larger competitors or construction unions oppose it. Since contractors of

⁴³⁰ Telephone Interview with Richard Brennan, DOL, Division of Policy and Analysis, (Dec. 8, 1997).

⁴³¹ Former Secretary of Labor Dole asserted that “while there was no particular focus on small construction firms, the changes affecting them were not inadvertent.” Her reasoning, however, is a non sequitur. While conceding that she does “not recall any focus on small construction firms,” she derives the intentionality merely from the perceived benefits: “By eliminating coverage for the smallest of businesses; we both eliminated the burden of a higher minimum wage on these businesses and reduced the Federal government’s own regulatory burden in dealing with a large number of businesses that do not have a significant impact on interstate commerce.” Letter from Elizabeth Hanford Dole to Marc Linder (Jan. 14, 1998).

⁴³² Letter from Elizabeth Hanford Dole to Marc Linder (Jan. 14, 1998).

this size were, by and large, not members of any construction employers association, they lacked the organizational wherewithal to apply pressure in any event. (To the extent that small contractors were violating various other labor-protective laws by unlawfully classifying their workers as nonemployees, they would, in any event, have had no incentive to call attention to themselves.) Since associations of larger contractors believed that their members were insulated from bid competition with such firms, and unions believed that their members were insulated from labor market competition radiating from such firms, the sudden withdrawal of the entire under-\$500,000-per-year sector from wage-and-hour enforcement was, in the almost universally used locution, "underneath the radar" of their lobbyists. As a result, Congress was deprived of even the pseudo-information generated by the carefully choreographed personal presentation of point-counterpoint anecdotes characteristic of hearings. Since virtually no one in or around Congress realized that after a quarter-century of universal coverage, more than 70 percent of all construction firms would be reassigned to the unfair labor standards regime,⁴³³ Congress could not even pretend that it had weighed the consequences of such unmediated and massive labor market deregulation. Whether such ignorance-based legislation generates a political-economical and moral environment superior to that associated with the same exclusionary outcome arrived at by an avowedly anti-labor process is a nice question.

A radically different interpretation of these attitudes and legislative policies, at least on the part of the unions, is, to be sure, possible. To the extent that the AFL-CIO was aware of the expansion of the small-business exemption in 1989, the labor movement's acquiescence in, and the decision to subordinate any opposition to, the amendment to the overriding need for an increase in the minimum wage could be viewed as noble if not entirely altruistic. After all, the vast majority of workers—such as migrant farm laborers—who are actually paid the minimum wage and

⁴³³ According to Gail Coleman, "no one focused on" the exclusion of the construction industry. Telephone interview with Gail Coleman, Solicitor's Office, DOL (Nov. 25, 1997).

whose weak labor market position would generate subminimum wages in the absence of a compulsory statutory norm,⁴³⁴ are not union members. Increases in the minimum wage may help ratchet up the whole wage structure for unionists. Nevertheless, the AFL-CIO's or the building trades unions' willingness to sacrifice the immediate interests of hundreds of thousands of construction workers in coverage under the FLSA for the sake of a more livable wage for millions of even more impoverished workers should be acknowledged as an act of solidarity.

CONCLUSION

[E]very time we have had a minimum wage increase, we have always . . . made the exceptions and the exemptions, so that small businesses could provide those jobs for those most in need, and so small businesses could create those jobs that small businesses must create if as a matter of fact we are going to have a growing economy.⁴³⁵

Focusing on the construction industry underscores one crucial way in which the pernicious impact of unfair labor standards on the rest of the economy may be different today than it was in the early years of the FLSA. In 1949, the Truman administration, viewing the President's election in 1948 as a repudiation of the antilabor policies of the Republican-dominated Eightieth Congress, proposed amendments to the FLSA that would have significantly expanded the universe of covered workers by pushing "the commerce power of Congress exercised to its fullest constitutional extent. . . ."⁴³⁶ In explaining the planned expansion to the House Committee on Education and Labor, the Secretary of Labor, Maurice Tobin, noted that one of the FLSA's original objectives was to guard fair employers "from unfair wage chiseling by the few." Within the

⁴³⁴ MARCLINDER, *MIGRANT WORKERS AND MINIMUM WAGES: REGULATING THE EXPLOITATION OF AGRICULTURAL LABOR IN THE UNITED STATES* (1992).

⁴³⁵ 142 CONG. REC. H5534 (1996) (statement of Rep. Goodling).

⁴³⁶ WILLIAM S. TYSON, MEMORANDUM: SCOPE OF SECTION 3(N), in *Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education & Labor*, 81st Cong., 1st Sess. 121 (1949).

“part of our industrial community” operating under the act’s “minimum ground rules” unfair competition had largely been “wiped out.” However:

there is another large part of the same general community for whom the labor costs, the wage rates, the hours of work, and the rules on child labor are whatever is required by the forces of competition. In this group are the workers who are not favored by State laws or self-organization. Yet their employers are frequently in the same competitive markets with those who must comply with the Fair Labor Standards Act.

