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1988]

IS SMALL BEAUTIFUL AT THE WORKPLACE?

JOHN T. DUNLOP†

I. INTRODUCTION

SMALL Is Beautiful, with its subtitle *A Study of Economics as If People Mattered*,¹ by E.F. Schumacher, was widely applauded when it appeared in 1973.² In Dr. Schumacher's view, bigness of private or public bureaucracies leads to impersonality, insensitivity and a lust to concentrate abstract power, while small is free, efficient, creative, enjoyable and enduring. In a theory of organisation, Dr. Schumacher concludes that "any organisation has to strive continuously for the orderliness of *order* and the disorderliness of creative *freedom*. And the specific danger inherent in large-

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1. E.F. SCHUMACHER, *SMALL IS BEAUTIFUL: A STUDY OF ECONOMICS AS IF PEOPLE MATTERED* (1973). Dr. Schumacher's book, although fairly characterized as being moralistic or theological in approach, provides an interesting perspective on what, in modern times, has been the primary domain of economists. Beginning with a discussion of the "Modern World" and his view of it, Dr. Schumacher asserts that technology and higher levels of organization cannot prevent what is the inevitable disaster:

We shrink back from the truth if we believe that the destructive forces of the modern world can be "brought under control" simply by mobilising more resources—of wealth, education, and research—to fight pollution, to preserve wildlife, to discover new sources of energy, and to arrive at more effective agreements on peaceful coexistence.

Id. at 276. Because Dr. Schumacher believes that continued economic growth, as that idea is currently understood, will ultimately threaten society's very existence, he argues forcefully for a new system of small-scale private and public ownership with a de-emphasis on materialism and growth.

2. In critiquing *Small Is Beautiful*, the Times Literary Supplement wrote:

About a great many such matters, Dr. Schumacher has good things to say, a proportion of them already familiar from Chesterton and Tawney and *Blueprint for Survival* and other sources, but here argued with remarkable force, well supported by hard facts and figures, and stated so apothegmatically as to tempt a reviewer to immoderate quotation.

617 Times Literary Supplement (London) 1108 (Sept. 28, 1973). This is not to say, of course, that Dr. Schumacher's book has been widely embraced by its readers. The London Times review of the work expresses what is perhaps the general, skeptical sentiment:

Critical expositions of the economic bases of our society are always good reading, even if they change nothing. Dr. Schumacher has, unlike most Utopians, stooped to the real world, and does suggest practical models for change. But how many people will really want to eschew greed and our norms and practise them?

London Times, June 2, 1973, at 12, col. d.

(1059)

scale organisation is that its natural bias and tendency favour order, at the expense of creative freedom.”³ The volume raises vital issues that are universal and timeless,⁴ but at no point does Dr. Schumacher consider productivity, compensation or the conditions of ordinary workers—relevant considerations in any comparison of the relative virtues of big versus small.

This symposium requires a brief introductory comment as to the meaning of small. “Small” is a relative term⁵ that is not fruitfully defined for all purposes by absolute numbers of employees, value of assets or sales.⁶ A small oil refinery does not fit on the same scale as a small barber shop. Further, small may refer to a single establishment,⁷ an enterprise⁸ or even an entire industry.⁹

3. E.F. SCHUMACHER, *supra* note 1, at 227 (emphasis in original).

4. Along with questions of how best to assist the Third World, Dr. Schumacher addresses the energy crisis, the efficacy and dangers of nuclear power, the problems of pollution, the dehumanization of industrial work, the breakdown of the urban environment as well as the moral decay of societies motivated by greed.

5. *See, e.g.*, 15 U.S.C. §§ 631-650 (1982 & Supp. IV 1986) (Aid to Small Business). The Small Business Administration’s regulations defining “small” for purposes of the Small Business Act (SBA) provide an excellent illustration of the variable meaning of the term. Although no definitive meaning is given, a business must be classifiable as “small” to be eligible for benefits under the SBA. *See* 13 C.F.R. § 121.1(a) (1984).

