LABOR LAW AND THE RACE TO THE BOTTOM

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Abstract

The claim that globalization will result in a race to the bottom is firmly entrenched in American labor law scholarship. This is somewhat surprising since empirical support for the claim is quite weak and, even more so, because acceptance of the claim implies a view of labor regulation that is outside the academic mainstream – that labor regulation always imposes net costs. On the other hand, maybe the dominance of the race-to-the-bottom claim is not so surprising given that the narrative supporting it is powerful, intuitive, oft-repeated, and, until now, virtually unchallenged.

Regardless of its cause, this consensus on the race-to-the-bottom claim has important implications for labor policy. For example, it weakens calls for aggressive labor regulation by validating the claim that such regulation is futile; it will simply hasten the movement of employers to lower-regulation jurisdictions. The claim also strengthens the notion that the labor market is just like any other market and, as such, better left alone. Why search for particular flaws in the labor market that might be corrected or for important values of human flourishing and dignity that might be addressed if the race to the bottom renders impossible any effective legal response?

This article challenges the dominant narrative supporting a race to the bottom in labor law. It supplies narratives that support the empirical literature – that there may not be much of a race at all and, even if there is, it may not be as fast and sudden as advertised. Some labor regulation may produce net benefits for society. This labor regulation should

be enhanced, not harmed, by global competition. But even labor regulation that imposes net costs on society may not be subject to the race to the bottom for a variety of reasons. The article certainly does not prove that there is never a race to the bottom. But it does demonstrate that there are plausible, alternative narratives to the dominant one. A narrative skeptical of the race-to-the-bottom hypothesis may help to re-calibrate the scales used to consider labor regulation. If we believe in a race to the bottom a bit less, we may be empowered to think more deeply and creatively about the promise and possibilities of effective labor regulation.

Race to the bottom is a frequent theme in American labor law scholarship. The basic claim is that economic pressure will result in races to the bottom which will squeeze out laws and regulations protecting labor. The argument goes like this:

> [Competition between states and nations] … diminishes the level of … labor-protective regulations. Companies prefer to produce in legal environments that offer the least protections for labor and, when feasible, they shift production to capture the resultant lower labor costs. As a result [states and] nations compete for business using lower labor standards to attract businesses, a dynamic known as "regulatory competition." Regulatory competition leads non-labor groups to oppose labor regulation on the ground that business flight hurts them. Thus regulatory competition can trigger a downward spiral in which [states and] nations compete with each other for lower standards while labor, having lost its historic allies …, is thus rendered powerless to resist.[1]

The overwhelming consensus in American legal scholarship is that races to the bottom are real, strong, and very threatening. Since 2001, about 85% of labor law articles discussing race to the bottom have accepted it, most of them uncritically.[2] Only a few articles have expressed skepticism.[3]

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[1] Katherine V.W. Stone, *A New Labor Law for a New World of Work: The Case for a Comparative-Transnational Approach,* 28 COMP. LAB. L. & POL'Y J. 565, 566 (2007).

[2] This literature survey and the one on social science literature should be viewed as suggestive rather than definitive. They are useful because they confirm the conventional wisdom about the status of the race-to-the-bottom concept in the legal and social science literatures. Discussion of race to the bottom in American labor law scholarship was searched for in the Westlaw database "Journals and Law Reviews" and the LexisNexis database "Law Reviews, CLE, Legal Journals & Periodicals, Combined." Two search terms were used: (1) "race to the bottom" /s labor and (2) "race to the bottom" /p labor. The phrases "/s" and "/p" restrict the results to those that include the terms "race to the bottom" and "labor" in the same sentence and paragraph, respectively. These databases were searched for the years 2001 to 2011. Later, the searches were repeated for sources published between the end of 2011 through February 28, 2012. The results were individually examined to determine whether the author(s) subscribed to race to the bottom theory and the length of their analysis (number of sentences or paragraphs, or entire article). Articles that merely acknowledged the existence of a race to the bottom theory in labor standards but did not stake a position or substantively analyze the theory were not included in the analysis. Seventy-three

The strength of this consensus is odd in a number of respects. First, in other, more empirically-driven disciplines, the consensus cuts strongly in the opposite direction. Since 2001, 70% of the articles mentioning race to the bottom in economics and political science were skeptical of the claim and, whether accepting or rejecting it, none of them treated the issue uncritically.[4] Some have gone so far as to claim that empirically there is "no evidence" of a general race to the bottom (although that seems to me to go a bit too far).[5] Second, in other areas of the law where the race-to-the-bottom claim has currency, such as environmental law and corporate law, there are articles supporting the basic claim, but there are also leading articles that analyze the issue extensively and articulate a skeptical view.[6] No major article like that exists in labor law scholarship. Third, even apart from these developments in other areas, there are stories that could be told about the evolution of labor law that are inconsistent with the race-to-the-bottom thesis. Despite the large number of labor law scholars and articles, those stories remain largely untold.

This article fills this void in American labor law scholarship. It tells the stories that are inconsistent with the race-to-the-bottom thesis. One of the main reasons for the consensus in favor of race to the bottom is the rhetorical force of the narrative supporting it. It is a powerful and intuitive story.[7] But there are other stories that can be told. This article is about those stories.[8]

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articles were identified; 61 accepted the race-to-the-bottom hypothesis; of those 61, 62% devoted one paragraph or less to analysis of the hypothesis and only 13% provided more than five paragraphs of discussion. Results and analysis are available from the author.

