

## THE AGE OF GREED AND THE SABOTAGE OF REGULATION

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### INTRODUCTION

The congressional debate over whether the government engages in ruinous “overregulation” is only occasionally coherent. Sometimes it is downright bizarre, and never is it for the faint of heart. The intensely disturbing dynamic between grandstanding, conservative Representatives and hypersensitive, anxiety-ridden White House operatives has evolved to the point that it threatens the central premise of the administrative state: that expert-driven, science-based, and pluralistic rulemaking is a far preferable way to implement statutes than the alternatives. When the alternative is policy making that responds on a hair trigger to self-interested demands by politicians driven by potential electoral backlash, the rational, albeit ponderous, traditions of the administrative state seem overwhelmingly more desirable.

Consider the recent case of children paid to work on farms and other agricultural facilities. In the context of a series of gruesome incidents involving teenagers as young as fourteen who were smothered in grain elevators<sup>1</sup> or lost legs to giant augers used to

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1. Barb Ickes, *Grain Bins: Now Defunct Company Paid over \$200,000 in Fines over Grain Bin Deaths*, QUAD CITY TIMES (Dec. 6, 2011), [http://qctimes.com/news/local/nw-defunct-company-paid-in-fines-over-grain-bin-deaths/article\\_c4e179c2-206f-11e1-af6b-001871e3ce6c.html](http://qctimes.com/news/local/nw-defunct-company-paid-in-fines-over-grain-bin-deaths/article_c4e179c2-206f-11e1-af6b-001871e3ce6c.html). For a description, photographs, and a diagram of these hazards, see Occupational Safety & Health Admin., *Grain Handling*, U.S. DEPT OF LAB., <http://www.osha.gov/SLTC/grainhandling/index.html> (last visited June 25, 2012).

remove crops from elevators and silos,<sup>2</sup> the United States Department of Labor (“DOL”) issued a Notice of Proposed Rulemaking (“NPRM”) in September 2011 announcing its intention to tighten prohibitions on the “hazardous occupations” where children younger than sixteen are employed.<sup>3</sup> Existing rules<sup>4</sup> were promulgated four decades ago, before many of the machines and methods now commonplace on today’s farms were developed,<sup>5</sup> and they have proven shockingly ineffective. The fatality rate for young agricultural workers is *four times* greater than for their peers in other workplaces.<sup>6</sup>

Consistent with DOL’s authorizing statute, the Fair Labor Standards Act (“FLSA”), the new requirements would have exempted children who work for their parents or a relative or friend standing in the place of a parent, no matter what their age or the activity for which they are paid.<sup>7</sup> DOL would have allowed children to raise animals for 4-H competitions and enroll in vocational training programs.<sup>8</sup> But the proposal would have prohibited children under sixteen years old from working for hire to operate farm machinery;<sup>9</sup> feed, herd, or otherwise handle farm animals when their activities would cause pain to the animal or result in “unpredictable” behavior;<sup>10</sup> manage crops stored in grain elevators or silos;<sup>11</sup> or pick tobacco because children are especially vulnerable

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2. Robert Barron, *Kremlin Boys Still Critical*, ENID NEWS & EAGLE (Aug. 8, 2011), <http://enidnews.com/localnews/x541067296/Kremlin-boys-still-critical>. For a description and photographs of these hazards, see *Grain Auger Safety*, UNIV. OF ILL. EXTENSION, <http://web.extension.illinois.edu/agsafety/equipment/grainaugersafety.cfm> (last visited June 25, 2012).

3. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,836–37 (proposed Sept. 2, 2011).

4. 29 C.F.R. pt. 570 (2011).

5. See Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,839, 54,843 (citing 35 Fed. Reg. 221 (Jan. 7, 1970)) (explaining that DOL last promulgated a rule defining hazardous occupations in agriculture that children could not perform in 1970 and describing injury and fatality rates for children working in agriculture).

6. *Id.* at 54,843 (to be codified at 29 C.F.R. § 570.70).

7. 29 U.S.C. § 203(e)(3) (2006) (demonstrating that the definition of “employee” does not include “any individual employed by an employer engaged in agriculture if such individual is the parent, spouse, child, or other member of the employer’s immediate family”).

8. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,849–52 (to be codified at 29 C.F.R. § 570.72).

9. *Id.* at 54,852–58 (to be codified at 29 C.F.R. § 570.71(a)(1)–(3), (7)) (Proposed Ag. H.O. 1–2).

10. *Id.* at 54,858–60 (to be codified at 29 C.F.R. § 570.99(b)(4)) (Proposed Ag. H.O. 4).

11. *Id.* at 54,862 (to be codified at 29 C.F.R. § 570.71(a)(8)) (Proposed Ag. H.O. 8).

to a form of nicotine poisoning known as “green tobacco sickness.”<sup>12</sup> DOL received more than 10,000 comments on the proposal and was considering revisions through the normal rulemaking process.<sup>13</sup>

In late January 2012, the House Small Business Committee’s Subcommittee on Agriculture, Energy, and Trade held a hearing entitled “The Future of the Family Farm: The Effect of Proposed DOL Regulations on Small Business Producers.”<sup>14</sup> With witnesses stacked four to one against the proposal, the hearing offered ample opportunity to excoriate DOL on the grounds that the proposed rule would end “family farming” as we know it. Representative Denny Rehberg (R-Mont.), who is trying to unseat Democratic Senator Jon Tester (D-Mont.), threatened to attach a rider to DOL’s appropriations bill to stop the rulemaking.<sup>15</sup> The justification? The proposal might prohibit the congressman from hiring his ten-year-old neighbor to herd his cashmere goats by riding a Kawasaki “youth” motorcycle after the undoubtedly startled critters. “I think you’re sitting around watching reruns of ‘Blazing Saddles’ and that’s your interpretation of what goes on in the West,” the self-described fifth generation rancher turned member of Congress informed DOL Deputy Wage and Hour Administrator Nancy Leppink.<sup>16</sup>

Other witnesses at the hearing told stories about how rewarding it was for their children to come of age feeding baby calves,<sup>17</sup> milking cows,<sup>18</sup> and helping their parents heft hay bales into the barn.<sup>19</sup> None of these activities would be prohibited by the rule, of course, provided the child was actually helping her parents or people serving in a parental role, as opposed to working for the

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12. *Id.* at 54,864–65 (to be codified at 29 C.F.R. § 570.99(b)(13)) (Proposed Ag. H.O. 13).

13. *The Future of the Family Farm: The Effect of Proposed DOL Regulations on Small Business Producers, Hearing Before the Subcomm. on Agriculture, Energy, & Trade of the H. Comm. on Small Business, 112th Cong. pt. 1 (2012)* [hereinafter *Family Farm Testimony*] (statement of Nancy J. Leppink, Deputy Wage and Hour Administrator, Wage and Hour Division, United States Department of Labor), available at [http://smbiz.house.gov/UploadedFiles/Leppink\\_Testimony.pdf](http://smbiz.house.gov/UploadedFiles/Leppink_Testimony.pdf).

14. See generally *Family Farm Testimony*, 112<sup>th</sup> Cong. (2012), available at <http://smbiz.house.gov/Calendar/EventSingle.aspx?EventID=276662>.

15. Dave Jamieson, *Denny Rehberg, GOP Congressman and Senate Hopeful, Blasts Child Labor Regulations*, HUFFINGTON POST (Feb. 2, 2012, 3:36 PM), [http://www.huffingtonpost.com/2012/02/02/denny-rehberg-child-labor\\_n\\_1250207.html](http://www.huffingtonpost.com/2012/02/02/denny-rehberg-child-labor_n_1250207.html).

16. *Id.*

17. See, e.g., *Family Farm Testimony*, *supra* note 13, pt. 3, at 2 (statement of Richard B. Ebert, co-owner and operator, Will-Mar-Re Farms, Blairsville, Pennsylvania), available at [http://smbiz.house.gov/UploadedFiles/Ebert\\_Testimony.pdf](http://smbiz.house.gov/UploadedFiles/Ebert_Testimony.pdf).

18. *Id.* at 5–6.

19. *Family Farm Testimony*, *supra* note 13, pt. 2, at 1 (statement of Chris Chinn, owner, Chinn Hog Farm), available at [http://smbiz.house.gov/UploadedFiles/Chinn\\_Testimony.pdf](http://smbiz.house.gov/UploadedFiles/Chinn_Testimony.pdf).

minimum wage or less at a farm that may or may not be owned or operated by relatives, but where the children worked under the supervision of unrelated people.<sup>20</sup> Yet it is worth imagining for a moment the nonagricultural industry analogy to this claim. How much sympathy would a factory owner elicit if she came to testify about how a child could develop self-respect by spending twelve hours a day in a sweat shop because the experience was equivalent to helping the child's grandmother do needlework?

The outlandish claims about how the proposal would operate were discouraging to anyone familiar enough with the life-threatening risks faced by young agricultural workers to understand the urgency of the proposed updates. Unfortunately, though, the proposal did not do nearly enough to help the most beleaguered of these children: migrants as young as ten or twelve years of age who stand, stoop, kneel, and bend side-by-side with their parents, suffering a miasma of injuries from heat stroke to cuts, repetitive motion injuries, and pesticide poisoning.<sup>21</sup> Instead, DOL promised to consider those problems another day.<sup>22</sup> In light of the proposal's untimely and heavily politicized termination, a generation or more may have to wait before the federal government returns to those urgent problems.

On April 26, 2012, when press coverage had ebbed for the day, DOL issued a short, four-paragraph press release announcing it was withdrawing the entire proposal:

The Obama administration is *firmly committed to promoting family farmers and respecting the rural way of life*, especially the role that parents and other family members play in passing those traditions down through the generations. The Obama administration is also deeply committed to listening and responding to what Americans across the country have to say about proposed rules and regulations. As a result, the Department of Labor is announcing today the withdrawal of the proposed rule dealing with children under the age of 16 who work in agricultural vocations. . . . *To be clear, this regulation will not be pursued for the duration of the Obama administration.* Instead, the Departments of Labor and Agriculture will work with rural stakeholders – such as the American Farm Bureau Federation, the National Farmers Union, the Future Farmers of America, and 4-H – to develop

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20. 29 U.S.C. § 213(c) (2006).

21. See generally HUMAN RIGHTS WATCH, *FIELDS OF PERIL: CHILD LABOR IN US AGRICULTURE* (2010), available at [http://www.hrw.org/sites/default/files/reports/crd0510webwcover\\_1.pdf](http://www.hrw.org/sites/default/files/reports/crd0510webwcover_1.pdf). For additional background, see generally *THE HARVEST* (Shine Global 2011).

22. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,865 (proposed Sept. 2, 2011).

an educational program to reduce accidents to young workers and promote safer agricultural working practices.<sup>23</sup>

Why did the White House beat such an explicit retreat on the proposed rule, taking the exceptional step of promising never to revive it for the “duration of the Obama administration”—phrasing that could mean the entire period that the President is in office, even if he wins a second term? On the most immediate level, Representative Rehberg, of cashmere goats and ten-year-old motorcyclist fame, is locked in a tight Senate race with Democratic incumbent Jon Tester, and the President can ill afford to lose the Senate.<sup>24</sup> Tester not only implored the White House to pull the rule but was joined by fellow Democrats like Senator Al Franken (D-Minn.).<sup>25</sup> The Obama campaign is also likely to be worried about competing with Republican candidate Mitt Romney for the rural vote, especially in key “swing” states like New Hampshire and Colorado.<sup>26</sup> In 2011, about 51 million people lived in areas the United States Department of Agriculture (“USDA”) characterizes as rural, and 260 million lived in areas it characterizes as “urban.”<sup>27</sup> Of course if either Tester’s or the President’s race is so close that this single, relatively obscure issue could swing the race one way or another, Democrats arguably have far bigger problems.

Pulling the camera back a few steps further to consider the President’s overall stance regarding Republican attacks on

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23. Press Release, U.S. Dep’t of Labor, Wage and Hour Div., Labor Department Statement on Withdrawal of Proposed Rule Dealing with Children Who Work in Agricultural Vocations (Apr. 26, 2012) [hereinafter WHD Press Release] (emphasis added), *available at* <http://www.dol.gov/whd/media/press/whdpressVB3.asp?pressdoc=national/20120426.xml>. Worth noting is the statement’s exclusion of child labor and farm worker advocates, as well as safety and health experts, from its roster of “rural stakeholders.” The list suggests that it was more interested in pandering to opponents of the rule than ensuring the implementation of a rigorous and effective training program. *Id.*

24. *Election 2012: Montana Senate*, RASMUSSEN REP. (June 19, 2012), [http://www.rasmussenreports.com/public\\_content/politics/elections/election\\_2012/election\\_2012\\_senate\\_elections/montana/election\\_2012\\_montana\\_senate](http://www.rasmussenreports.com/public_content/politics/elections/election_2012/election_2012_senate_elections/montana/election_2012_montana_senate) (showing a poll from June 18, 2012 with Rehberg at 49% and Tester at 47% of likely voters) (access to complete article requires subscription).

25. Sam Hananel, *Obama Criticized in Reversal on Child Farm-Labor Regulations*, WASH. POST (Apr. 29, 2012), [http://www.washingtonpost.com/politics/obama-criticized-in-reversal-on-child-farm-labor-regulations/2012/04/29/gIQAZvEDqT\\_story.html](http://www.washingtonpost.com/politics/obama-criticized-in-reversal-on-child-farm-labor-regulations/2012/04/29/gIQAZvEDqT_story.html).

26. Philip Elliott, *Romney and Obama Compete for Rural Voters’ Support*, BLOOMBERG BUS. WK. (June 15, 2012), <http://www.businessweek.com/ap/2012-06/D9VDL5CG1.htm> (reporting that Romney is expected to win the majority of rural voters but that the Obama campaign is trying to keep the margin as narrow as possible, especially in swing states like Colorado and New Hampshire).

27. ECON. RESEARCH SERV., USDA, STATE FACT SHEETS (2012), *available at* <http://www.ers.usda.gov/data-products/state-fact-sheets/state-data.aspx?StateFIPS=00>.

“overregulation” provides a more enduring explanation. President Obama has exhibited a steadfast determination to respond with conciliation to intemperate and relentless demands by his political opponents that he dismantle regulation because it is undermining the nation’s economy.<sup>28</sup> His concessions have done very little to win the gratitude of national business groups like the Chamber of Commerce.<sup>29</sup> As important, efforts to meet politicians of the other party halfway seem not only to have failed but have also made matters far worse because, as negotiation experts would remind us, responding to highly competitive negotiation tactics with conciliation incites escalating confrontations and even more extreme demands.<sup>30</sup>

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28. In the aftermath of the 2010 midterm elections, with conservatives firmly in charge of the House of Representatives and already mounting an attack on regulations that allegedly cripple the economy, President Obama pivoted from neglect to repudiation, publishing an opinion piece in the *Wall Street Journal* promising to create a “21st-century” system that eliminates “dumb” rules and avoids “excessive, inconsistent, and redundant regulation.” Barack Obama, Op-Ed., *Toward a 21st-Century Regulatory System*, WALL ST. J., Jan. 18, 2011, at A17; see also Cass Sunstein, Op-Ed., *21st-Century Regulation: An Update on the President’s Reforms*, WALL ST. J., May 26, 2011, at A17. The President has not defended the mission of the agencies or the performance of the people he appointed to lead them in the face of blistering Republican attacks on overregulation, except in the context of explaining how far he is willing to go to eliminate unnecessarily burdensome regulations. See, e.g., Alan Fram, *Obama Proposes Revamping Regulations to Aid Businesses*, WASH. POST (May 30, 2011), [http://www.washingtonpost.com/politics/obama-proposes-revamping-regulations-to-aid-businesses/2011/05/29/AG2QYOEH\\_story.html](http://www.washingtonpost.com/politics/obama-proposes-revamping-regulations-to-aid-businesses/2011/05/29/AG2QYOEH_story.html) (“Overall, the drive would save hundreds of millions of dollars annually for companies, governments and individuals and eliminate millions of hours of paperwork while maintaining health and safety protections for Americans, White House officials said.”).

29. See T.W. Farnam, *U.S. Chamber of Commerce Begins Multi-Million Dollar Ad Campaign in Congressional Races*, WASH. POST (Feb. 9, 2012), [http://www.washingtonpost.com/blogs/election-2012/post/us-chamber-of-commerce-begins-multi-million-dollar-ad-campaign-in-congressional-races/2012/02/09/g1QA1Rr51Q\\_blog.html](http://www.washingtonpost.com/blogs/election-2012/post/us-chamber-of-commerce-begins-multi-million-dollar-ad-campaign-in-congressional-races/2012/02/09/g1QA1Rr51Q_blog.html); John McCardle & Emily Yehle, *Obama Admin Outlines 500 Reforms It Says Will Save Businesses Billions*, N.Y. TIMES (Aug. 23, 2011), <http://www.nytimes.com/gwire/2011/08/23/23greenwire-obama-admin-outlines-500-reforms-it-says-will-24456.html?pagewanted=all>; Sam Stein, *Obama’s Executive Order Pits Him, Yet Again, Against Chamber of Commerce*, HUFFINGTON POST (Apr. 21, 2011), [http://www.huffingtonpost.com/2011/04/21/obamas-executive-order-chamber-commerce\\_n\\_852253.html](http://www.huffingtonpost.com/2011/04/21/obamas-executive-order-chamber-commerce_n_852253.html).

30. ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AN AGREEMENT WITHOUT GIVING IN* 21 (1991) (arguing that a successful negotiator does not respond to competitive tactics with concessions, but by forcing the other party to negotiate based on the argument’s merit); ROY J. LEWICKI ET AL., *NEGOTIATION* 37–42 (McGraw-Hill/Irwin 6th ed. 2009) (noting that the negotiator should respond to competitive tactics by mirroring the aggressive behavior or by challenging the use of competitive tactics and treating them as a separate issue from the substance of the negotiation); Robert J. Condlin, *Bargaining With A Hugger: The Weaknesses and Limitations of a Communitarian Conception of Legal Dispute Bargaining, Or Why We Can’t All Just Get Along*, 9 CARDOZO J.

But the long-term implications of this decision, which are by no means isolated,<sup>31</sup> are likely to be remembered long after the President and whoever is elected Senator from the great state of Montana leave office. In the maddening, heavily politicized scum where regulatory decisions are up for grabs, the long-standing tradition of expertise-driven administrative decision making seems to be hanging by a thread, dooming Executive Branch agencies to shy away from controversial rulemaking regarding public health, worker and consumer safety, and the environment in the absence of a statutory mandate, no matter how pressing the problem. Or, as Professor Thomas McGarity rightly warns us, the era of “blood sport rulemaking” is now upon us, with the inevitable result that even the resolution of business-on-business disputes will become far more expensive and unpredictable.<sup>32</sup>

This Article opens with an evaluation of the proposed rule in relation to the allegations that were leveled against it. Having established that DOL could have resolved legitimate objections from agricultural trade associations like the American Farm Bureau Federation (“AFBF”)<sup>33</sup> fairly easily had the rulemaking process run its course, the Article evaluates the ramifications of the likelihood that rulemaking to protect child labor in agriculture could stall for years in the administrative process. The Article concludes with some predictions on what it will take to force the Executive and Legislative Branches to return to the administrative process in deciding what to do about such controversies.

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CONFLICT RESOL. 1, 70–73 (2007) (finding that a cooperative response to highly competitive tactics is ineffective because conciliatory behavior will be exploited); Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 60–61 (1985) (finding that pursuing a cooperative strategy in the face of competitive negotiation tactics causes the negotiator to lose standing, is perceived as a sign of weakness, and leaves him open to exploitation).

31. See, e.g., AMY SINDEN ET AL., CTR. FOR PROGRESSIVE REFORM, TWELVE CRUCIAL HEALTH, SAFETY, AND ENVIRONMENTAL REGULATIONS: WILL THE OBAMA ADMINISTRATION FINISH IN TIME? (2011), available at [http://www.progressivereform.org/articles/12Rules\\_1106.pdf](http://www.progressivereform.org/articles/12Rules_1106.pdf) (cataloguing twelve very important health, safety, and environmental rules that were pending eighteen months before the 2012 presidential election); RENA STEINZOR & JAMES GOODWIN, CTR. FOR PROGRESSIVE REFORM, OPPORTUNITY WASTED: THE OBAMA ADMINISTRATION’S FAILURE TO ADOPT NEEDED REGULATORY SAFEGUARDS IN A TIMELY WAY IS COSTING LIVES AND MONEY (2012), available at <http://www.progressivereform.org/12RulesIssueBrief.cfm> (explaining that six months before the election, the Administration still had not promulgated or proposed the vast majority of these initiatives).

32. Thomas O. McGarity, *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, 61 DUKE L.J. 1671, 1680–81 (2012).

33. To get a sense of the AFBF’s mission, staff, and sponsored activities, see generally AM. FARM BUREAU FED’N, <http://www.fb.org/> (last visited July 16, 2012).