It is clear, both from the Act itself and from the legislative history, that the specification of what is a small business has been left to administrative, rather than legislative, determination. Size standards vary by industry with particular attention to the structure of the designated industry, Administration policy and the needs of the various Federal programs to which they apply. In its most basic sense, this is the approach of establishing size standards. Factors, among others, which are examined for the purpose of setting size standards include maximum size of firms, average firm size, the extent of industry dominance by large firms, the number of firms, the distribution by firm size of sales and employees in the industry, the presence of Federal procurement, and relation to other SBA programs. The development of size standards is not an exact quantitative procedure. No single measurement or simple numerical device is the basis for establishing size standards.

Id. at § 121.1(b).

6. For a discussion of statutory provisions exempting businesses from federal minimum wage requirements based upon annual sales, *see infra* note 35.

7. *See* OFFICE OF MANAGEMENT AND BUDGET, STANDARD INDUSTRIAL CLASSIFICATION MANUAL 12 (1987). The Standard Industrial Classification (SIC), a uniform classification system produced by the Office of Management and Budget, uses the term “establishment” to denote its smallest economic unit. *Id.* An establishment may be a farm, factory, mine or store and may represent a part of a larger company or entity. *Id.* The SIC system is designed to classify all such units found within the United States so to promote statistical uniformity when comparing sectors of the national economy. *Id.* at 11. For SIC purposes, every economic “establishment” is assigned a four-digit classification number according to its primary activity, whether that activity is the production of a product or the delivery of a service. *Id.* at 16.

Moreover, the degree of control is also variable. While one establishment may be completely independent and exercise autonomy in decisionmaking, for example, a local street vendor, another may be almost completely controlled as a part of a giant organization, for example, a local owner of a McDonald's restaurant.¹⁰

Before beginning a general discussion of the merits of applying American labor law to small business—however such a term is defined—it is important to keep in mind what working in a smaller setting means for the ordinary worker. Control over the policy of the workplace, it may be assumed, is potentially allocated in an endless variety of ways. Thus, smallness may affect employment policies, or not, depending upon the degree of control given to the small unit. Nonetheless, certain generalities about the small workplace may be made.

8. For SIC purposes, the term "enterprise" refers to an economic unit comprised of several smaller establishments. *See id.* at 12. "Enterprise" is defined as a group of establishments having more than fifty percent direct or indirect common ownership. *Id.* at 13.

9. A group of all SIC establishments classified under the same SIC Code number represents a specific "industry" which may be further subcategorized as a "three-digit" or "four-digit" industry depending on the purpose at hand. For example, the SIC three-digit industry Code 265 represents all manufacturers of paperboard containers and boxes. "Paperboard Containers and Boxes" is a "three-digit" industry. Within SIC Code 265, there are further subcategories of manufacturers. For example, SIC Code 2652 represents Setup Paperboard Box Makers while SIC Code 2653 denotes Corrugated and Solid Fiber Box Manufacturers. *See id.* at 120-21. Four-digit industry classifications under the SIC are therefore said to be "finer" than the broader, three-digit classifications.

10. The McDonald's Corporation operates a world-wide system of restaurants which package and sell fast food. The corporation, primarily through its licensing and leasing agreements, exercises strict control over more than 9,900 individual restaurants which service 7,500 locations throughout the United States, Canada, Western Europe, the Pacific and Latin America. MOODY'S INDUSTRIAL MANUAL 6227 (1988).

One of the most obvious means by which the corporation has achieved its success is through the very type of strict control over its product and services which Dr. Schumacher has attributed to modern economies. Ray Kroc, the founder of the famous restaurant chain, wrote:

We agreed that we wanted McDonald's to be more than just a name used by many different people. We wanted to build a restaurant system that would be known for food of consistently high quality and uniform methods of preparation. Our aim, of course, was to insure repeat business based on the system's reputation rather than on the quality of a single store or operator. This would require a continuing program of educating and assisting operators and a constant review of their performance. . . . I knew in my bones that the key to uniformity would be in our ability to provide techniques of preparation that operators would accept because they were superior to methods they could dream up for themselves.