[3] Interestingly, there tends to be more skepticism about the race-to-the-bottom claim in labor law scholarship originating outside of the United States. *See, e.g.,* Peter Gahan, *et al., Economic Globalization & Convergence in Labor Market Regulation: An Empirical Assessment*, 60 AM. J. COMP. L. 703 (2012)(Australia); Brian Langille, *What is International Law For?,* 3 LAW & ETHICS HUM. RTS. 47 (2007)(Canadian); BOB HEPPLE, LABOUR LAWS AND GLOBAL TRADE 13-15 (2005)(United Kingdom).

[4] Discussion of race to the bottom in social science scholarship was searched for in the following databases: Project Muse, Omnifile, Science Direct, JSTOR, and Academic Search Premier. The same searches, process, and analysis was used as described in note __, *supra*. Twenty-three articles were identified; 16 rejected the race-to-the-bottom hypothesis; over 90% of all the articles contained extensive analysis of more than five paragraphs; none of the articles contained less than three paragraphs of discussion. Results and analysis are available from the author. For a long list of articles that find no relationship between low labor standards and either foreign direct investment or the competitiveness of exports, see Alan Hyde, *A Stag Hunt Account & Defense of Transnational Labour Standards A Preliminary Look at the Problem,* Cornell Law School Legal Studies Research Paper Series No. 06-008, at 12 n. 28 (2008), *at* http://papers.ssrn.com/id=896362.

[5] Hyde, *supra* note 5, at ___.

[6] See Richard L. Revesz, *Rehabilitating Interstate Competition: Rethinking the "Race to the Bottom" Rationale for Federal Environmental Regulation*, 67 N.Y.U. L. REV. 1210 (1992); Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U. L. REV. 913 (1982).

[7] In addition to being powerful and intuitive, the narrative is supported by two strong cognitive biases. First, the human brain indexes facts around stories; facts without stories are less influential, while facts embedded within stories tend to be remembered. ROGER C. SCHANK & ROBERT P. ABELSON, SCRIPTS, PLANS, GOALS AND UNDERSTANDING: AN INQUIRY INTO HUMAN KNOWLEDGE STRUCTURE (1977); Roger C. Schank & Robert P.

These stories are important both for labor law scholarship and for the development of labor policy. The law is inherently a narrative-driven discipline. Labor law scholars are generally lawyers who build from the ground up beginning with the stories of individual cases. They are not generally trained in statistics-based arguments and tend to be skeptical of them (although this is changing). As a result, the strong and intuitive narrative in support of the race-to-the-bottom thesis wins by default in the absence of alternatives. And the thesis, if unchallenged, skews the debate on very important policy issues. For example, it weakens claims for aggressive labor regulation and strengthens the notion that the labor market is just like any other market and, as such, better left alone.[9] Thus, a narrative skeptical of race to the bottom can help to re-calibrate the scales used to consider labor regulation. In general terms, if we believe in race to the bottom a bit less, we are likely to believe in the value of labor regulation a bit more.

The first section of this article discusses the basic structure of the race-to-the-bottom claim. It begins by imaging what labor regulation would be like in an insulated jurisdiction and then considers how that regulation would be affected by interjurisdictional competition. It turns out that the effects are likely to depend importantly on the purpose of the regulation and its overall economic effects. Section II will talk about one of two broad categories of labor regulation: regulation that creates net value for society. In theory, it is easy to see how well-designed labor regulation to address market failures might produce net value. This section will

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Abelson, *Knowledge and Memory: The Real Story, in* KNOWLEDGE AND MEMORY: THE REAL STORY 1-85 (Robert S. Wyer, Jr., ed., 1995). With race-to-the-bottom, the pro-race story is simple, intuitive and memorable; the race-skeptical story has yet to be told well. Second, the costs of labor regulation tend to be more salient than the benefits of labor regulation. The costs of workers' compensation, for example, occur sooner and are easier to quantify than its benefits. The costs are there to be counted today, while the benefits relate to improvements in human health and well-being and depend on the relative efficiency of workers' compensation compared to other possible systems for dealing with workplace injuries, such as the market or tort law. *See infra* XXX. Recent scholarship has demonstrated that people exhibit systemic biases in favor of more salient information. *See, e.g.*, Fochman & Weiman, *The Effects of Tax Salience and Tax Experience on Individual Work Efforts in a Framed Field Experiment*, IZA Discussion Paper, no. 6049 (available at ftp.uza.org/RePEc?Discussionpaper/dp6049.pdf; Andrew Hayashi et al., Experimental Evidence of Tax Salience and the Labor-Leisure Decision: Anchoring, Tax Aversion, or Complexity, ssrn.com/abstract=2067157 (2012); David Gamage *et al., Experimental Evidence of Tax Framing Effects on the Work/Leisure Decision,* ssrn.com/abstract=1629919 (2010); Emmanual Saez, *Do Taxpayers Bunch at Kink Points?*, http://elsa.berkeley.edu/~saez/saezAEJ09bunching.pdf (2009). This salience bias supports the race-to-the-bottom hypothesis which focuses on the costs of labor regulation.

[8] This article focuses on the power of narrative as a primary factor to explain the strong consensus favoring race to the bottom. Another possible explanation is that the articles in other disciplines are usually deeply empirical and, hence, statistical. It may be that that is not of interest or cannot be well understood by labor law scholars. Or it could be that labor law scholars have strong ideological screens that make it difficult to see or uncomfortable to articulate views skeptical of race to the bottom. These would certainly be interesting ways to think about the consensus. But they are not the primary focus of this article.