## I. THE RULE ON THE MERITS

A. *Foregone Benefits*1. *Workplace Fatalities*

The category labeled “agriculture, forestry, fishing, and hunting” by the United States Bureau of Labor Statistics (“BLS”) had the highest number and rate of fatal occupational injuries in 2010, the most recent year for which such statistics are public.<sup>34</sup> Focusing in on agriculture, BLS found that the fatality rate was 26.8 deaths/100,000 workers; this number is seven times higher than the average fatality rate of 3.5/100,000 across all industries.<sup>35</sup> A special BLS study of the youth labor force completed in 2000 on the basis of thousands of interviews of workers in the field found that “[a]gricultural employment is particularly dangerous work; youths aged 15 to 17 who have jobs in agriculture had a risk of a fatality that was more than 4.4 times as great as the average worker aged 15 to 17.”<sup>36</sup> Between 1992 and 1998, three-quarters of all deaths of child workers younger than fifteen years of age occurred in agriculture; these fatalities represented more than half of the total number of youth fatalities in the industry.<sup>37</sup>

Work in the “Farm-product Raw Materials, Not Elsewhere Classified” category, which includes loading, unloading, and otherwise maintaining grain elevators and silos, was extraordinarily hazardous. Fifty-one incidents of “grain entrapment” during the medieval practice of lowering oneself into the giant storage bins and walking on the grain to break up its clumps were reported in 2010; 51% resulted in death, and 12% of those fatalities involved children under sixteen years of age.<sup>38</sup> Workers performing this very dangerous practice are supposed to wear harnesses so they can be pulled out of an entrapment situation.<sup>39</sup> But—and this problem would have been front and center had the White House allowed DOL to defend its rule—teenagers younger than sixteen, and even those under twenty-one, are not yet developmentally ready to assess the risk of high hazard work:

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34. Press Release, U.S. Dep’t of Labor, Bureau of Labor Statistics, Nat’l Census of Fatal Occupational Injuries (Preliminary Results) 4 chart 2 (Aug. 25, 2011), available at <http://www.bls.gov/news.release/pdf/cfoi.pdf>.

35. *Id.* at 1, 3.

36. U.S. DEP’T OF LABOR, REPORT ON THE YOUTH LABOR FORCE 58 (rev. ed. 2000) [hereinafter REPORT ON THE YOUTH LABOR FORCE], available at <http://www.bls.gov/opub/rylf/pdf/rylf2000.pdf>.

37. *Id.* at 60.

38. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,846 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pt. 570).

39. 29 C.F.R. § 1910.272(g)(2) (2011).



Research has shown that the prefrontal cortex is the last part of the adolescent brain to fully mature and that the process is not completed until the early twenties or beyond. With that maturation, the executive functioning of youth is fine-tuned, improving their ability to understanding [sic] future risks and impulsive actions.<sup>40</sup>

On the whole, policymakers are ambivalent about such research. States rely on it when they impose stringent requirements for driver's licenses,<sup>41</sup> but teenagers are allowed to enlist in the military.<sup>42</sup> Whatever these inconsistencies, appropriate fear of hazards at work is muffled by respect for the boss, habitual acquiescence to authority, and concern about getting fired. For the teenagers—especially boys—who take such dangerous chances, realization of their implications often comes too late.

As we shall see, the congressional hearing that set the stage for killing the proposed rule involved four individuals who are farmers strongly opposed to the proposal and a DOL official who spent much of her time apologizing for it.<sup>43</sup> Had the subcommittee invited a lay witness to testify about the hazards that the rule sought to prevent, the tenor of the hearing would have changed:

[M]y 19-year-old nephew, Alex Pacas, was engulfed in grain and suffocated, along with 14-year-old Wyatt Whitebread.

On that day, the boys were sent into a grain bin with 15-year-old Chris Lawton and 20-year-old Will Piper to “walk the corn,” an attempt to break up the corn, which is not allowed unless workers are wearing harnesses to ensure they won't be engulfed when the corn caves in.

In the course of doing that, the two young ones—Wyatt and Chris—figured out they could break up the corn easier by sliding down it. . . . Now the corn crusts form a bridge, and

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40. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,870.

41. *Id.*

42. 10 U.S.C. § 505 (2006) (allowing seventeen-year-olds to enlist in the armed services with parental permission and eighteen-year-olds to enlist on their own).

43. See, especially, the statement of Nancy Leppink, in which she stated:

After receiving a number of comments from the agriculture community on the need to provide the Department with further input on the parental exemption, the Department announced on February 1, 2012, that it would re-propose the parental exemption portion . . . . The Department recognizes the unique attributes of farm families and rural communities. The re-proposal process will seek comments and input as to how the Department can comply with statutory requirements to protect children, while respecting rural traditions.

*Family Farm Testimony*, *supra* note 13, at 1–2.

there's a hollow pocket beneath it, and that's what makes it so dangerous to be in there.

So the crust broke, and Wyatt started sinking into the corn. The augers were running, and the augers are at the bottom of the bin and they bring the corn down, which is a big "no-no" while there are people inside the silo.

Wyatt started sinking; he was yelling "Help me, help me!" So Alex and Will tried to get to Wyatt. They grabbed ahold of him—they almost had Wyatt out—and corn is a great pressure, it takes a lot of pressure on you, so they were really struggling to get Wyatt out of this corn.

They almost freed him when the corn broke beneath Will and Alex. Wyatt sank awfully fast and was screaming "Help me! Please save me!" as the corn engulfed him—and Alex, my nephew—his best friend Will, were in there—and they were still trying to get to Wyatt . . . .

As the corn was flowing around my nephew, he said the Lord's Prayer, and it kept rising and Will kept trying to keep the corn out of his face, he kept brushing it back—trying to get it out and of course, every time, the corn would flow back in, and my nephew was straining his neck back as far as he could and he couldn't stay above the grain. So, he became engulfed.

The rescue workers came and they managed to get a grain tube around Will to try to keep the grain from flowing around him anymore. What people don't know is that when they did that, it was also around the body of my nephew. They were best friends—they had been best friends for years. Will was in there for, I think, six hours while they tried to rescue him, staring at his dead friend—and he said at one point, he passed out, he became unconscious, because it's really toxic in a grain bin and fell forward and right onto Alex.<sup>44</sup>

The withdrawal of the proposed rule means that this ghastly situation is not covered by DOL's forty-year-old prohibitions on children sixteen and younger doing dangerous work, although, as we shall see, even the most intemperate critics of the proposal ignored these badly needed safeguards. The normal rulemaking process is designed to address strategic withdrawals of imperfect provisions at the same time that crucial protections are advanced, but the heavily politicized "process" used to evaluate this proposal is not adept at making such distinctions.

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44. Catherine Rylatt, *Catherine Rylatt on Protecting Young Workers from Tragedy*, COALITION FOR SENSIBLE SAFEGUARDS, <http://www.sensible safeguards.org/worker-safety/catherine-rylatt> (last visited June 25, 2012).

## 2. *On-the-Job Injuries*

BLS data on injuries were limited to youth between sixteen and nineteen years of age and did not include long-latency illness and disability (e.g., loss of hearing because of excessive noise levels on the job or the onset of diseases like cancer caused by pesticide exposure).<sup>45</sup> BLS did not break this information down for agriculture as an industry. Nevertheless, the data show that the injury rate for youth workers has steadily decreased over time and is about half the overall rate for adult workers.<sup>46</sup> Once again, however, work in elevators and silos proved an outlier, with an extraordinarily high injury rate of 6.4 per 100 workers or 6400/100,000 workers.<sup>47</sup>

Unfortunately, injury and illness data are notoriously unreliable in the United States; studies have shown that as many as 50% of such episodes are never reported.<sup>48</sup> The data exclude such categories as the self-employed, farms employing fewer than eleven people, federal government employees, and private household workers.<sup>49</sup> Employers discourage workers from reporting injuries to avoid inspections by the Occupational Safety and Health Administration (“OSHA”) and claims for workers’ compensation, sometimes offering financial incentives for underreporting.<sup>50</sup> Workers, especially illegal immigrants, may fear loss of jobs if they report such incidents.<sup>51</sup> Therefore, even these disturbing statistics on injuries suffered by children doing agriculture work are likely understated to a significant extent.

### B. *The Substance of the Rule*

The DOL rulemaking proposal would have updated the forty-year-old requirements governing child labor in agriculture in four separate ways. The proposal (1) clarified (its opponents would say it expanded) the statutory exemption for children who work for their parents or persons standing in place of their parents; (2) updated and expanded “hazardous orders” specifying work that hired child laborers are barred from doing; (3) updated and expanded the requirements for specialized agricultural training programs run by

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45. REPORT ON THE YOUTH LABOR FORCE, *supra* note 36.

46. *Id.* at 61–64.

47. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,846 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. pt. 570).

48. For an overview of these problems and citations to the many studies documenting them, see AFL-CIO, DEATH ON THE JOB: THE TOLL OF NEGLECT 10–13 (21st ed. 2012), available at <http://www.aflcio.org/content/download/22781/259751/version/1/file/DOTJ2012nobugFINAL.pdf>.

49. *Id.* at 11.

50. *Id.*

51. *Id.*

organizations like the 4-H because participation in such training allows children to do more hazardous work; and (4) strengthened the civil penalties available to punish violators of these requirements.<sup>52</sup> This Article only addresses the first two changes because they were the primary inspirations for the political backlash that killed the rule.

1. *Standing in a Parent's Shoes*

Despite the willful distortions of the proposal's opponents, hazardous orders—or, for that matter, any of the requirements enforced by DOL's Wage and Hour Division ("WHD") under the FLSA—do *not* apply to children who work for their parents or parental surrogates on farms that these adults own.<sup>53</sup> The theory behind this blanket exemption, which has been embedded in the FLSA since 1966, is that parents and parental surrogates would not allow their children to do life-threatening work.<sup>54</sup> Two realities undermine this theory. First, a comprehensive report by BLS on occupational fatalities among teenagers found that 30% of fatalities happened when they were working in a "family" business, and 43% of those fatalities occurred in agriculture.<sup>55</sup> Second, the overwhelming trend in agricultural production is the steady enlargement of farms that operate commercially to produce food (grain, plants, and meat).<sup>56</sup> At the same time that farms have grown larger through consolidation, the most productive have also remained in the hands of "families"—defined by the USDA as people related by blood or marriage.<sup>57</sup> Consequently, children can work on family-owned farms without working under the direction of or in

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52. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,836–45.

53. *Id.* at 54,839 ("The newly enacted FLSA section 13(c)(2) stated that "[t]he provisions of section 12 relating to child labor shall apply to an employee below the age of sixteen employed in agriculture in any occupations that the Secretary of Labor finds and declares to be particularly hazardous for the employment of children below the age of sixteen, *except where such employee is employed by his parent or by a person standing in place of his parent on a farm owned or operated by such parent or person.*" (emphasis added)).

54. *Id.* at 54,841 ("The parental exemptions in the FLSA, which permit children to be employed by their parents in some otherwise prohibited occupations, were not predicated on the belief that the children of business owners and/or farmers were more physically or mentally advanced, more safety conscious, or in possession of more cautious work habits than their peers. Instead, these exemptions were granted in recognition of, and continue to rely upon, the concept that a parent's natural concern for his or her child's well-being will serve to protect the child.").

55. REPORT ON THE YOUTH LABOR FORCE, *supra* note 36.

56. See ROBERT A. HOPPE & DAVID E. BANKER, U.S. DEP'T OF AGRIC., STRUCTURE AND FINANCES OF U.S. FARMS, FAMILY FARM REPORT 3 (2010), available at [http://www.ers.usda.gov/media/184479/eib66\\_1\\_.pdf](http://www.ers.usda.gov/media/184479/eib66_1_.pdf).