R. KROC, GRINDING IT OUT: THE MAKING OF McDONALD'S 81-82 (1977).

II. THE FACTUAL BASE ABOUT THE SMALLER WORKPLACE

A. Wage Schedules

Historically, wage rates tend to vary systematically and directly with the size of the enterprise or establishment. A 1940 Bureau of Labor Statistics study found this positive relationship between size of enterprise and plant size in industries in which ownership was concentrated, but found little relationship in less concentrated industries.¹¹ In a 1947 research conference on wages, I reported on the basis of wage data gathered during wartime wage controls that "one finds that large firms pay higher wages than smaller firms."¹²

Recent work, more elegant in quantitative method, has strongly reinforced these findings as general in the economy.¹³ A number of factors such as labor quality, working conditions, union avoidance and product-market power are shown not to override the independent influence of size on wages.¹⁴ "The effect of employer size on wages is *both* an establishment- and a firm-size effect."¹⁵ Size differentials are persistent and general. Even the finest industry classifications are influenced by size.¹⁶ "[T]he size-wage differential appears to be both sizeable and om-

11. TEMPORARY NAT'L ECONOMIC COMM., 76TH CONG., 3D SESS., HOURLY EARNINGS OF EMPLOYEES IN LARGE AND SMALL ENTERPRISES, Monograph No. 14, at xi (S. Comm. Print 1940).

Workers at the same job in the meat-packing, iron and steel, and electrical-goods industries and in the manufacture of radio sets, explosives, soap, fertilizers, and chewing and smoking tobacco and snuff had higher hourly earnings when employed by one of the biggest concerns in their industry than when working for a smaller company. This difference was not a function of region, size of community, or size of establishment, and could not be explained by unionization.

On the other hand, there was no relation between size of average hourly earnings and the size of company in the shoe, leather, cotton goods, woolen and worsted goods, hosiery, knitted underwear and outerwear, radio parts and tubes, and furniture industries. Thus, size of company appears to be a significant factor only in those industries in which a substantial share of the total business is done by a few companies, not in the industries in which ownership is more widely diffused.

Id. at xi-xii.

12. See J. Dunlop, *Labor Markets and Wage Determination: Then and Now*, in J. DUNLOP, C. KERR, R. LESTER & L. REYNOLDS, *HOW LABOR MARKETS WORK* 47, 56 (B. Kaufman ed. 1988).

13. C. Brown & J. Medoff, *The Employer Size Wage Effect* (Aug. 1988) (unpublished paper).

14. *Id.* at 2, 30-31.

15. *Id.* at 30 (emphasis in original).

16. *Id.* at 18-19, 30-31. For a discussion of industry classifications, see *supra* notes 7-9.

nipresent.”¹⁷ There even appears to be evidence that the size-wage differential has been increasing in a secular fashion since 1967.¹⁸

The annual report of the President on small business has noted the small firm wage reality:

[W]orkers in small firms, on average, received lower estimated hourly earnings than workers in large firms. . . . Several factors figure in this, including the use of more capital per worker in large firms, differences in work force characteristics (e.g., large firms have more prime-age, highly-educated workers) and a variety of institutional factors, such as the prevalence of unionization in large firms.¹⁹

It is essential to appreciate how large these wage differentials are, often fifty to one hundred percent higher at the top category compared to the lowest group of establishments. For example, consider the Standard Industrial Classification (SIC) Code 514, Groceries and Related Products, Wholesale Trade, which has 134,000 employees. Average hourly earnings on a nationwide basis for the size categories (zero to nine employees, ten to nineteen, twenty to forty-nine and so on) progress as follows: \$6.21, \$6.78, \$6.73, \$7.20, \$7.64, \$8.50, \$9.02 and \$11.10.²⁰ Or consider SIC Code 242, Sawmills and Planing Mills, which has 81,000 employees. Average hourly earnings progress as follows: \$5.38, \$5.43, \$5.70, \$6.33, \$7.43, \$7.96, \$8.10 and \$9.00 for the size category over 1000 employees.²¹

17. *Id.* at 31.

18. N. Garris, *Secular and Cyclical Variability of the Firm Size-Wage Differential* 40, 48 (Mar. 20, 1985) (Harvard College undergraduate thesis, Dept. of Economics).

“Secular” refers to an economic phenomenon whose influence is linear throughout time, such as the current shift in the economy from manufacturing to service-oriented businesses or an increase in unionization throughout an industry. *See id.* at 1. The term can be contrasted with “cyclical,” which indicates an influence that is sensitive to the changing business cycle and variables such as unemployment, inflation and interest rates. *See id.*

19. THE SMALL BUSINESS ADMINISTRATION, *THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT* 248 (1986) [hereinafter *THE STATE OF SMALL BUSINESS*].