[9] *See, e.g.*, Daniel R. Fischel, *Labor Markets and Labor Law Compared to Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061 (1984); John J. Donohue, *Employment Discrimination Law in Perspective: Three Concepts of Equality*, 92 MICH. L. REV. 2583, 2595-99 (1994).

provide examples; the net-value category may cover more labor regulation than commonly thought. The next section will address the other broad category of regulation: regulation that imposes a net cost on society. Despite the net cost, a society may decide to enact this type of regulation for a variety of reasons, including the goal of a more acceptable distribution of income and wealth. Section III will discuss the fate of net-cost regulation in the face of interjurisdictional competition. While it is true that such competition may threaten net-cost regulation, this section will demonstrate through examples that a race to the bottom is by no means inevitable. Section IV will discuss four issues that make the race-to-the-bottom argument even more complicated and contingent.

The goals of this article are modest. The article does *not* claim that there is never a race to the bottom in labor law. Instead, it urges circumspection in making race-to-the-bottom claims. This article provides as-yet untold narratives to support the social science evidence indicating that the most prudent approach to the race-to-the-bottom claim is not the current one of uncritical acceptance, but instead one of cautious skepticism.

I. Islands and Races: The Structure of the Race-to-the-Bottom Claim

On its face, the race-to-the-bottom argument is simple and straightforward: labor regulation is expensive and, because globalization[10] puts pressure on costs, it will weaken labor regulation. This claim aligns with our basic intuitions about how competition works and, in large part because of that, it has great rhetorical force. But upon examination, it turns out race to the bottom is not one, relatively simple claim, but a set of complicated and interrelated ones. First, it requires us to imagine what labor regulation would be like in the absence of globalization. This is a hypothetical exercise in a world that has been globalized since the beginning of the industrial era,[11] but it is necessary to make sense of the race-to-the-bottom claim. Otherwise, one cannot separate out the effects of globalization, nor evaluate whether the direction is up or down. Then we need to examine the precise ways in which globalization will impose pressure for change. Will it be the same for all labor regulation? Will globalization always point to the bottom, or may there also be upward pressure sometimes? Third, we need to ask how the players will respond to this pressure. How will firms respond and how, in turn, will governments respond to the firms' reactions? Finally, we need to ask how fast these responses will occur. The claim, after all, is that a "race" will occur. So how fast will we circle this track? This section will examine these issues. It will explore the basic structure of the race-to-the-bottom claim.

[10] Race to the bottom is a claim about interjurisdictional competition. The competition can occur between many different types of jurisdictions: cities, states, regions, nations. The main points of this article are general ones that apply to the race-to-the-bottom claim in all these contexts. Generally, however, the principal example used will relate to competition between countries and "globalization" will be the word used to indicate greater competition.

[11] For an interesting and insightful review of international connections between Europe and the United States in the first half of the 20th century, see DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998).

Let us begin, then, with an island jurisdiction completely cut off from the rest of the world, but which has an abundance of all that is necessary for a vibrant economy. The island has schools, natural resources, skilled and unskilled laborers, capital for investment – everything, except the ability to interact with other jurisdictions. Of course, there is no such jurisdiction, certainly not in the modern world. But, again, imagining one is necessary to set a baseline for the race to the bottom. To make any sense of a "race" to the "bottom," we need to know where we're starting from.

Some might argue that no labor regulation would be required on this island. Employers would offer jobs at compensation levels sufficient to attract employees with certain skills. The compensation would be equal to the marginal productivity of each employee. If the compensation were more than the employees' marginal productivity, the employers would go out of business. If it were less, other competing employers would pay more and the employer would not be able to attract a competent workforce. Employees would sort into jobs appropriate for their skills, taking into account factors such as the risk of injury, the amenities provided (office with a view of the mountain peaks), etc. If employees wanted jobs with a lower risk of injury or more amenities, employers would provide them by investing in job safety or amenities, but employees would have to pay for them by accepting lower wages to ensure that their total compensation (wages plus safety, or wages plus amenities) stayed equal to their marginal productivity. So everything would be perfect without any labor regulation. Employers would get the employees they need at the "right" price and employees would receive fair value for their labors (an amount equal to their marginal productivity) through the combination of wages and amenities which they prefer. We might think of this island as "Chicago."[12]

But "Chicago" is an unlikely jurisdiction. Even on the island, there is likely to be labor regulation for a number of different reasons. First, regulation might arise when it can provide value that employers and employees are unlikely to be able to produce on their own. As I will discuss in more detail later, several common types of labor regulation may fall into this category, such as workers' compensation (which, among other things, may be able to produce quicker, more certain payments for injuries at a lower cost)[13] and employee leave requirements (which can solve an employer-side, first-mover problem).[14] Since these types of laws produce value, both employers and employees should support them; they can make everybody better off. How the benefits are distributed across employees, employers, and society is uncertain. That will depend on factors, such as the level of unionization, the supply of and demand for workers with certain skills, and the level of competition in the particular industries affected. But there is a surplus to

[12] For examples of important articles arguing that employer and employee interests might be best served on an island like Chicago, see Andrew P. Morriss, *Bad Data, Bad Economics, and Bad Policy: Time to Fire Wrongful Discharge Law,* 74 TEX. L. REV. 1901 (1996); Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws,* 56 U. CHI. L. REV. 1311 (1989); Richard A. Epstein*, In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947 (1984);

[13] *See infra…*

[14] *See infra…*

be divided, so one might expect to see these types of laws.[15] I will refer to this category of laws as "net-value" labor regulation.