57. *Id.* at 2.

proximity to their parents or even to people who fulfill the role of their parents.<sup>58</sup> DOL's tightening of its interpretation of the parental exemption, which it insists only codifies informal guidance it has issued to the agricultural industry for decades, was intended to eliminate the exemption for those circumstances.

So, for example, a child under sixteen would lose his exemption if he works for a neighbor like Representative Rehberg or a "non-parental relative," unless the relative assumes parental duties, even on a temporary basis.<sup>59</sup> At this point, DOL's line drawing became arbitrary, as all efforts to control complex situations do. A child staying with a grandparent for three months during the summer on the farm the grandparent owns *would* qualify for the exemption, but employment of a child "commuting" to the farm on a "daily or weekend basis" or visiting the farm for a period of one month would *not* be exempt.<sup>60</sup> Opponents of the proposal ridiculed these distinctions, but their goal was not to persuade DOL to modify this approach but rather to kill the rule outright.<sup>61</sup>

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58. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,841 ("Accordingly, application of the parental exemption in agriculture has been for over forty years limited to the employment of children exclusively by their parent(s) on a farm owned or operated by the parent(s) or person(s) standing in their place. Any other applications would render the parental safeguard ineffective. Only the owner or operator of a farm is in a position to regulate the duties of his or her child and provide guidance. Where the ownership or operation of the farm is vested in persons other than the parent, such as a business entity, corporation or partnership (unless wholly owned by the parent(s)), the child worker is responsible to persons other than, or in addition to, his or her parent, and his or her duties would be regulated by the corporation or partnership, which might not always have the child's best interests at heart. As Solicitor of Labor Richard F. Schubert advised Congressman Walter B. Jones in his letter of September 12, 1972, '[e]mployment by a partnership or a corporation would not fulfill the [parental] exemption requirement unless the partnership was comprised of the child's parents only or the corporation was solely owned by the parent or parents.'" (alterations in original)).

59. *Id.* ("It does not matter if the assumption of the parental duties is permanent or temporary, such as a period of three months during the summer school vacation during which the youth resides with the relative. This enforcement position does not apply, however, in situations where the youth commutes to his or her relative's farm on a daily or weekend basis, or visits the farm for such short periods of time (usually less than one month) that the parental duties are not truly assumed by that relative." (citation omitted)).

60. *Id.*

61. See Press Release, Nat'l Cattlemen's Beef Ass'n, NCBA Backs Department of Labor's Reconsideration of On-Farm Child Labor Regulations (Feb. 1, 2012), <http://www.beefusa.org/newsreleases1.aspx?NewsID=2224> (arguing that DOL's announcement that it would re-propose the rule "did not go far enough . . . [and that DOL] should scrap the provision completely"); Lynne Finnerty, *What Went Right on Youth Labor Proposal*, FBNEWS (May 28, 2012), <http://fbnews.fb.org/WorkArea/DownloadAsset.aspx?id=34295> (last visited Sept. 10, 2012) (congratulating the agricultural sector for effectively opposing the

## 2. *Dangerous Work*

The proposed rule's updates of existing hazardous orders were informed by a 1998 Institute of Medicine report that led to a study by the National Institute for Occupational Safety and Health ("NIOSH").<sup>62</sup> DOL's contemplation of the study for almost a decade and a half before it mustered the resources and political will to tangle with the agriculture lobby does not bode well for its return to child labor issues any time soon. Of course, DOL is not alone in succumbing to the relentless backlash this powerful industry can muster, as illustrated by the saga of legislation to reauthorize its subsidies during the spring and summer of 2012.<sup>63</sup> Nevertheless, DOL's inability to prevail in the context of protecting children who are among the most vulnerable members of society should give pause to any observer of the Washington, D.C. policy-making process.

The updated orders covered everything from operating heavy machinery to applying pesticides while employed on a farm.<sup>64</sup> Grain elevators, silos, and augers were targeted,<sup>65</sup> as was handling timber with a diameter larger than six inches.<sup>66</sup> But, judging from the complaints voiced by opponents during congressional hearings and

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regulations, stating that "[e]veryone came together behind one rallying cry: the child labor rule had to go!"; Am. Farm Bureau, TWITTER (Dec. 13, 2011), <https://es.twitter.com/#mygoalfor2012> stop the child labor restriction bills").

62. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,844. See generally NIOSH, NIOSH CHILDHOOD AGRICULTURAL INJURY PREVENTION INITIATIVE (2009), available at <http://www.cdc.gov/niosh/review/public/145/pdfs/DraftChildAgInjPrevInit.pdf>.

63. Ron Nixon, *Senate Advances Farm Bill*, N.Y. TIMES (June 7, 2012), <http://www.nytimes.com/2012/06/08/us/politics/farm-bill-advances-in-senate.html> ("Among other provisions, the bill would eliminate direct payments to farmers and make expanded crop insurance program the primary safety net for farmers. The government now spends about \$7 billion a year on crop insurance to pay about two-thirds of the cost of farmers' premiums. Under the federal program, farmers can buy insurance that covers poor yields, declines in prices or both. . . . Unlike other farm programs, the crop insurance program does not cap the amount of subsidies.").

64. The updates are explained in Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,860–66 (to be codified at 29 C.F.R. pt. 570).

65. According to a study by researchers at Purdue University, the grain storage industry experienced fifty-one entrapment incidents in 2010, with half resulting in death; twelve percent of this total involved children under the age of sixteen. *Id.* at 54,846.

66. The National Children's Center for Rural and Agricultural Health and Safety has prepared a side-by-side comparison of existing requirements and the changes that would have been made by the DOL proposal. See generally MARY E. MILLER, AGRICULTURAL CHILD LABOR HAZARDOUS OCCUPATION ORDERS: COMPARISON OF PRESENT RULES WITH 2011 PROPOSED REVISIONS (2011), available at <http://www.ncfh.org/pdfs/2k12/9268.pdf>.

in the media, the most controversial changes to existing hazardous orders including the following:

Tightening of the restrictions on children younger than sixteen operating tractors of any size either on the farm or on public roads (exceptions are provided for those who participate in training programs and who hold a valid state driver's license);<sup>67</sup>

Tightening restrictions on the handling of animals by children under 16 years of age to include: (1) working in a yard, pen, or stall occupied by a male horse, pig, cow, or bison older than six months; (2) engaging in animal husbandry practices that inflict pain on animals or result in unpredictable animal behavior; (3) poultry catching or cooping in preparation for slaughter or market; and (4) herding animals in feedlots or on horseback, or using motorized vehicles such as trucks or all-terrain vehicles;<sup>68</sup> [and]

Lowering the prohibited height from 20 feet to six feet for ladders or scaffolding used by children under 16.<sup>69</sup>

Like revisions to the parental exemption, DOL's efforts to modernize its hazardous orders depended on the drawing of arbitrary lines. On some farms and with respect to particular teenagers, herding cattle on horseback or climbing a twenty-foot ladder into an apple tree would come as second nature and be easily

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67. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,852–55 (to be codified at 29 C.F.R. §§ 570.71(a)(1), .72) (“NIOSH notes that tractor-related incidents are the most common type of agricultural fatality in the U.S., and that tractor roll-overs are the most common event among those fatalities.”).

68. *Id.* at 54,858–60 (to be codified at 29 C.F.R. 570.71(a)(2)–(4), 7) (“NIOSH cites several studies that demonstrate animals are one of the most common sources of injuries to children on farms and notes that, in 1998, it estimated that 20% of all injuries to youth under the age of 20 occurring on farms were animal-related. NIOSH notes that animal-related farm injuries are a problem for farm workers of all ages, and that the dangers farm animals present are numerous. Livestock-handling injuries are among the most severe of agricultural injuries; they are more costly and result in more time off work than other causes of agricultural injuries.”).

69. *Id.* at 54,860–62 (to be codified at 29 C.F.R. 570.71(a)(5)–(6)) (“NIOSH . . . notes that data for all ages of workers suggest that permitting youth to work at heights up to 20 feet is not sufficiently protective, as the majority of fatal falls among agricultural production workers for which the height of the fall is recorded occurred from a height of 20 feet or less. NIOSH also reports that lowering the height threshold for youth in agriculture to six feet would make the Ag H.O. more consistent with the occupational safety standards applicable to the construction industry. . . . The Federal child labor provisions for nonagricultural occupations currently prohibit minors under 16 years of age from working from any ladders or scaffolds, regardless of their height.” (citation omitted)).

accomplished. In other instances, with less agile and physically developed children, these activities are risky. Because DOL believed that it had exempted all children under sixteen who worked with their parents or parental surrogates, it sharpened the rules to prevent the inadvertent—or advertent—exploitation of children who are unlikely to perceive the risks presented by these activities and work for supervisors committed to getting the job done as quickly and inexpensively as possible.

DOL could have issued vague prohibitions against placing children in dangerous situations and relied on enforcement to flesh out that standard. This approach would have required far more aggressive and effective enforcement, and the Government Accountability Office (“GAO”) and other experts have criticized DOL’s child labor enforcement program for its infrequent and erratic inspections and lenient settlements with chronic violators.<sup>70</sup> Further, given the harsh tenor of the campaign to kill the rule, reliance on such a generic standard would not have satisfied DOL’s critics, and instead might well have inspired even more enthusiastic condemnation.

*C. The Rural “Way of Life,” the Myth of the “Family” Farm, Willful Distortions, and the Government Leviathan*

*1. Rural Life*

As the Obama Administration’s press release terminating the proposed child labor rule indicates,<sup>71</sup> the gist of the arguments made by its opponents was that it would severely undermine the “rural

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70. U.S. GOV’T ACCOUNTABILITY OFFICE, HEHS-98-193, CHILD LABOR IN AGRICULTURE: CHANGES NEEDED TO BETTER PROTECT HEALTH AND EDUCATIONAL OPPORTUNITIES 37–48 (1998), *available at* <http://www.gao.gov/assets/160/156344.pdf> (blaming weak enforcement on the agriculture industry’s unique challenges and on declining resources); U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-629, WAGE AND HOUR DIVISION NEEDS IMPROVED INVESTIGATIVE PROCESSES AND ABILITY TO SUSPEND STATUTE OF LIMITATIONS TO BETTER PROTECT WORKERS AGAINST WAGE THEFT 1 (2009), *available at* <http://www.gao.gov/assets/300/291496.pdf> (noting that “GAO found that WHD frequently responded inadequately to complaints . . .” and that GAO created ten fictitious cases for WHD and reported that WHD properly handled only one of the complaints); *see also* HUMAN RIGHTS WATCH, *supra* note 21, at 73–77 (“[WHD]’s enforcement of child labor laws in agriculture has been extremely weak.”). President Obama’s DOL Secretary, Hilda Solis, has taken steps to improve this track record. Erik Eckholm, *U.S. Cracks Down on Farmers Who Hire Children*, N.Y. TIMES (June 28, 2010), <http://www.nytimes.com/2010/06/19/us/19migrant.html> (“I picked blueberries last year, and my 4-year-old brother tried to, but he got stuck in the mud,” said Miguel, a 12-year-old child of migrants. “The inspectors fined the farmers, and this year no kids are allowed.”).