20. J. Dunlop, *Industrial Relations and Economics: The Common Frontier of Wage Determination*, in *INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES: PROCEEDINGS OF THE THIRTY SEVENTH ANNUAL MEETING 19-20* (1984).

21. *See id.* at 20.

B. *Fringe Benefits*

Marked differentials in fringe benefits are likewise found according to size of establishment and enterprise.²² In December 1985, a survey of small employers reported health insurance was provided to all employees by size class as follows: one to four employees, thirty-two percent; five to nine employees, fifty-one percent; ten to nineteen employees, fifty-four percent; twenty to forty-nine employees, fifty-four percent; fifty to ninety-nine employees, fifty-eight percent; and one hundred or more employees, seventy-four percent.²³ In contrast, a 1986 survey of one hundred very large companies indicated that approximately ninety-three percent provided for conversion of health benefits to individual coverage for employees after layoffs, and ninety-nine percent provided coverage to retirees.²⁴ The following table shows

FIRM SIZE (NUMBER OF EMPLOYEES)	PERCENTAGE OF EMPLOYEES COVERED BY HEALTH INSURANCE
Self-employed	1.3
Under 25	37.3
25-99	66.0
100-499	75.7
500-999	79.5
1000 or more	85.4

the percentage of workers within each firm size covered by an employer-based health insurance plan in 1983.²⁵ (The difference

22. Compare NATIONAL FEDERATION OF INDEPENDENT BUSINESS, SMALL BUSINESS EMPLOYEE BENEFITS 6 table 2 (Dec. 1985) (compiling benefit data for firms ranging from one to 100 employees) with U.S. DEPARTMENT OF LABOR BUREAU OF LABOR STATISTICS, EMPLOYMENT BENEFITS IN MEDIUM AND LARGE FIRMS, 1986 4 table 1 (Bulletin 2281 June 1987) (compiling benefit data for firms with at least 100 employees) and THE BUSINESS ROUNDTABLE, CORPORATE HEALTH-CARE-COST MANAGEMENT AND PRIVATE-SECTOR INITIATIVES 4 (July 1987) (compiling data on health benefits for firms employing mean of 25,705 salaried and 34,962 hourly workers apiece).

23. See NATIONAL FEDERATION OF INDEPENDENT BUSINESS, *supra* note 22, at 6. Data from the study indicates that other benefits such as paid vacations, paid sick leave, life insurance and retirement plans follow the same general trend although the availability of employee discounts showed no definitive correlation. *Id.*

24. THE BUSINESS ROUNDTABLE, *supra* note 22, at 51-52. These "very large" companies spent an average of \$116 million on health care coverage in 1985, and they employed a mean of 25,705 salaried and 34,962 hourly workers each. *Id.* at 4.

25. *A Profile of the Nonelderly Population without Health Insurance*, EMPLOYEE BENEFIT RESEARCH INSTITUTE ISSUE BRIEF, May 1987, at 5 table 4.

from one-hundred percent is the percentage not covered). The prevalence and quality of other employee fringe benefits similarly varies with the size of establishment and enterprise.²⁶

C. *Occupational Safety and Health*

There is evidence that the incidence of occupational accidents and illness at the workplace are also a function of establishment and enterprise size.²⁷ Programs to reduce or prevent accidents and illness often require capital equipment as well as specialized training and supervision which smaller workplaces may not be able to afford.²⁸ The application of the Occupational Safety and Health Act (OSHA)²⁹ to smaller workplaces is relatively influenced by the costs of inspections and the effects of a union presence in generating OSHA implementation in larger enterprises.³⁰

D. *Employment Stability*

It is well recognized that the life cycle of a high proportion of small enterprises is short: Infant mortality is high with consequent loss of employment. Dun and Bradstreet reports that there were 253,092 business starts in 1986—56.6% with two employees or less and 23.5% with three to five employees.³¹ There were 61,616 business failures in 1986.³² Almost forty percent of the failures were of businesses in existence three years or less and nearly fifty-five percent of the failures were of businesses in exist-

26. For a discussion of other employee fringe benefits, see *supra* notes 22-23.

27. See D. Weil, *Government and Labor at the Workplace: The Role of Labor Unions in the Implementation of Federal Health and Safety Policy 27 & n.7* (1987) (Ph.D. thesis in Public Policy, Harvard University).