Second, regulation may arise for reasons other than the net value they create for society. One example of this might be regulation designed to ameliorate social disparities of various types. Minimum wage laws, for instance, might be enacted with the goal of protecting low-skilled workers. If these laws arise because of a market failure, it may well be that they provide extra value that the parties cannot produce on their own. But if that is the case, these would be net-value labor regulations and, hence, fall into my first category. Thus, for my purposes, the assumption here is that these laws do ***not*** produce extra value; instead, they redistribute income from one group to another with either no gain or a net loss to employers and employees overall.[16] Despite this net cost, these types of laws may well arise for a variety of reasons. As I will discuss in more detail later, they may arise to enhance social and political stability, to pursue certain moral goals, or for other reasons. Here, by definition, there will be winners and losers. Those in the targeted group receiving the minimum wage will come out ahead. How the losses will be distributed is uncertain and will depend on many factors. But the costs must be and will be distributed in some fashion across employers, employees, taxpayers, and consumers. I will refer to this category as "net-cost" labor regulation.[17]

Both net-benefit and net-cost regulation can arise in a variety of contexts. For example, if our island is a federal state like the United States, any of these types of regulation could occur as sub-national legislation (in the United States, for example, as state legislation) or it could occur as national legislation. Obviously, if it were sub-national legislation, legislation on any particular topic may well take different forms in different sub-national units. Similarly, the legislation, either national or sub-national, could be drafted to apply to only particular employers or workers. For example, it might apply only to fast-food restaurants or only to automobile assembly plants.

[15] This is not to say that these laws are inevitable. For an interesting theoretical discussion of barriers to net-value regulations, see Daron Acemoglu, *Modeling Inefficient Institutions*, *in* ADVANCES IN ECONOMIC THEORY 341-80 (Richard Blundell et al., eds., 2006).

[16] To be clear, I am *assuming* here that minimum wage laws are net-cost to help me explore the general issue of labor regulation that falls into that category. I am not making any assertion about whether minimum wage laws actually protect the groups they are intended to protect, or whether those benefits exceed the costs of the regulation. Those issues are not the subject of this article; they have been explored elsewhere. *See, e.g.,* DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995); Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997).

[17] There are many paths through which net-value and net-cost labor regulation could be enacted. See infra, e.g., … (at paragraph discussing political regulation). This article is not intended to be a compilation of every possible type of labor regulation. Instead, it analyzes how the two major categories of labor regulation – net-value and net-cost – interact with the race-to-the-bottom hypothesis.

As this discussion suggests, "labor regulation" is a large and complex topic. In later sections of this article, I will talk about it in even more detail.[18] But this section discusses the basic structure of the race-to-the-bottom claim; for that purpose, this less-detailed, general description should suffice.

The central question presented by the race-to-the-bottom claim is how labor regulation on our island would change if, instead of being completed isolated, it were located in an ocean of other islands that could trade with each other? For present purposes, the precise nature of the international competition does not matter a great deal. The competition may occur because employers can move their plants to islands that offer little or no labor regulation. Or the competition may occur when employers who are already on those islands can send their goods to islands with more regulation thus threatening regulation and labor conditions on the higher-regulation islands. Or maybe both occur with the first occurring in some industries and the latter in other industries. Again, whether these things occur and how much is very important to the race-to-the-bottom argument. These are the economic factors that drive the race. But the precise way in which the competition is manifested is not important to the general claims made about a race to the bottom. That general claim is that this kind of global competition, however manifested, will place enormous downward pressure on labor regulation.

Net-value labor regulation challenges the most basic claim of the race-to-the-bottom thesis, that is, that all labor regulation imposes costs that employers will seek to avoid. By definition, net-value regulation confers net benefits on society. So where would we be *more* likely to see it on economically isolated islands or in competition? In both, there would be *economic* pressure to *enact* this type of regulation. It is precisely that type of pressure which makes it unlikely that we will observe islands named "Chicago." On an island, the absence of this type of labor regulation would mean that certain goods might be more expensive than they would need to be, that employers might have somewhat lower profits, or that workers would make slightly less money than they would otherwise (or probably all three in some uncertain combination). But the

[18] I should be clear that there are parts of "labor regulation," broadly construed, that I am not talking about in this article. Most importantly, I am not talking about labor regulation arising from treaties, trade agreements, or other compacts designed to limit interjurisdictional competition. (When the interjurisdictional competition is between states, this limitation would exclude consideration of federal regulation.) These kinds of agreements are certainly a policy option available to try to address problems created by interjurisdictional competition, and they present important issues in their own right. But this is not an article about them. Certainly, this analysis has implications for the necessity and structure of international agreements dealing with labor issues; the race-to-the-bottom claim is often cited as one reason for such agreements. But, again, discussion of those topics is beyond the scope of this article. Second, this article focuses on on labor *regulation*, not labor *conditions*. Labor regulation describes the legal requirements established through political processes which pursue certain policy objectives. Labor conditions, in contrast, are the actual conditions experienced by workers: their wages, hours, and other aspects of their jobs. Thus, it may be that international competition will affect wages, causing them to go up in some countries and down in others, while not affecting labor regulation at all. Or vice versa. For discussion of this point, see infra … But in either event, this book focuses on labor regulation, not labor conditions.

consequences would be more severe when there is international competition. If some of the benefits lost because a particular jurisdiction did not have these regulations went into the cost of goods, the jurisdiction would lose out to others that had the regulations and, as a result, were able to produce the goods more cheaply. So the losses would be compounded. If the lost benefits were felt by firms in their profits, then the ability of the jurisdiction's firms to attract capital would be jeopardized by the relative attractiveness of similar, but more profitable firms elsewhere. If the lost benefits were translated into lower wages and benefits for workers, workers might begin to think about moving away but, even if they did not do that, they would see other workers on other islands who are very similar to them doing better than they are. Because the consequences of failing to have net-value regulation are more severe in international competition than on an island, we should see *more* of this type of regulation when there is competition. The prediction here is the opposite of the standard prediction. Instead of a race to no regulation, there will be a race to more regulation, at least more net-value regulation.[19]

It is worth noting here that this aspect of the race-to-the-bottom argument depends on a general premise that would be discomfiting to its proponents who, in general, tend to favor labor regulation. The premise that the costs of all labor regulation exceed benefits is the same premise that would result in an island named "Chicago." If one believes in Chicago, then one should believe the race-to-the-bottom argument. But if one believes that labor regulation can solve market flaws and, in so doing, provide real benefits to society, then the increased competitiveness of globalization should produce pressures in the opposite direction, towards more and better net-value labor regulation.