I cannot escape the conclusion that what is good for one group of employers is equally good for those who compete with them. I am impressed with the fact that it is pretty hard for a fair employer to live by the rules and stay in business in bad times when his competitor is free to cut labor costs and undersell him. Moreover, the employers and employees who are not subject to the act are left to be the victims of the same type of vicious competition among themselves which helped to create the greatest depression in our history.⁴³⁷

There is little doubt that Tobin correctly assessed the depressed conditions in the exempt sector both then and now. Less certain is the continuing validity of his conceptualization of the competitively ramifying effects of the substandard sector on the covered sector. As recently as the 1960s, the relationship between the two sectors assumed a different character than today. At that time, too, some craft unions often refrained from organizing residential building, but the strategic objective was accommodation. Unions “prefer that small home builders find in the nonunion market the lower wages and flexibility that craft lines deny. For the union man, the nonunion sector serves as a buffer. When union-scale heavy construction jobs are unavailable, craft union members can temporarily move into the home-construction field. Such buffer

⁴³⁷ *Amendments to the Fair Labor Standards Act of 1938: Hearings Before the House Committee on Education & Labor, 81st Cong., 1st Sess. 15 (1949) (testimony of Maurice Tobin).*

arrangements also provide flexibility in bargaining with management, for the craft world provides a variety of escape hatches. A craftsman can strike in the unionized sector while working in the nonunionized."⁴³⁸ The "flexibility" characteristic of that period would not have embraced today's prospect of temporarily working, not merely below the high standards of union contracts, but in derogation of statutory norms. Substandard conditions in residential building may have rendered that sector almost as inaccessible to union workers as it is to law-abiding employers.⁴³⁹

If, as the case of the construction industry today appears to show, employers in the two sectors operate in noncompeting product markets and do not compete for the same groups of workers, it is possible that labor standards in the covered sector are largely impervious to the corrosive impact of wage chiseling. Whether this hypothesis is objectively true or not—and surely the exemption from the FLSA of contractors doing less than \$500,000 of business must exert a wage-depressing competitive impact on covered employers doing somewhat more than \$500,000 of business—construction employers associations and unions, as the aforementioned interviews reveal, seem to act on the assumption that it is. For not only did construction employers not lobby for and the unions against the small-business exemption in 1989, their lobbyists and legislative directors were unaware of its inclusion in the amendments. More astounding yet, eight years later, when interviewed about their positions on the exemption, most of them were flabbergasted to hear that it even existed. In self-exculpation, union officials explained that they do not organize such small firms, while employers' representatives stated that their members'

⁴³⁸ Margaret Chandler, *Craft Bargaining*, in *FRONTIERS OF COLLECTIVE BARGAINING* 50, 58 (John Dunlop & Neil Chamberlain eds., 1967). For evidence that unionized workers sometimes forgo overtime as an accommodation to employers, see Barry Whelchel, *Informal Bargaining in Construction*, 10 *IND. REL.* 105, 107-109 (1971).

⁴³⁹ The greater price sensitivity among house buyers and the associated reduced ability of residential builders to pass their increased costs on have long intensified competitive pressures and demands for downward wage flexibility in residential construction. John Dunlop, *Labor-Management Relations*, in *DESIGN AND PRODUCTION OF HOUSES* 270 (Burnham Kelly ed., 1959).

businesses were far larger than the exemption threshold and did not engage in the kind of building operations typically performed by small contractors.

In fact, however, the groups do compete. Traditionally, during cyclical downswings, large firms, "in order to maintain their level of output, will not hesitate to bid on construction projects which are normally left to the smaller firms."⁴⁴⁰ For example, a reputable roofing contractor in the Iowa City area observes that larger roofing contractors could traditionally make a living from commercial projects in upswings, but needed residential work to sustain themselves during recessions. The domination of the residential sector by unfair labor standards has deprived some larger and law-abiding firms of that safety valve, undermining their long-term viability.⁴⁴¹ And labor union economists agree that, regardless of the sectoral organizing strategy of building trades unions, there is a standards-depressing spill-over effect from the residential to the commercial construction labor market.⁴⁴²

Employers' and unions' subjective belief in the thesis of noncompeting groups would bode well for the further evisceration of the FLSA. Advocates of governmental deregulation would face fewer obstacles to achieving their goals if organized capital and labor were to remain indifferent to efforts to cut back coverage incrementally. Such a scenario was conjured up a half-century ago, when Ralph Gwinn, a Congressman from New York who detected socialism in the most unlikely places,⁴⁴³ engaged William McComb, the Wage and Hour Administrator, in the following colloquy:

⁴⁴⁰ Peter J. Cassimatis, *The Performance of the Construction Industry, 1946-1965*, at 295-96 (1967) (Ph.D. diss., New School for Social Research) (on file with author).