28. See *id.* at 10-11 & n.14.

29. 29 U.S.C. §§ 651-678 (1982 & Supp. IV 1986). OSHA is remedial legislation designed "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." *Id.* at § 651(b). OSHA is coextensive with the commerce clause of the Constitution applying to all employers who are engaged in business that affects interstate commerce. *Godwin v. Occupational Safety & Health Review Comm'n*, 540 F.2d 1013, 1014 (9th Cir. 1976). Employers subject to OSHA's coverage must comply with safety and health standards promulgated by the Occupational Safety and Health Administration and provide a workplace free of recognized hazards likely to cause serious injury. 29 U.S.C. § 654(a).

30. See D. Weil, *supra* note 27, at 313-15.

31. THE DUN & BRADSTREET CORPORATION, BUSINESS STARTS RECORD 2 (1986-1987).

32. THE DUN & BRADSTREET CORPORATION, BUSINESS FAILURES RECORD 5 (1986).

ence five years or less.³³ In this dynamic and even convulsive setting, employment stability may be expected to be low on average as compared to older and established enterprises. Keeping track of such starts, failures and transformations alone is a most complex undertaking.

Despite some exceptions, the evidence is that smaller establishments do not as readily adopt new technologies enhancing their competitiveness and facilitating security of employment. A study of computerized automation in manufacturing reports:

At plants with 500 or more employees that are part of multi-plant corporations, the chances are overwhelming (at 18 to 1) that we will find some computerized automation. On the other hand, for small single-plant enterprises with fewer than 50 employees, the chances that management will have installed any computer-controlled machines are less than 50-50.³⁴

In summary, as a factual matter, smaller enterprises *on average* tend to have lower wage schedules, lower fringe benefits, poorer conditions of occupational safety and health and a greater likelihood of business failure eliminating jobs than larger enterprises in the same industry.³⁵ These remarks are not intended as an opprobrium, but rather as a factual description for background to this symposium. Nor should these size comparisons detract from the fact that approximately thirty percent of non-governmental workers are in enterprises with fewer than twenty-five employees and another fourteen percent are in the twenty-five to ninety-nine

33. *Id.* at 17.

34. M. KELLEY & H. BROOKS, *THE STATE OF COMPUTERIZED AUTOMATION IN U.S. MANUFACTURING*, Executive Summary 2 (1988) (Program on Technology, Public Policy and Human Development of the Center for Business and Government, Kennedy School of Government, Harvard University).

35. It should also be mentioned that some small enterprises are exempt, by different definitions, from a variety of social legislation which affects employees. *See, e.g.*, 29 U.S.C. §§ 213(a)(2), (4) (1982) (1977 Minimum Wage Amendments). The minimum wage amendments exempt certain retail or service establishments from federal minimum wage requirements using annual sales as a basis for differentiating exempt from nonexempt firms.

The terms used in the Fair Labor Standards Act furnish considerable indication that the minimum wage exemption was intended to reach only small retail businesses. Annotation, *What Constitutes "Retail or Service Establishment" Within Exemption Stated in § 13(a)(2) and (4) of Fair Labor Standards Act, As Amended (29 U.S.C. § 213(a)(2) and (4))*, 7 A.L.R. FED. 624, 635 (1971). Congress's purpose was to insure exemptions to the likes of the corner grocery store, the filling station, drugstore, clothing store and meat dealer. *Durkin v. Mercer Water Co.*, 112 F. Supp. 656, 658 (W.D. Pa., *aff'd sub nom. Mitchell v. Mercer Water Co.*, 208 F.2d 900 (3d Cir. 1953).

employee bracket.³⁶ Thus, the smaller-sized enterprises provide a vital number of jobs for wage and salary earners.

III. THE POSITION OF SMALL BUSINESS IN WORKPLACE LEGISLATION AND RULEMAKING

The point needs to be made simply and dispassionately that small business and its various representatives have expressed vehement opposition in administrative, legislative and judicial arenas to extensions of workplace legislation to small business. Their numbers and influence often make them more effective advocates than big business on many of these issues. Moreover, small business tends to take positions through a wider variety of organizations and spokespersons, greatly enhancing its influence.