In contrast to net-value labor regulation, net-cost labor regulation will be threatened by international competition. By definition, the benefits of this type of labor regulation do not exceed its costs. As a result, a jurisdiction that enacts net-cost labor regulation will be in roughly the same position as one that *fails* to enact net-value labor regulation: overall, it will be a poorer island. Under global competition, again, these effects will be magnified, so there will be more pressure not to enact, or to repeal, net-cost labor regulation.

The question here is whether net-cost labor regulation would wither and die as predicted by the race-to-the-bottom hypothesis, or whether some of it might survive. The claim here is that some of it might survive. Consider two possible situations in which a jurisdiction might enact net-cost labor regulation to protect low-income workers. First, consider one that enacts a law to redistribute income to low-wage workers, such as a minimum wage law or a wage subsidy law. I am assuming this is net-cost labor regulation within my terminology, in the sense that its benefits do not exceed its costs.[20] Nevertheless, for a variety of reasons, a jurisdiction might enact such a law. For example, it might enact such a law to reduce the likelihood of costly social and political instability. If this is the reason, the jurisdiction might be making the calculation that this cost is a

[19] Obviously, even if regulation benefits society overall, this does not mean that all firms will benefit, and those that do not may still begin a race. I will discuss this issue later. *See infra*…
[20] Again, this is an assumption, not an assertion. *See supra*…

decent investment in the kind of social and political environment that fosters investment and productivity.[21] How would a low-wage policy enacted for these reasons fare in global competition? Assuming the premises are correct,[22] a net-cost labor regulation enacted for this reason should fare very well. In fact, if these regulations can be calibrated properly, one might expect to see more of them when there is global competition. Without these regulations, the economy will suffer from extra and avoidable social and political instability, and there will be no way for employers and employees to avoid it.[23] In competition, employers and employees would be able to escape to other jurisdiction that have these regulations and, as a result, would be able to reap the rewards of stability. Consequently, jurisdictions would have more incentive to provide labor regulations likely to produce this stability under competition than they would as separate islands. [24]

Another reason a jurisdiction might want to enact a low-wage policy such as a minimum wage or wage subsidy law might have nothing to do with this kind of instrumentalist thinking. It might want to enact such a policy simply because its populace prefers a more egalitarian society.[25] The issue here arises because of possible disjunctions between political and economic decision-making. In broad outline, it is possible for a "populace" to enact a minimum wage law to satisfy its preference for equality if one more than half the populace is in favor. Economic decision-making, on the other hand, is much more individualized. On an island, employers who either disagree with the law or whose business is adversely affected by the law can take certain

[21] *See, e.g.*, Alberto Alesina & Roberto Perotti, *Income Distribution, Political Instability, and Investment*, 40 EUR. ECON. REV. 1203, 1225-26 (1996) (income inequality increases social and political instability which, in turn, significantly reduces investment); Geoffrey Garrett, *Global Markets and National Politics: Collision Course or Virtuous Circle?*, 52 INT'L ORG. 787, 789, 798 (1998) (agreeing with other economists that reducing inequality stimulates growth through social stability). Of course, this may be only a broader way of defining the benefits of such a law, so maybe it flips from the net-cost to the net-value category of labor regulation. So, in a way, it may be cheating to call this net-cost regulation if this broader assessment of benefits makes it net-value. But this previews the problem presented by the need to evaluate cost and benefits over time, which I discuss later. *See infra …*

[22] The premises are a) that it was enacted for this reason, b) that a reduction in social inequality actually does foster social and political stability, and c) that the regulation was calculated properly so that the price of the redistribution was less than the value of the increased stability.

[23] This concept is analogous to other areas in which a lack of oversight and regulation has resulted in worrisome instability. *See, e.g.*, Lynne L. Dallas, *Short-Termism, the Financial Crisis, and Corporate Governance*, 37 J. CORP. L. 265 (2012); Robert B. Ahbieh, *Imperfect Alternatives: Networks, Salience, and Institutional Design in Financial Crises*, 79 U. CIN. L. REV. 527 (2010); Bruce E. Aronson, *The Financial Crisis One Year Later: Proceedings of a Panel Discussion on Lessons of the Financial Crisis and Implications for Regulatory Reform*, 43 CREIGHTON L. REV. 275 (2010).

[24] This example raises issues that will be discussed in more detail later, including (1) what is the appropriate time frame for evaluating the social value of a labor regulation, see infra … and (2) how do we measure social benefits. See infra …

[25] Minimum wage and wage subsidy laws, of course, do not produce very egalitarian societies. But I use this as a simple placeholder for the complicated mix of preferences that might result in such laws, for example, to require some minimum level of compensation for work, to avoid seeing homeless people on the streets, or to avoid other social welfare payments.

steps – reduce employment levels, invest in other types of businesses, etc. But they cannot escape. When there is international competition, employers can go to other jurisdictions that do not have such a law. The question for us is whether this dynamic will put such pressure on redistributive labor regulations that they will disappear?