71. WHD Press Release, *supra* note 23.



way of life.”<sup>72</sup> The accusation has multiple, mutually reinforcing assertions embedded within it, but all rest on the fundamental premise that the vast majority of children (no number is ever stated) work for their parents, relatives, or close neighbors and friends on small family farms, where they learn about the traditions of hard work, love of animals, and the bounties of nature and where the adults who supervise them have their best interests as the overriding priority. As one of the opponents put it:

My name is Chris Chinn. My husband, Kevin, and I are fifth generation farmers. We are blessed to be the parents of two wonderful children, Rachelle, 14, and Connor, 10. . . . The DOL proposal was only unveiled last September, yet, it has created a firestorm among farmers and ranchers around the country, and for good reason. . . . [T]here is virtual unanimity within the agricultural community that these regulations would have an enormous impact on farm families. . . . If the proposal you are examining today were in effect then, my upbringing and childhood would have been far different and much less fulfilling. I think I can honestly say I would be a different person. I wouldn't give up what I learned for anything in the world. And my husband and I very much want to pass on that kind of upbringing to our own children.<sup>73</sup>

The concern that the proposal would bar children from becoming acculturated to farming by their parents is a perplexing one because, as explained earlier, in order to be consistent with its statutory authority under the FLSA,<sup>74</sup> DOL exempted those situations from coverage in the *Federal Register* notice published in September 2011. In the course of reiterating this statutory—and therefore non-discretionary—exemption, DOL reminded farmers of its long-standing position that the exemption did not extend to children working on larger farms that happened to be owned or operated by relatives unless their direct, adult supervisors were

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72. Andrea Billups, *Child Farmworker Limits Pulled*, WASH. TIMES, Apr. 30, 2012, at 10 (quoting both Democratic and Republican members of Congress who characterized the rule as an attack on the “rural way of life”); Hananel, *supra* note 25. *But see* Pam Tharp, *Young Farmers Win Rules Battle*, PALLADIUM-ITEM (Richmond, IN), Apr. 30, 2012, at A1 (quoting Future Farmers of America advisor Don Sturgeon as saying that the rule “would have impacted people’s incomes and livelihoods as well. Labor costs are high enough the way it is, and this would have affected profitability.”).

73. *Family Farm Testimony*, *supra* note 13, pt. 2, at 1 (statement of Chris Chinn, American Farm Bureau Federation, owner, Chinn Hog Farm), *available at* [http://smallbusiness.house.gov/uploadedfiles/chinn\\_testimony.pdf](http://smallbusiness.house.gov/uploadedfiles/chinn_testimony.pdf).

74. The Act exempts children under sixteen years of age who are working on a farm owned or operated by their parent or a person standing in the place of their parent. 29 U.S.C. § 213(a)(6) (2006).

serving in a parental role at the time the work was done.<sup>75</sup> It may well have been this language that set off such intense opposition to the proposal. The rulemaking process is well suited to dealing with this kind of confusion, but DOL staff experts never got a chance to respond via a final rule. Instead, DOL political appointees and White House staff were so intimidated by these intemperate complaints that, without defending the proposal, DOL announced in February 2012 that, before its staff even read the comments and considered changes in the proposal, it would be suspending all changes to the parental exemption.<sup>76</sup>

This concession did not satisfy the AFBF, the trade association that spearheaded opposition to the DOL proposal and sponsored Chinn's testimony to Congress.<sup>77</sup> Its leadership of this particular campaign arose in a much broader context of opposition to the regulatory system as a whole. As its president, Bob Stallman, told his troops at their annual meeting in January 2011:

We face challenges from regulators who are ready to downsize American agriculture, mothball our productivity, and out-source our farms. . . . [O]verregulation endangers our industry. This pressure is a clear and present danger to American agriculture . . . . Our membership is comprised of farmers and ranchers who grow conventional crops, biotech crops, organic crops, traditional and specialized livestock . . . big and small. But the common thread is always—family. Family-based agriculture—done by those who have the most pride, investment and personal connection to the hard work of farming and ranching—remains the best way to meet the quality and quantity demands we face.<sup>78</sup>

The sense that more is going on here than the preservation of nuclear families on small farms is underscored by the evolving structure of agriculture as an industry.

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75. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,876 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. § 570.97(b)).

76. Press Release, Congressman Danny Rehberg, Rehberg on Youth Ag Rule Changes: Not Enough, Not Even Close (Feb. 1, 2012), *available at* <http://rehberg.house.gov/index.cfm?sectionid=26&itemid=1855>; Sam Hananel, *Child Labor Plan Changed by Labor Department*, HUFFINGTON POST (Feb. 1, 2012), [http://www.huffingtonpost.com/2012/02/01/child-labor-labor-department-farm-work\\_n\\_1247395.html](http://www.huffingtonpost.com/2012/02/01/child-labor-labor-department-farm-work_n_1247395.html).

77. *AFBF Files Comments on Child Labor*, COTTON FARMING, <http://www.cottonfarming.com/home/issues/2012-01/Child-Labor.html> (last visited June 25, 2012) (noting that the AFBF had organized a coalition of seventy farm groups to oppose the proposal).

78. Bob Stallman, President, Am. Farm Bureau Fed'n, Annual Address to Members, 92nd AFBF Annual Meeting: Producing Results 2, 4 (Jan. 10, 2010), *available at* <http://www.farmpolicy.com/wp-content/uploads/2011/01/StallmanAnnualMeetingAddress2011.pdf>.

## 2. *The “Family” Farm*

Annual net farm income, the standard USDA measures for the success of the industry, fluctuates dramatically. In 2007, it stood at \$71 billion; this figure was 18% higher than the total in 2006.<sup>79</sup> In 2009, net income fell to \$55 billion.<sup>80</sup> The total in 2012 was projected at \$122 billion, up 3.7% from 2011.<sup>81</sup>

The vast majority of farms that operate commercially are family operations in the sense that they are owned by people who are related by blood or marriage, although “non-family farms” that account for only 2% of total farm numbers produced 18% of total agricultural output in 2007.<sup>82</sup> Large farms account for the lion’s share of production—the largest 12% of farms by size, with annual sales above \$250,000, generate 84% of total national agricultural output.<sup>83</sup> The very largest farms, called “million dollar farms” because they generate sales over that amount annually, comprise only 47,600 of the approximately two million farms in the United States but produce 53% of agricultural output.<sup>84</sup> Taken together, these trends suggest that when children under sixteen go out from home to work on the farm, they get hired at places where their supervisors are likely not to be their relatives.

As an occupational class, farmers are aging rapidly, with 28% at least sixty-five years old, in comparison to 8% of self-employed workers in non-agricultural positions who have reached that advanced age.<sup>85</sup> According to the USDA, these statistics have prompted “concerns about a mass exit of farmers from agriculture in the near future,”<sup>86</sup> allowing opponents of the DOL child labor rule to hint darkly that if farmers are not allowed to inspire their children to stay in farming, agriculture as a whole could stumble and fall.<sup>87</sup> Senator John Thune (R-S.D.), the sponsor of legislation to block funding for the DOL proposal that attracted forty-four co-sponsors in the Senate and may well have persuaded the Obama

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79. HOPPE & BANKER, *supra* note 56.

80. *Id.*

81. 2012 *Farm Sector Income Forecast*, USDA ECON. RESEARCH SERV., <http://www.ers.usda.gov/topics/farm-economy/farm-sector-income-finances/highlights-from-the-2012-farm-income-forecast.aspx> (last updated Sept. 21, 2012).

82. HOPPE & BANKER, *supra* note 56, at v. For these purposes, “family farm” is defined as a place where “the majority of the business is owned by the operator and individuals related to the operator by blood or marriage.” *Id.* at 2.

83. *Id.* at i, iv.

84. *Id.* at 8–10.

85. *Id.* at 22.

86. *Id.* at 23.

87. *Family Farm Testimony*, *supra* note 13, pt. 2, at 1, 5 (statement of Chris Chinn, American Farm Bureau Federation, owner, Chinn Hog Farm), available at [http://smallbusiness.house.gov/uploadedfiles/chinn\\_testimony.pdf](http://smallbusiness.house.gov/uploadedfiles/chinn_testimony.pdf); Senator Jerry Moran, *Labor Dept.’s Overreach Could Threaten Life on the Farm*, POLITICO (Apr. 19, 2012), <http://www.politico.com/news/stories/0412/75364.html>.

Administration to kill the rule, warned that, “[i]f this proposal goes into effect, not only will the shrinking rural workforce be further reduced, and our nation’s youth be deprived of valuable career training opportunities, but a way of life will begin to disappear.”<sup>88</sup> But the USDA dismisses those anxieties because the largest and most productive farms have operators who are considerably younger.<sup>89</sup> That fact refutes the notion that unless people are allowed to hire teenagers freely for any job on the farm, agriculture as an industry will fail as young people desert rural life and migrate to big cities.

DOL estimates that only 56,000 children under the age of sixteen would be affected by its proposal, although this number may well be an underestimate.<sup>90</sup> This estimate is based on 2006 data compiled by NIOSH as part of its Childhood Agricultural Injury Survey.<sup>91</sup> A March 2011 entry on the NIOSH website states that 1.03 million people younger than twenty resided on farms in 2010.<sup>92</sup> Although the NIOSH web site does not break down this figure by age, it is difficult to imagine that 974,000 of this total falls in the sixteen to twenty age range, nor is it readily apparent why DOL used 2006 data when 2010 data were available.

Further indication that reliable statistics in this area are elusive is a 2008 evaluation of NIOSH research programs by the National Academies of Science, which estimated that some 993,000 children fifteen years old and younger worked on U.S. farms and ranches in 2006.<sup>93</sup> Researchers writing for the *Journal of Agricultural Safety and Health* estimate that half of all youth under twenty who live in farm households worked on farms in 2006, with the largest number deriving from the ten-to-fifteen-year-old age group.<sup>94</sup> The researchers found that an additional 307,000 people younger than twenty who did not live on farms were hired to do work that same year.<sup>95</sup>

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88. *Lawmakers Introduce Bills to Block Federal Labor Proposal*, FBNEWS, Apr. 16, 2012 at 1, available at [http://www.fb.org/assets/files/fbn/2012/FBN\\_04-16-12.pdf](http://www.fb.org/assets/files/fbn/2012/FBN_04-16-12.pdf).

89. HOPPE & BANKER, *supra* note 56, at 23–25.

90. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,873 (proposed Sept. 2, 2011).