The present period well illustrates this behavior. Small business exemptions or cut-offs were vigorously debated before the passage of recent legislation over plant closing notification to workers.³⁷ Pending legislation which would mandate health care benefits,³⁸ family and medical leave,³⁹ notification of toxic substances at the workplace⁴⁰ and provisions for employer sponsored day care⁴¹ are sure to bring similar debates.

But opposition to legislation enhancing government social responsibilities has long been the posture of American business. Stanley Marcus, a thoughtful business leader, has well said:

Who among the business community today would seriously propose that Congress repeal our child labor laws—or the Sherman Anti-Trust Act? The Federal Reserve Act, the Security Exchange Act? Or Workman's

36. THE STATE OF SMALL BUSINESS, *supra* note 19, at 229 (citing 1983 data). Another 14% of nongovernmental workers are employed by enterprises with 100-499 employees while the remaining 42% are employed by enterprises of over 500 employees. *Id.*

37. Worker Adjustment and Retraining Notification Act, 102 Stat. 890 (1988) (plant closing). The federal plant closing notification law requires that employers of full-time employees give sixty days notice before closing a plant or laying off large numbers of workers. *Id.* at 891. The act specifically exempts from its protection, however, those employees who work for companies hiring less than one hundred workers. *Id.* at 890.

38. See S. 1265, 100th Cong., 2d Sess., 134 CONG. REC. S6633 (daily ed. May 25, 1988).

39. See H.R. 925, 100th Cong., 2d Sess., 134 CONG. REC. H752 (daily ed. Mar. 8, 1988).

40. See S. 79, 100th Cong., 1st Sess., 133 CONG. REC. S150 (daily ed. Jan. 6, 1987).

41. See S. 1271, 100th Cong., 1st Sess., 133 CONG. REC. S7055 (daily ed. May 21, 1987).

Compensation? Or Social Security? Or Minimum Wage? Or Medicare? Or that such legislation is an integral part of our system; that it has made us a stronger, more prosperous nation—and, in the long run, has been good for business. But we can take precious little credit for any of the social legislation now on the books, for business vigorously opposed most of this legislation—and we get precious little credit from the people.⁴²

In a significant way, small business has been the vanguard of opposition by the business community more generally to expanded workplace regulation. The appeal in American political life and ideology of populism, the dream of one's own business and the influence of smaller communities has made small business more effective than big business in its opposition to regulation.

One should not, however, be too quick to dismiss the critique of expanded regulation often expressed on behalf of small business. As I said more than a decade ago:

Over the years, regulation has proved to be a practical and effective approach to some social and economic problems. . . .

A major reason for the attraction of regulation over the years has been the belief that it is a speedy, simple and cheap procedure. It should be apparent that the administrative procedure is by no means fast or inexpensive but the prevailing belief is that it is. This misconception, in large part, is due to the fact that the constraints on the rule-making and adjudicating activities of regulatory agencies are not widely perceived or appreciated. . . . There are a variety of problems with this approach.

The first problem with regulation is that it encourages simplistic thinking about complicated issues. . . .

Second, designing and administering a regulatory program is an incredibly complicated task. . . .

Third, oftentimes policies that appear straightforward will have unintended consequences which can create problems as severe as those with which the regulations were intended to deal. . . .

42. S. Marcus, *Can Free Enterprise Survive Success*, Address at the University of Nebraska at Omaha 5 (Nov. 18, 1975).

. . . .

A fourth problem is that the rule making and adjudicatory procedures of regulatory agencies tend to be very slow, creating conflicts between the different groups involved, and leading to weak and ineffective remedies for the people the programs aim to help. . . .

. . . .

Fifth, the rule-making and adjudicatory procedures do not include a mechanism for the development of mutual accommodation among the conflicting interests. . . .

. . . .

Sixth, regulatory efforts are rarely abandoned even after their purpose has been served. . . .

. . . .

A seventh problem involves the legal game-playing between the regulatees and the regulators. . . .