In theory, there are many reasons such laws might survive, even in the face of international competition. First, the amount of pressure will depend some on how many employers will leave (or threaten to leave) because of the law. I will discuss this in more detail later but, for a variety of reasons, the movement is unlikely to be universal and swift: some jobs simply cannot be moved; even if movable, the costs of the move may be high; some products cannot be imported; the employer may agree with the purpose of the law; and so forth.[26] Second, when employers do leave, the particular jurisdiction may not view it as such a bad thing. Some jurisdictions may traffic in low-income labor; others may invest more in human capital and hope for more. A jurisdiction in the latter category may not mourn the departure of an employer better suited for the former. More generally, jurisdictions may become more specialized because of global competition than they are able to be as separate islands. When that occurs, there may be a Tieboutian-like sorting.[27] Some islands may simply be better suited to low-income labor than others.[28] Third, a number of steps are possible that can lessen the incentives of employers to leave. For example, fiscal instruments (taxes) could be used to shift costs away from the most mobile employers or monetary instruments, such as a currency devaluation, could be used to offset worries about competitiveness in global markets.[29] In sum, even though distributional labor regulation raises labor costs overall (by definition), the connection between those costs and the ultimate fate of this type of regulation in the face of global competition is long, complicated, and uncertain.

Labor regulation designed to favor politically powerful groups is another type in which the costs of the regulation overall exceed the benefits (by definition).[30] Thus, it will be threatened

[26] *See infra*…

[27] Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. (1956).

[28] Basic comparative advantage analysis indicates that islands may specialize in particular types of labor. For example, assume the workers of Island A are 10 times more productive than those of Island B in high technology and 3 times more productive in low technology. Although Island A has an absolute advantage in both areas, comparative advantage theory holds that a likely outcome is that Island A will produce only high-technology goods and Island B will produce only low-technology goods. Island A's workers will demand too high a wage to permit them to work in low technology, while Island B's workers will not be productive enough to compete in high technology. *See, e.g.*, N. GREGORY MANKIW, BRIEF PRINCIPLES OF MACROECONOMICS 54-59 (2009); TYLER COWEN & ALEX TABARROK, MODERN PRINCIPLES: MACROECONOMICS 383-87 (2010). For a popular explanation, see PAUL KRUGMAN, POP INTERNATIONALISM, 57-59 (1996).

[29] This will be discussed in more detail later. *See infra*…

[30] A central message of the public choice literature is that small, cohesive groups have a disproportionate influence on public policy. *See generally*, JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); DANIEL A. FARBER & PHILLIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION (1991); DENNIS C. MUELLER, PUBLIC CHOICE III (2003); MAXWELL L. STEARNS & TODD J. ZYWICKI, PUBLIC CHOICE CONCEPTS AND APPLICATIONS IN LAW (2009); Research Handbook on Public Choice and

by globalization, just as net-cost regulation is, and analysis of the two types of regulation will mirror each other. Political regulation also leads to a type of stability (political stability), not all employers will be affected by its costs, any adverse effects can be ameliorated through fiscal and/or monetary measures, etc. The difference is that for political regulation, we might all cheer its demise (except its politically powerful beneficiaries, of course), while we might worry about the fate of other types of net-cost labor regulation. This muddies even more the basic race-to-the-bottom argument. In addition to its prediction of less labor regulation, the claim also has a normative aspect: the race to the bottom is unfortunate. But if it takes with it costly regulation that is in place primarily for political reasons, then that would not be so bad. So the claim must be that the pressures creating the race to the bottom will hit "good" regulation (such as a minimum wage law) harder than it will hit "bad" regulation (such as political regulation). The contours of that argument are at best unclear.

Finally, let us consider a couple of the contexts in which labor regulation might arise. Consider first a federal state in which labor regulation in a particular area occurs at a sub-national level. In the United States, examples of this would include workers' compensation and common law limitations on employment at will. To what extent would globalization put extra pressure on these types of labor regulation? The obvious point here is that these regulations have already been through the crucible of inter-jurisdictional competition and, somehow, have survived. In this context, the race-to-the-bottom claim must be that competition from outside jurisdictions is in some way more severe or disruptive than competition from sub-national jurisdictions within a federal state.[31]

This claim has intuitive appeal in a world in which the difference in wages between any two States in the United States are much narrower than the difference in wages between any State and those in, say, China. But while the magnitude of the wage difference may have an important effect on labor *conditions*, its effect on labor *regulation* is much less clear. That is, while in this example the difference may tend to pull the wages of some workers down, its effect on workers compensation or unemployment insurance laws is much less clear. This is because the forces affecting labor conditions are not the same as the forces affecting labor regulation. For labor conditions, the classic model is that countries will specialize in areas where they have abundant resources.[32] So in our example, China will focus on goods requiring low-skilled labor and the United States will focus on goods requiring more highly skilled labor. For low-skilled labor, the model predicts a convergence of wages with those in China going up faster than those in the

Public Law (Daniel A. Farber & Anne Joseph O'Connell, eds., 2010). In the labor context, these groups might be unions intent on benefiting themselves or certain workers; industry groups; large employers; or others. In this case, the regulations produce losses to society overall and to particular groups, but public-choice dynamics result in labor regulation that benefits a small, cohesive group enough to overcome these disadvantages.