91. *Id.*

92. NAT’L INST. FOR OCCUPATIONAL SAFETY & HEALTH, A STORY OF IMPACT: GUIDELINES FOR CHILDREN’S AGRICULTURAL TASKS DEMONSTRATES EFFECTIVENESS (2011), available at <http://www.cdc.gov/niosh/docs/2011-129/pdfs/2011-129.pdf>.

93. NAT’L RESEARCH COUNCIL & INSTITUTE OF MEDICINE OF THE NAT’L ACADS., AGRICULTURE, FORESTRY, AND FISHING RESEARCH AT NIOSH 23 (2008), available at <http://www.nap.edu/catalog/12088.html>.

94. K.J. Hendricks & E.M. Goldcamp, *Injury Surveillance for Youth on Farms in the U.S. 2006*, 16 J. AGRIC. SAFETY & HEALTH 279–91 (2010).

95. *Id.*

In sum, farms are larger and employ more people than either the agriculture lobby admits or DOL counts. The universe of children hurt on farms is likely to be significantly larger than the government has yet counted or the agriculture lobby is willing to acknowledge. The appealing image of children being mentored by their parents as they cuddle baby animals, weed a row of lettuce in the garden behind the farm house, or milk a tranquil cow does not reflect the reality that commercially productive farms are big and getting bigger, and have long since departed from this idyllic image, either in theory or in practice.

### 3. *Willful Distortions*

Comedian Jon Stewart has perfected the practice of juxtaposing videotape of a politician's statement on one day against a video showing her saying something entirely different years earlier or months later.<sup>96</sup> He manages to make these opportunistic explorations of the candid camera as humorous for his audience as it should be uncomfortable for his targets. Similarly uncomfortable but much less amusing is a head-on comparison of what the proposed rule actually said and what its critics claimed it said. Readers will hopefully keep in mind that none of these provisions, as imagined or in reality, would apply to situations where children are working under the direct supervision of their parents.

#### **Statement of Richard R. Ebert, Will-Mar-Re Farms:**

As I understand the proposed rule, DOL would limit the ability of youth to milk cows, which my children have often done. The rule would also likely restrict the ability of children to work with calves, which is a very rewarding experience and an appropriate life lesson for today's youth.<sup>97</sup>

#### **Federal Register Notice Preamble for Proposed Rule:**

The Department most recently has investigated the serious injury of a 15-year-old female who was pressed against a metal corral by a stampeding calf. The minor was employed to herd livestock in and out of pens in preparation for sale and/or transport. The young worker, who was knocked down and then stomped by hooves, suffered a life-threatening laceration of her liver, broken ribs, a cracked femur, and a crushed bile

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96. For information about the show and video clips from past programs, see generally THE DAILY SHOW, <http://www.thedailyshow.com/> (last visited June 29, 2012).

97. See, e.g., *Family Farm Testimony*, *supra* note 13, pt. 3, at 2 (statement of Richard B. Ebert, co-owner and operator, Will-Mar-Re Farms, Blairsville, Pennsylvania), available at [http://smbiz.house.gov/UploadedFiles/Ebert\\_Testimony.pdf](http://smbiz.house.gov/UploadedFiles/Ebert_Testimony.pdf).

duct. Complications arising from her injuries prolonged her hospital stay to over five weeks.<sup>98</sup>

***Federal Register Notice Text of Proposed Rule:***

(4) *Certain occupations involving working with or around animals (Ag H.O. 4).* Working on a farm in a yard, pen, or stall occupied by an intact (not castrated) male equine, porcine, bovine, or bison older than six months, a sow with suckling pigs, or cow with newborn calf (with umbilical cord present); engaging or assisting in animal husbandry practices that inflict pain upon the animal and/or are likely to result in unpredictable animal behavior such as, but not limited to, branding, breeding, dehorning, vaccinating, castrating, and treating sick or injured animals; handling animals with known dangerous behaviors; poultry catching or cooping in preparation for slaughter or market; and herding animals in confined spaces such as feed lots or corrals, or on horseback, or using motorized vehicles such as, but not limited to, trucks or all terrain vehicles.<sup>99</sup>

**Statement of Chris Chinn, Owner, Chinn Hog Farm, on behalf of the American Farm Bureau Federation:**

For instance, DOL has the authority to designate occupations that are “particularly hazardous.” But it appears they have gone well beyond that authority in the proposal. In [hazardous order] #2, for instance, they have outlawed youths under 16 from operating any equipment that is “operated by any power source other than human hand or foot power.” That would appear to include battery powered tools like screwdrivers or flashlights. It also appears to mean that a garden hose, which is powered by water pressure, would be off limits as well. It is simply nonsense for DOL to think Congress gave them the authority to outlaw 15 year olds from watering a lawn.<sup>100</sup>

***Federal Register Notice Preamble for Proposed Rule:***

The fact that employees of this industry routinely perform a variety of tasks is also evidenced by the number and types of child labor violations that the [DOL] WHD has documented . . . . WHD has found minors . . . operating several types of power-driven woodworking machines (in violation of HO 5); operating several types of power-driven

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98. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,847 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. § 570.99).

99. *Id.* at 54,879 (emphasis added).

100. *Family Farm Testimony*, *supra* note 13, pt. 2, at 4 (statement of Chris Chinn, owner, Chinn Hog Farm), available at [http://smbiz.house.gov/UploadedFiles/Chinn\\_Testimony.pdf](http://smbiz.house.gov/UploadedFiles/Chinn_Testimony.pdf).

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hoisting apparatus, such as forklifts, manlifts, skid loaders, and back hoes (in violation of HO 7) . . . .<sup>101</sup>

***Federal Register Notice Text of Proposed Rule:***

(2) Occupations involving the operation of power-driven equipment, other than agricultural tractors (Ag H.O. 2). Operating and assisting in the operation of power-driven equipment.

(i) Definitions:

*Farm field equipment* means implements, including self-propelled implements, or any combination thereof used in agricultural operations.

*Farmstead equipment* means agricultural equipment normally used in a stationary manner. This includes, but is not limited to, materials handling equipment and accessories for such equipment whether or not the equipment is an integral part of a building. . . .

*Implements* shall include, but not be limited to, power-driven equipment and tools used in agricultural occupations such as farm field equipment and farmstead equipment as defined in this section.

*Operating* includes the tending, setting up, adjusting, moving, cleaning, oiling, repairing, feeding or offloading (whether directly or by conveyor) of the equipment; riding on the equipment as a passenger or helper; or connecting or disconnecting an implement or any of its parts to or from such equipment. *Operating* also includes starting, stopping, or any other activity involving physical contact associated with the operation or maintenance of the equipment.

*Power-driven equipment* includes all machines, equipment, implements, vehicles, and/or devices operated by any power source other than human hand or foot power, except for office machines and agricultural tractors as defined in paragraph (b)(1)(i) of this section. The term includes lawn and garden type tractors, and lawn mowers that are used for yard mowing and maintenance.<sup>102</sup>

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101. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. at 54,847.

102. *Id.* at 54,877.

#### 4. *The Government Leviathan*

The congressional leaders of the opposition to the DOL child labor proposal are strongly opposed to big government, Washington bureaucrats, and their interference with the rural life enjoyed by family farmers. As Senator John Thune put it:

I am pleased to hear the Obama Administration is finally backing away from its absurd 85 page proposal to block youth from participating in family farm activities and ultimately undermine the very fabric of rural America, but I will continue working to ensure this overreaching proposal is completely and permanently put to rest. The Obama DOL's youth farm labor rule is a perfect example of what happens when government gets too big.<sup>103</sup>

Congressman Denny Rehberg added: "I'm just appalled. It really bugs me to read something like this and expect this one-size-fits all knowledge from Washington, D.C., to try and determine what is appropriate for agriculture within a state like Montana. It just baffles me."<sup>104</sup>

But they support the maintenance—and, indeed, the expansion—of farm subsidy programs such as crop insurance:

U.S. Senator John Thune says they are . . . crafting a better crop insurance program in the new bill, partly at the request of South Dakota farmers. "That's what they told me over and over was the most important thing in this Farm Bill was a good strong crop insurance program, so we worked very hard to have a good strong crop insurance program in the bill," Thune said.<sup>105</sup>

"Time and again the Obama Administration and their Senate allies have demonstrated how little they understand the challenges folks in Montana face on farms and ranches," Rehberg said. "The Farm Bill actually spends more on food stamps for urban populations than supporting our family farms."<sup>106</sup>

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103. Greta Van Susteren, *Department of Labor Drops Child Farm Work Proposal*, GRETAWIRE (Apr. 26, 2012), <http://gretawire.foxnewsinsider.com/2012/04/26/department-of-labor-drops-child-farm-work-proposal/>.

104. Tim Leeds, *Rehberg Drops Gauntlet on Child Farm Labor*, HAVRE DAILY NEWS (Feb. 6, 2012), <http://www.havredailynews.com/cms/news/story-426217.html>.

105. Ben Dunsmoor, *U.S. Senate Working on 2012 Farm Bill*, KELOLAND TV (June 13, 2012, 6:06 PM), <http://www.keloland.com/NewsDetail6162.cfm?Id=0,133032>.

106. Marnee Banks, *Rehberg: Farm Bill Doesn't Support Family Operations*, KTVQ.COM (June 22, 2012, 9:37 PM), <http://www.ktvq.com/news/rehberg-farm-bill-doesn-t-support-family-operations/>.



Crop insurance subsidies, which pay two-thirds of the costs of buying such policies for eligible farmers, cost U.S. taxpayers about \$7 billion during the last fiscal year.<sup>107</sup> The government also pays farms to leave unproductive land to lie fallow, but skyrocketing prices for acreage in places like Senator Thune's and Representative Rehberg's respective home states of South Dakota and Montana have led farmers to sell large swaths of unproductive land to each other.<sup>108</sup> Because crop insurance will be available to insure them against the likelihood that they will be unable to generate full production on such acreage, this trend could expand the federal program by billions of dollars.<sup>109</sup>

The inconsistency between furious resistance to "big government" and "Washington" in a regulatory context and avid demands that Washington must continue to supply federal subsidies is hypocritical, to say the least. But distasteful, inconsistent, and self-interested behavior is common in the political scrum. In fact, allowing people with special interests to advocate freely before Congress is a central feature of our constitutional system of government. The premise of that dynamic is that through temperate debate, negotiation, log rolling, and the balancing of regional interests, Congress and the White House will formulate compromises that allow one of the most enduring democracies in the world to go forward. But, of course, that outcome is far from what happened with respect to the child labor rule.

#### D. Collateral Damage: The Migrant Child

Migrant children follow their parents on a yearly odyssey to hand harvest high value crops such as tomatoes and blueberries, moving from south to north throughout the country.<sup>110</sup> FLSA prohibits parents from withdrawing children under sixteen from

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107. Ron Nixon, *Crop Insurance Proposal Could Cost U.S. Billions*, N.Y. TIMES (June 6, 2012), <http://www.nytimes.com/2012/06/07/us/politics/bill-to-expand-crop-insurance-poses-risks.html?pagewanted=all>.