An eighth problem with regulation concerns the difficulty encountered by small and medium size firms in complying with the regulations of the various agencies, and the problems the government has in trying to enforce compliance. Many regulations do not well fit the circumstances of small enterprises. It is often difficult if not impossible for small to medium size firms to keep track of the large number of regulations issued by various agencies. And there is little reason to do so; the chances of a small or medium size firm being inspected are minute and if it is inspected and found to be in violation fines for a first offence are usually small. Thus, it may make practical business sense for a firm to put off the expenses required to achieve compliance until after an inspection has specified those changes which have to be made.

Compliance cannot be compelled through a police effort in every workplace, given any practicable levels of funds and personnel. . . .

Ninth, as the rule-making and compliance activities of regulatory agencies become routine, it grows increasingly difficult for the President and the agency to attract highly qualified and effective administrators into leadership positions. . . .

Tenth, uniform national regulations are inherently

unworkable in many situations because the society is not uniform. . . .

An eleventh problem is what is called "regulatory overlap," where a number of different regulatory agencies share some of the same responsibilities.⁴³

So small business, even when it pleads only for itself, alerts us to some pervasive shortcomings of the traditional twentieth-century governmental approach to workplace regulation.

IV. IMPLICATIONS FOR THE SYMPOSIUM

I believe that the factual base and unique position of small business raise at least four implications for this symposium.

1. Workplace regulatory policy should not rely on labor market forces to eliminate differences between small and large business. The factual base outlined earlier requires that policy and administration be very skeptical, indeed, that it reject much of current microeconomic analysis which suggests that there is a single labor market and that it functions like a bourse.⁴⁴ The labor market is not a bourse, and changes in wages do not clear the market of shortages or unemployment. Large wage and benefit differentials persist among firms for the same job classification in the same locality in different industries and among firms of different size. Workers do not offer to work for less than those currently employed in high wage firms, and high wage firms do not go to lower paid firms and offer workers positions. The labor market will not "correct" differentials among firms based on size to create a uniform rate of compensation.

2. The symposium must begin with an appreciation of "The Limits of Legal Compulsion."⁴⁵ There are severe limitations on what can be done by compulsion alone in this field, and means to expand the possibilities of consultation and education deserve more attention. Moreover, any realistic appraisal of the resources available for enforcement in the current budgetary setting, and the time required for full litigation, compels attention to other alternatives.⁴⁶

43. Dunlop, *The Limits of Legal Compulsion*, 27 LAB. L.J. 67, 68-71 (1976).

44. A "bourse" is the paradigm of a theoretical market in which surpluses and shortages are quickly corrected by falling and rising prices, respectively. A market which parallels the functioning of a bourse will generate a commodity price at which demand exactly meets supply.

45. Dunlop, *supra* note 43, at 67-74.

46. For a discussion of the problem of limited resources for enforcement

3. We need to understand why other Western countries have less severe problems with these issues than we do. First, employer associations encompass the range of interests of large and small firms and a greater degree of internal discipline exists. In the United States, no single association speaks for management or seeks to compromise internal differences. As a consequence, the most extreme position often gets the most public or governmental attention. Second, in many Western countries, the minister of labor has the authority to extend to an entire industry the "most representative" agreement including provisions as to wages, health and working conditions. The United States has no comparable tools through which to resolve such issues on an industry basis.

4. American labor law is designed to apply to all industries and workplaces, except agriculture and one or two partial exceptions. (Airlines and railroads are, of course, subject to separate legislation.⁴⁷) Designed to deal with manufacturing, our labor law is ill-suited to the diversity of relationships in construction, maritime and college faculties, for example. I have expressed elsewhere⁴⁸ such strong reservations about the current legal framework to collective bargaining that I do not wish to be party to a new measure of initiatives to apply that framework more rigorously to small business without extensive reform.

and the costliness of litigation in the regulatory promulgation and enforcement process.

47. See 49 U.S.C. app. §§ 1301-1557 (1982 & Supp. III 1985) (aviation); 49 U.S.C. app. §§ 1701-1743 (1982) (airport and airway development); Interstate Commerce Commission: Railroad and Pipeline Carriers, 49 U.S.C. app. §§ 1-27 (1982) (railroad and pipeline carriers).

48. J. Dunlop, *The Legal Framework of Industrial Relations and the Economic Future of the United States*, in AMERICAN LABOR POLICY 1-15 (C. Morris ed. 1987).