[31] For more discussion of this, *see infra*…

[32] *See supra* note …

United States.[33] So the general prediction is relatively straight-forward – increased low-wage competition should decrease the relative labor *conditions* (wages) of similar workers in the United States. There are many debates about how this process works and how smoothly transitions can occur. But that model for labor conditions does not apply very cleanly to labor *regulation*. Consider, for example, something like workers' compensation and assume for the moment that the regulation is net-value. Given this, a particular state, let us say Nebraska, will be in a better competitive position with workers' compensation than without *regardless of the level of wages elsewhere*. Whether the wages elsewhere are high or low, workers' compensation helps Nebraska's competitiveness; eliminating workers' compensation would hurt Nebraska. Thus, the fate of labor regulation depends not on the labor conditions elsewhere, but rather on whether it is net-value *within* Nebraska. If it is, it will be more likely to survive. If not, it will be at risk. But, and this is the principal point here, in a federal system, Nebraska's workers compensation system has already been through the crucible of inter-jurisdictional competition, even before China entered the picture. Nebraska was pushed to get its workers' compensation system calibrated properly by its competition with New York, California, and North Dakota. And if it is calibrated properly to make it as net-value as possible, then the entrance of one more competitor should not matter.

The precise nature of the labor regulation at issue is another important part of the context. Consider, for example, a minimum wage law that applies only to hairstylists or counter workers at fast-food restaurants.[34] What effect would global competition have on a labor law like this which applies only to goods or services that are largely insulated from international trade?[35] The benefits of the law within the jurisdiction will be the same after the entrance of foreign competitors, that is, the hairstylists and local counter workers will receive higher wages. But with global competition some of the costs of it will now be exported. Now *foreign* employers will bear

[33] This process is slowed because wages tend to be rigid downward. *See, e.g.*, Jan Babecký *et al., Downward Nominal and Real Wage Rigidity: Survey Evidence from European Firms*, Policy Research Working Paper No. 5159, The World Bank (Dec. 2009); Carl M. Campbell III & Kunal Kamlani, *The Reasons for Wage Rigidity: Evidence From a Survey of Firms*, 112 Q.J. ECON. 759 (1997); Joseph E. Stiglitz, *Theories of Wage Rigidity, in* KEYNES' ECONOMIC LEGACY: CONTEMPORARY ECONOMIC THEORIES (James L. Butkiewicz et al. 1986).

[34] Haircuts are the prototypical example of nontradable goods. But, as with most concepts, this one gets very sticky in its details. On the one hand, some types of goods and services may be more tradable than commonly thought. For example, fast-food servers would seem to a category requiring local workers and yet technology has permitted some tasks to be exported. Matt Richtel, *The Long-Distance Journey of a Fast-Food Order*, N.Y. TIMES, April 11, 2006, at D11 (drive-through orders at fast-food restaurants are routed to call centers far away). On the other hand, some goods and services may not be viewed as perfect substitutes precisely because they are produced in particular countries. N. GREGORY MANKIW, BRIEF PRINCIPLES OF MACROECONOMICS 294 (5th ed. 2009)(German and American cars may not be perfect substitutes).

[35] Nontradable goods arise from three primary constraints: (1) transportation costs may be too high to permit trade (e.g., trade in cement); (2) some goods and services simply must be provided locally (e.g., haircuts); and (3) legal barriers to trade (e.g. tariffs or quotas).TYLER COWEN & ALEX TABARROK, MODERN PRINCIPLES: MACROECONOMICS 418-19 (2010).

some of these extra costs.[36] In essence, the jurisdiction is able to retain all of the benefits of the law, while exporting a portion of the costs. Thus, all other things being equal, global competition may *increase* the incidence and stringency of laws like this.[37]

This section challenges the race-to-the-bottom claim that the pressure of global competition on labor regulation is always and universally downward. Instead, the claim here is that global competition may cut in the direction of more or stronger labor regulation for a variety of reasons. But as presented in this section, this is only broad theory. The next section analyzes some of these possibilities in more detail.

II. The Value of Labor Regulation

In theory, net-value labor regulation should fare well in the global environment; in fact, it should grow and thrive because its extra value will be even more important as competition increases. This section provides examples of labor regulation that may fall into the net-value category. One must be humble about such claims. This section will also discuss why it is extremely difficult to evaluate the net value of labor regulation. However, what is clear at the end of the day is that one of the pillars of the race-to-the-bottom claim is flawed: it is not true that all regulation clearly has negative net value and, hence, is destined to fall to global competition.

A. Injured Workers: Social Insurance

> Erickson was employed by the railway company as a section hand, and was engaged in his work repairing the roadbed of the railroad near Fremont, when a fast passenger train approached, and he stepped aside to let it pass. As the train passed him, a large piece of coal fell from the tender of the locomotive, struck the ground near him, and broke into smaller pieces, one of which flew towards him, striking him, and causing a fracture of the leg.
>
> Union Pacific Railway Co. v. Erickson, Nebraska Supreme Court, 1894[38]
>
> I suppose we are all in favor of workmen's compensation.

[36] There are three basic ways in which the costs of the minimum wage law might be distributed: some hairstylists and counter employees may lose their jobs, consumers may pay more, and/or the profit margins of employers may be reduced. To the extent the extra costs fell into the last category, foreign employers would share them.

[37] Of course, with all things economic, all other things may not be equal. Changes in the prices of nontradable goods may have knock-on effects in areas such as exchange rates and trade deficits. See Carlos A. Végh, *Non-Tradable Goods & Relative Prices, in* OPEN ECONOMY MACROECONOMICS IN DEVELOPING COUNTRIES (2011).

[38] 59 N.W. 347 (Neb. 1894).