108. *Id.* ("The sharp rise in the price of corn, wheat, soybeans and other crops, driven in large part by the growth of Asian economies, has caused farmers to plant land long prone to erosion and flooding. In the prairies and rolling hills of the Northern Great Plains in the Dakotas and in Montana, millions of acres that are home to ducks and other waterfowl, and attractive grounds for hunters, are rapidly being turned into corn, soybean and wheat fields.").

109. *Id.* ("By guaranteeing income, farmers say, crop insurance removes almost any financial risk for planting land where crop failure is almost certain. 'When you can remove nearly all the risk involved and guarantee yourself a profit, it's not a bad business decision,' said Darwyn Bach, a farmer in St. Leo, Minn., who said that he is guaranteed about \$1,000 an acre in revenue before he puts a single seed in the ground because of crop insurance. 'I can farm on low-quality land that I know is not going to produce and still turn a profit.'").

110. See generally HUMAN RIGHTS WATCH, *supra* note 21, at 5–11.

school,<sup>111</sup> but this prohibition is often ignored, in part because children cannot sustain the burden of both work and their education.<sup>112</sup> DOL has found children as young as nine or ten harvesting onions—it even had one case where a child as young as six was discovered doing this work,<sup>113</sup> but the more common age to start work is twelve.<sup>114</sup>

Migrant children confront a range of hazards in the field. The most common are working in unrelenting heat or cold, for ten or more hours a day, without any opportunity to rest in a more comfortable environment.<sup>115</sup> They work with sharp implements and use power-driven equipment without adequate training.<sup>116</sup> They climb tall ladders to pick fruit, often under dangerous conditions.<sup>117</sup> And they come in constant contact with pesticides, sometimes through drift from adjoining fields, sometimes through residue, and sometimes from working in a field that was being sprayed at the time.<sup>118</sup>

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111. *Family Farm Testimony*, *supra* note 13, at 5-7.

112. HUMAN RIGHTS WATCH, *supra* note 21, at 5 (“Although their families’ financial need helps push children into the fields—poverty among farmworkers is more than double that of all wage and salary employees—the long hours and demands of farmwork result in high drop-out rates from school.”).

113. *Family Farm Testimony*, *supra* note 13, at 8.

114. HUMAN RIGHTS WATCH, *supra* note 21, at 5 (“Seventeen-year-old Jose M., who described the shock he felt going to work at age 11, said that when he looks around the field and sees 12-year-olds, ‘I know how they feel. I used to feel like that. They have a face that says they don’t want to be here.’ He added, ‘Teachers at school know when kids turn 12. They see the cuts on their hands. They know a child at 12 goes to work. No if’s, and’s, or but’s.’”).

115. *Id.* at 5-11, 54-55.

116. *Id.* at 3 (“Marcos told us that the first year he ‘used a chainsaw a couple of times but that was it. If someone was doing something else, they’d say, Cut there.’ But when he returned to the same farm the next year at age 13, he used a chainsaw like everyone else. When asked if he was taught how to use it, he replied: ‘You just have to start it, that was the most important thing.’” (internal quotation marks omitted)). Other equipment used by children such as Marcos, including chemicals, knives, and tall ladders, can result in injury and death. *Id.* at 7, 39-42.

117. *Id.* at 42 (“Children described climbing tall ladders carrying heavy containers to pick fruit. In the mornings, trees and ground are often wet with dew. Workers often place one foot on a branch or use the top two steps of the ladder to extend their reach, and pick with one or both arms over their head reaching for fruit. A young man who picked cherries, pears, and apples around Yakima, Washington, as a teenager said: ‘You carry 20-30 pounds in your bag. . . . In the morning it’s pretty wet and the ladder gets wet. If you take a wrong step, you’re down from the ladder.’”).

118. *Id.* at 47-54 (“Andrea C. in Michigan said that on the farm where she works, pesticides are sprayed from a tractor: ‘Sometimes we’re passing by and they’ll spray anyways.’ Sam B. in Texas told us he was sprayed from an airplane the previous year. A former child farmworker in North Carolina who now educates workers about pesticides told us that she had personally seen tobacco workers being sprayed with pesticides: ‘People don’t leave. . . . People say, We can leave but we don’t want to because we’re afraid the *patron* [boss]

Available studies and reports estimate that anywhere from 165,000<sup>119</sup> to 400,000 child migrants harvest crops in the U.S. on an annual basis.<sup>120</sup> Some 83% are Hispanic, lending an unpleasant aura of racial prejudice to the AFBF's determined avoidance of the problem.<sup>121</sup>

The wide range of estimates is not surprising because substantial obstacles prevent the accurate collection of data. Workers are employed seasonally and may not be present during a particular population survey.<sup>122</sup> Illegal immigrants decline to participate in surveys out of fear of deportation.<sup>123</sup> To get around legal restrictions, children even work under other people's names.<sup>124</sup> Nevertheless, the federal government's haphazard and uncoordinated efforts to obtain better statistics are troubling. The 2008 USDA farm worker profile explains that it relies on two inconsistent survey methods: cross-sectional estimates, which describe the total number of workers at any given time, and annual estimates, describing the total number of workers for the year.<sup>125</sup> The National Agricultural Workers Survey ("NAWS"), self-described as the "only national information source on the demographic, employment, and health characteristics" of the crop worker population,<sup>126</sup> compiles population data from a series of annual surveys.<sup>127</sup> The BLS identifies two types of surveys NAWS uses: random interviews with workers aged fourteen to seventeen at their worksite, and interviews with parent farm workers about their children younger than eighteen.<sup>128</sup>

FLSA and its implementing regulations do not address most of the hazards confronted by migrant children. Under existing regulations, crop workers younger than sixteen are prevented from

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will fire us. They stay there because they're afraid of their patron." (internal quotation marks omitted).

119. Hendricks & Goldcamp, *supra* note 94, at 282.

120. THE HARVEST, *supra* note 21.

121. U.S. Dep't of Labor, Emp't & Training Admin., *The National Agricultural Workers Survey*, <http://www.doleta.gov/agworker/report9/chapter1.cfm#summary> (last updated Jan. 11, 2010) (providing demographic information for all crop workers, not only children).

122. These obstacles include the fact that workers are employed seasonally and may not be present during a particular population survey, unauthorized workers fear authorities, and children who are not legally eligible for work are not counted as officially employed. See WILLIAM KANDEL, PROFILE OF HIRED FARMWORKERS, A 2008 UPDATE 55 (2008), available at [http://www.ers.usda.gov/media/205619/err60\\_1\\_.pdf](http://www.ers.usda.gov/media/205619/err60_1_.pdf); HUMAN RIGHTS WATCH, *supra* note 21, at 16.

123. KANDEL, *supra* note 123.

124. THE HARVEST, *supra* note 21.

125. KANDEL, *supra* note 123.

126. U.S. DEP'T OF LABOR, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2001-2002, at 1 (2005), available at [http://www.doleta.gov/agworker/report9/naws\\_rpt9.pdf](http://www.doleta.gov/agworker/report9/naws_rpt9.pdf).

127. *Id.* at 2.

128. REPORT ON THE YOUTH LABOR FORCE, *supra* note 36, at 52.

performing any of the tasks enumerated in the hazardous orders, though very few of the risks that pose the greatest threats to migrant children are listed.<sup>129</sup> The proposed rule would have reduced the height restrictions for ladders from twenty to six feet,<sup>130</sup> prohibited the use of chain saws to remove stumps,<sup>131</sup> and strengthened pesticide protections.<sup>132</sup>

The preamble to the proposed rule said that DOL was considering adding a hazardous order addressing excessive heat and other egregious working conditions.<sup>133</sup> The preamble noted that while long days of physical labor, especially during hot summer months, affect all crop workers, “young workers may not have the maturity and judgment to recognize the symptoms of heat stress, which can quickly become fatal.”<sup>134</sup> Astoundingly, public comments submitted in opposition to the proposal lambast the suggestion of a hazardous order against excessive temperatures. The Texas Farm Bureau defends the practice of harvesting in excessive heat because it is ubiquitous throughout the state;<sup>135</sup> the Tennessee Farm Bureau fears that the hazardous order would “create a paperwork nightmare”;<sup>136</sup> and a letter from over fifty agricultural organizations and businesses question the science supporting this type of hazardous order.<sup>137</sup> One can only conclude that these organizations do not count among their membership the twelve-year-old migrant children who harvest crops in the 110-degree heat that is common in southern fields, once again underscoring the difference between the “family” farm experience and the lot of children who work for hire.

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129. Current regulations prevent using a chain saw to cut down trees with a diameter greater than six inches, using ladders at a height greater than twenty feet, and handling certain pesticides and chemicals. See 29 C.F.R. § 570.71 (2011) for complete list of agricultural hazardous orders.

130. Child Labor Regulations, Orders and Statements of Interpretation; Child Labor Violations—Civil Money Penalties, 76 Fed. Reg. 54,836, 54,860 (proposed Sept. 2, 2011) (to be codified at 29 C.F.R. § 570.71(a)(6)).

131. *Id.* (to be codified at 29 C.F.R. § 570.99(b)(5)).

132. *Id.* at 54,863 (to be codified at 29 C.F.R. § 570.99(b)(9)).

133. *Id.* at 54,865 (“The Department is also considering whether to create a new Ag H.O. that would limit the exposure of young hired farm workers to extreme temperatures and/or arduous conditions.”).

134. *Id.*

135. Letter from Ned Meister, Dir., Tex. Farm Bureau to U.S. Dep’t of Labor, Wage & Hour Div. 2–3 (Oct. 25, 2011), *available at* <http://www.regulations.gov/#!documentDetail;D=WHD-2011-0001-1156> (“[Y]outh employed in harvesting of fruit, vegetables and berries is not an uncommon practice in Texas.”).

136. Letter from Tenn. Farm Bureau Fed’n to U.S. Dep’t of Labor, Wage & Hour Div. 8–9 (Nov. 29, 2011), *available at* <http://www.regulations.gov/#!documentDetail;D=WHD-2011-0001-4511>.

137. Letter from Advanced Ins. Marketers et al. to U.S. Dep’t of Labor, Wage & Hour Div. 23–25 (Dec. 1, 2011), *available at* <http://www.regulations.gov/#!documentDetail;D=WHD-2011-0001-8885>.