⁴⁴¹ Telephone Interview with Kurt Tjemeland, T & K Roofing, Ely, IA (Dec. 2, 1997).

⁴⁴² Telephone Interview with John Zalusky (Dec. 9, 1997). Zalusky was an AFL-CIO economist until his retirement and was involved in the 1989 FLSA negotiations.

⁴⁴³ Gwinn spoke of "socialist Federal regulation of prices and wages" 1949 *Hearings*, *supra* note 36, at 98.

Mr. GWINN. It is because people chisel that you think the Government must manage the economy to the extent that you propose?

Mr. MCCOMB. It is because some employers will pay as little as they can for their employee's work.

Mr. GWINN. How many?

Mr. MCCOMB. Well, it would just take a very small percentage. You have spoken of free competition.

...

Mr. GWINN. How many of the employers, do you say, are chisellers?

Mr. MCCOMB. A very small percentage of them.

Mr. GWINN. How small?

Mr. MCCOMB. Oh, less than 5 percent. . . .

Mr. GWINN. All right; then you would subject our whole economy in this area to management from Washington, and all of your inspectors and all of the expenses of the taxpayers that are involved, and all the bookkeeping that is involved, and the uncertainties, and the ill will because 5 percent of our employers, you say, are chisellers?

Mr. MCCOMB. . . . I will have to disagree with you, that there would be a great deal of ill will. I know of many, many employers who want to pay a decent wage, but if they must compete with the man who is paying a very low wage and has no regard for the living conditions under which his workers must live, those employers must pay low if they are going to compete with the others. . . .

Mr. GWINN. You have great faith in our free economy and in the honesty of 95 percent of our employers?

Mr. MCCOMB. Yes, I do.

Mr. GWINN. If a majority of them come forward in these hearings and say they will take their chance on competition with the 5 percent of the chisellers, are you willing to leave this law to their judgment in that regard?

Mr. MCCOMB. I do not think you could.⁴⁴⁴

⁴⁴⁴ 1949 Hearings, *supra* note 36, at 103-04.

The Wage and Hour Administrator may not have thought it possible 50 years ago,⁴⁴⁵ but if unions and covered employers no longer believe that they compete with and thus no longer need to be "protected against the unfair methods of competition of those who utilize sweatshop methods to gain a competitive advantage,"⁴⁴⁶ their indifference to the exemption of small firms may help vindicate Gwinn's deregulatory program yet. If a rational industrial policy of any kind underlies the expanded small-business exemption, it must be based on the conclusion that such a rigid "dual economy" has emerged that larger firms and primary-sector unions can ignore wage-chiselers with impunity, many of whose employees will increasingly become those whom Congress has expelled from the welfare rolls.⁴⁴⁷ Alternatively, the policy of exempting small firms from the FLSA must also assume that all small employers are willing to become wage-chiselers: for Congress's decision to subject all employers below the \$500,000—and, in the future, perhaps an even higher⁴⁴⁸—threshold to the withering competition of unfair labor standards tendentially compels even well-intentioned employers to reproduce the conditions prevailing among their most rapacious rivals.

⁴⁴⁵ At that time it was still *de rigueur* in the construction industry to find that: "For the well-established employers, it is . . . important to have a floor under competitive labor costs. Otherwise, the threat is always present of a competitor securing cost advantages through undercutting labor standards." Frank Pierson, *Building-Trades Bargaining Plan in Southern California*, 70 MONTHLY LAB. REV. 14, 14 (1950).

⁴⁴⁶ 1937 *Hearings*, *supra* note 50, at 3 (statement of Asst. Atty. Gen. Robert Jackson).

⁴⁴⁷ E.g., Tony Horwitz, *Poor Prospects: Paring Welfare Rolls Proves a Huge Grind for Everyone Involved*, WALL ST. J., Nov. 4, 1997, at A1.

⁴⁴⁸ Passage of bills introduced by Democrats in 1998 to increase the minimum wage may, once again, be conditioned on an increase in the small-business exemption threshold. S. 1573, 105th Cong., 2d Sess. (1998); H.R. 3100, 105th Cong., 2d Sess. (1998). Although an attorney to the Building & Construction Trades Department recommended to the organization that it seek to repeal the exemption, it did not follow that advice. Telephone Interview with Terry Yellig (Feb. 20, 1998).

Above all, however, a rational industrial policy informing revision of the FLSA presupposes, at the very least, an explicit economic theory and unbiased empirical studies, which have been conspicuously absent.⁴⁴⁹ A democratically organized discussion comparing the class-based distribution of the benefits and deprivations of universal coverage and selected exemptions would require a measure of honesty and comprehension on the part of legislators and interest and intelligence on the part of intervening participants that had never been particularly prominent in earlier FLSA debates, and has virtually disappeared since the 1980s.

⁴⁴⁹ The one outstanding exception was the seven volumes of the REPORT OF THE MINIMUM WAGE STUDY COMMISSION (1981).