## II. IMPLICATIONS

A. *Administrative Law as Blood Sport*

In an exceptionally important article published in the *Duke Law Journal* and entitled *Administrative Law as Blood Sport: Policy Erosion in a Highly Partisan Age*, Professor Thomas McGarity argues that the fundamental nature of rulemaking has changed drastically over the last few years.<sup>138</sup> Rather than focusing primarily on convincing federal regulators that the outcome they desire is authorized by the statute and wise public policy, advocates on behalf of potentially regulated industries routinely take their objections to the White House and Congress seeking highly politicized intervention to compel regulators to do what they want. Soliciting such intervention in regulatory battles with high financial stakes surely did not begin recently.<sup>139</sup> What is different now, Professor McGarity's analysis suggests, is that the lawyers who represent clients in such proceedings would be committing a kind of malpractice if they did not pull out all these stops.<sup>140</sup>

The case study Professor McGarity uses to illustrate what he calls "blood sport" rulemakings—the Federal Reserve Board's ("the Fed") effort to regulate the interchange fees that banks charge consumers for using debit cards—had heavily moneyed interests on both sides of the table because it affected the distribution of billions of dollars.<sup>141</sup> Major retailers and consumer groups supported regulatory controls on the fees and, perhaps needless to add, the banking industry opposed them.<sup>142</sup> The campaign involved trips to court, intense lobbying of the Fed's staff, campaign contributions to key members of Congress closely associated in time with legislative action on behalf of a warring industry, and even mass advertising in the Washington, D.C. metropolitan area's metro system.<sup>143</sup> The banks solicited the support of groups that seemed to have little at stake in the rulemaking, including Americans for Tax Reform and the Christian Coalition of America.<sup>144</sup>

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138. McGarity, *supra* note 32, at 1679–80.

139. See, e.g., Frank Ackerman et al., *Applying Cost-Benefit to Past Decisions: Was Environmental Protection Ever a Good Idea?*, 57 ADMIN. L. REV. 155, 160–72 (2005) (describing the epic political battles over EPA's early decision to ban lead in gasoline).

140. McGarity, *supra* note 32, at 1748–50.

141. *Id.* at 1682–84.

142. *Id.* at 1684–85.

143. *Id.* at 1682–1703 (describing the arduous twists and turns in this saga).

144. Americans for Tax Reform advocates for a national, single rate, flat income. For more information, see generally AM. FOR TAX REFORM, <http://www.atr.org/> (last visited July 18, 2012). The Christian Coalition describes itself as "offer[ing] people of faith the vehicle to be actively involved in impacting the issues they care about." For further information, see generally

When the banks went to Congress because they did not like the Fed's rulemaking proposal, they received crucial support from Senator Jon Tester of child labor fame, who offered an appropriations rider to block the Fed from taking action on the rule for two years.<sup>145</sup> The rider did not pass, so the swarm of lobbyists trudged back downtown to the Fed and across town to the courts for a second round.<sup>146</sup>

Unlike that extravaganza, the battle over the rule regarding child labor in agriculture was an ignominious rout. The organizations that represent children—especially migrant labor children—could not hire lobbying powerhouses to represent their interests.<sup>147</sup> The Obama Administration cut and ran at the first sign of trouble.<sup>148</sup> No one went to court, and no one took a vote in Congress. Instead, a one-sided and misleading campaign organized by the AFBF that lasted only a period of months ensured that the proposal was swept off the table indefinitely.<sup>149</sup>

Why the AFBF was so ferocious in opposing the proposal remains elusive. Its staff may have believed with all sincerity that the rules violated long-standing, libertarian values shared by the trade association's members and that these values were important to uphold regardless of lobbying costs. But with the so-called "farm bill" containing crop insurance and other subsidies up for reauthorization at the same time that the child labor dispute unfolded, it is difficult to imagine that, despite its large size, the AFBF would devote resources to such an abstract principle.

More cynical answers seem substantially more likely. The issues posed by the rulemaking, as the AFBF explained them, offered a golden opportunity to whip its membership up into a frenzy of resentment against government, over the long term assisting in the election of sympathetic members of Congress and maybe even the presidency. Despite President Obama's rapid retreat at the urging of Democratic Senators Tester and Franken, AFBF members are unlikely to be converted to the notion that, on a

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CHRISTIAN COALITION OF AM., [http://www.cc.org/about\\_us](http://www.cc.org/about_us) (last visited July 18, 2012).

145. McGarity, *supra* note 32, at 1699–1700.

146. *Id.* at 1700–03.

147. See Lee Fang, *Big Ag Industry Rallies to Support New Pro-Child Labor Legislation*, REPUBLIC REP. (Apr. 23, 2012, 9:00 AM), <http://www.republicreport.org/2012/big-ag-labor-thune/> (“[The] children who might benefit from the labor regulations do not have the political resources to push back against the lobbying might of the industrial farms.”).

148. Hananel, *supra* note 25.

149. See, e.g., Robert Koenig, *Critics Say “Misinformation” Killed Rules to Restrict Child Labor on Farms*, ST. LOUIS BEACON (May 1, 2012, 12:01 PM), [https://www.stlbeacon.org/#!/content/24734/rules\\_on\\_child\\_labor\\_scuttled](https://www.stlbeacon.org/#!/content/24734/rules_on_child_labor_scuttled) (detailing the “ads, talk radio shows, and social media” campaign waged by groups such as the AFBF and FFA in lieu of “serious debate”).

national basis, the two major political parties offer equivalent opportunities to pursue their agenda.

As likely, implementation of the proposal would have imposed significant costs on the commercial farms with the most clout in that organization. Children provide heavily discounted harvesting services to large farmers because federal law does not require that they earn the minimum wage, and they often do “piece work”; that is, they are paid by the bucket of crop harvested.<sup>150</sup> It also seems probable that a significantly larger universe than DOL’s estimate of 56,000 covered children would have been protected by the rule. Despite the weakness of DOL’s enforcement efforts, million dollar and larger farms are simply unwilling to take any chances on violating more stringent requirements.

Professor McGarity predicts that, for the foreseeable future, blood sport rulemaking is likely to dominate the landscape for high-profile, contentious rules with big money at stake.<sup>151</sup> In the process, rulemaking will become slower and more opaque while Presidents will have a significantly more difficult time attracting the best and brightest to government service. He sees these developments as gravely threatening to the rule of law in the country, shifting the debate from the rulemaking process and judicial review, with all of their procedural safeguards, to arenas where only the wealthy can play and where the scope of the issues at stake is far larger than the specifics of a single rule:

[T]his Article concerns the possible emergence of a new period, one in which the animating debate is not over the legitimacy of administrative rulemaking but over the legitimacy of any government intervention into private economic arrangements. . . . When the legitimacy of government intervention is a seriously debated question in the broader political economy, every significant rulemaking exercise becomes a possible occasion for acrimonious debate over the need for government regulation. Those who contest the legitimacy of any intervention feel free to launch an all-out war against an agency whenever the agency engages in a significant rulemaking effort, without regard to the impact on the agency’s ability to carry out its statutory mandate.<sup>152</sup>

#### B. Who Should Care?

I have no doubt that Professor McGarity is right with respect to both his diagnosis and his prognosis. In fact, the story told here not

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150. 29 U.S.C. § 213(a)(6) (2006) (exempting piece in agriculture work from minimum wage requirements); *see also* HUMAN RIGHTS WATCH, *supra* note 21, at 6, 31–32 (explaining that many migrant children do piece work and that many more do not earn the minimum wage).

151. McGarity, *supra* note 32, at 1721.

152. *Id.* at 1723–24.

only supports his analysis but suggests that the trends he identifies are moving faster, and cutting a wider swath through the administrative system than suggested by his case study regarding more equally matched opponents and considerably higher stakes. The real question is whether anyone but those who cannot afford to play blood sports should regret these developments.

For regulatory beneficiaries without considerable funding, the conversion of administrative policy making into a galactic battle with multiple, expensive fronts is an unmitigated disaster, as is the diminution—arguably to insignificance—of the concept that the federal civil service, when implementing laws like FLSA, has as its primary mission the identification and protection of the public interest defined by Congress until and unless the statutes are repealed. We can take as a given that whenever a rulemaking proposal would gore the ox of an industry with resources, and its beneficiary is the public as a whole, much less a minority group that inspires hostility in some quarters, the trend toward blood sport rulemaking will mean increasingly frequent victories for the financially endowed side. As disturbing, for agencies that protect public health, worker and consumer safety, and the environment, unless Congress has bestowed a specific statutory mandate and deadline for the promulgation of a rule, the chilling effect of the blood sport trend cannot be underestimated.<sup>153</sup> How sanguine potentially regulated industries can be when rules only implicate their own interests is quite another story.

### C. *Blood Sport to the Death*

The universe of rules that arbitrate intramural (within one industry) and intermural (between different industrial sectors) disputes is difficult to quantify and define. But at the very least, this universe includes disagreements over taxes, tariffs and other forms of trade restrictions, federal contracting and debarment, receipt of federal grants and loans, communications, securities and banking marketing and sales, and health care reimbursement. If one contemplates the possibility that trends in rulemaking could infect other administrative decision making—such as permitting, licensing, and enforcement—additional areas include antitrust prohibitions, patents and other forms of intellectual property protections, drug approvals, new chemical marketing and sales, and many others.

The elaborate procedural and substantive constraints on administrative decision making that have been engrafted on the system are also impossible to summarize neatly, but like any area of

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153. *Id.* at 1761–62 (describing how blood sport strategies have combined with national and international crises to make agencies increasingly less capable of producing effective regulations).



law, they are designed to offer advance guidance and, even more important, business certainty to potential combatants. The power of this predictability to encourage private resolution of such disputes cannot be underestimated.

At the very least, the advent of blood sport rulemaking reverses these trends. One party to a dispute will not be able to ascertain in advance when its opponent will step into the blood sport arena, moving beyond the relatively structured, highly controlled world of rulemaking notices, comments, visits with rulemaking staff or hearings before administrative law judges, visits to the White House Office of Information and Regulatory Affairs when appropriate (and perhaps even when not), requests for the production of data, exhaustion of administrative remedies, appeals to district and circuit courts, standards of review, petitions for rehearing, appeals, and, at long last, a final decision. Like the difference between English minuets and modern video games, the brave new world of blood sport administrative law will not be for the faint hearted. The shrewdness of the strategizing, the choice of the most effective lobbying firm, and the avoidance of media attention will all play a role in who wins or loses. Nevertheless, the resolution of such matters is likely to become far more expensive the higher the stakes, the more numerous the players, and the greater the number of those players who decide to play.

#### CONCLUSION

In the short run, President Obama's efforts to defuse the most extreme accusations regarding the link between the bad economy, loss of jobs, and protections like the child labor rule are misguided, counterproductive, and could jeopardize his legacy whether or not he serves a second term. Because placating his opponents is impossible, he ends up in a situation where he is exposed to escalating demands that require further, costly concessions. This defensive posture also means that the White House has assumed de facto control over the agencies and departments that should be making these decisions. On the inevitable occasion when one of the extraordinarily harmful incidents addressed by the stifled rules recurs, the President will have no buffer to blunt the fury of injured people and their families.

Over the long run, short circuiting the well-worn process of administrative decision making chills initiative and ruins morale at agencies already rendered weak and ineffective by budget cuts, bureaucracy bashing, and outmoded legal authority. Undoubtedly, blood sport administrative law will cause grave damage to the effective operation of government. And for regulated industries that cannot resist pursuing such relief, the true lesson may well turn out to be that you should take care what you wish for. Their own, home-

grown version of blood sport could cost a great deal of money and leave few contestants alive.