William B. Hornblower, Meeting of New York State Bar Association, 1911[39]

When Lars Erickson was injured in 1894, there was a system for dealing with workplace injuries – the common law tort system for dealing with accidents generally. Using that system, Lars filed a lawsuit, won, and recovered $1,625. To win, however, Lars had to overcome several significant legal hurdles. First, he had to prove that the employer was negligent in permitting the lump of coal to fall from the tender. The Court held that he had proven enough to permit the jury to find negligence, which it had, through evidence that the tender was filled high, that limited precautions were taken to ensure that the coal was secured properly, and that protective railings were placed around the tenders only after the accident. Second, he had to prove that his own negligence did not contribute to his injury. The Court said there was "no room for doubt" that, although he necessarily had to be somewhat close to the tracks, he was far enough away to avoid any "ordinary danger" from a passing train "properly loaded." Third, he had to prove that he had not assumed the risk of such an injury by working for the railroad. The Court said he had not. Lars was a section hand repairing roadbeds. He did not know anything about the risks from stacking coal in tenders. Finally, he had to overcome the fellow servant rule, which generally prevented employees from recovering because of the negligence of other employees. But the Court said the rule did not apply in this case because there was no "consociation in the same department of duty or line of employment" between Lars and the negligent employees. The company was too big to hold Lars responsible for the mistakes of all the railroad's employees.

Lars Erickson's experience was not typical. Most injured workers at that time never filed suit; or when they did, they lost; or even if they won, they did not win much.[40] Margaret Baxter lost in 1894 when she tried to recover for the death of her 33-year-old husband, George, who was run over by a railroad car when his foot got caught in the rails. George knew the tracks were dangerous and, therefore, had assumed the risk of death himself.[41] Anthony Yost, a 20-year-old section hand, failed to recover for his injuries when he was struck by a train engine. He knew trains went on these tracks and he failed to look before crossing the tracks. His own contributory negligence meant he could not recover from the railroad.[42] Ida L. Krayenbuhl failed to recover for

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[39] New York State Bar Association, Proceedings of the Thirty-Fifth Annual Meeting 442 (1912). The statement was made as the Bar Association considered a proposal for an amendment to the state constitution designed to ensure that a system of workers' compensation would be constitutional.
[40] *See, e.g.*, JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMKAING OF AMERICAN LAW 43-70 (2004)(providing a rich description of the problems tort law had in dealing with the rise of industrial accidents during the late 19th and early 20th centuries); DANIEL T. RODGERS, *supra* note ___, at 246 (1998)(in Pittsburg in 1906 and 1907, 25% of families of workers killed on the job received nothing, another 32% received no more than $100, burial expenses only); Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 66 (1967)(most families in New York and Wisconsin received no compensation for fatal workplace injuries; recoveries awarded were small and took a long time; and litigation expenses consumed 44-68% of the awards).
[41] *Missouri Pac. Ry. Co. v. Baxter*, 60 N.W. 1044 (Neb. 1894).
[42] *Chicago, Burlington & Quincy R.R. Co. v. Yost*, 76 N.W. 901 (Neb. 1898).

the death of her husband, John, when he was struck by a train while trying to remove a handcar and railroad tie from the tracks. The train may have blown a warning signal and, if so, the railroad simply may not have been negligent. This was the result even though Krayenbuhl's efforts avoided a train wreck that may have cost many lives. As the Court said, his "conduct was not negligence; it was heroism."[43] But if the railroad was not negligent, it did not need to pay for heroism. In Nebraska in 1896, heroism at work was laudable, but not usually compensable.

What happened next is a familiar story: what to do about injured workers became one of the most important and debated issues of the first quarter of the 20th century. After a brief feint towards employer liability statutes which made the tort system more amenable to injured workers,[44] the country overwhelmingly and swiftly turned to workers' compensation statutes as the solution to the problem, and that solution remains the predominant one today.[45]

Most of this story is both somewhat misleading and not central to our purposes. The story may be misleading because it makes it seem as if workers' compensation was the obvious and virtually pre-ordained solution to this complex problem. As John Fabian Witt put it "to move [from the crisis of worker injuries] to workmen's compensation is to jump to the end of the story, to tell it backward from its conclusion."[46] But that is not at all what really happened. Instead, again in Witt's words, the crisis "precipitated a scramble for alternatives to the law of torts among working class families seeking protections against the mounting risks of injury and death."[47] I would add that the scramble was not only among working class families, or even mostly among them, but rather one by politicians, judges, academics, other policymakers, and the general public. Many alternatives were considered and many end points were possible, including employer liability statutes, cooperative insurance schemes, commercial insurance, vigorous safety regulation, and, of course, workers' compensation.[48] Workers' compensation may have prevailed almost by accident, as suggested by Witt,[49] or because of the influence of developments overseas,[50] or for other reasons. But it certainly was not preordained.

Workers' compensation as the ultimate endpoint in this policy scramble is also not central to our purpose. The purpose here is to explore how regulatory responses to worker injuries

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[43] *Omaha & R.V.R. Co. v. Krayenbuhl*, 67 N.W. 447, 449 (Neb. 1896).
[44] In general, these statutes limited the broad defenses employers used successfully to defend against tort liability. *See* C. ARTHUR WILLIAMS, JR. & PETER S. BARTH, COMPENDIUM ON WORKMEN'S COMPENSATION 13-18 (1973).
[45] *Id.*
[46] JOHN FABIAN WITT, THE ACCIDENTAL REPUBLIC: CRIPPLED WORKINGMEN, DESTITUTE WIDOWS, AND THE REMAKING OF AMERICAN LAW 70 (2004).
[47] *Id*.
[48] Moreover, to say that workers' compensation won the policy battle is to gloss over a great deal of variety in workers' compensation systems. In a very real sense, there was not one winner, but fifty (or more) distinct winners.
[49] WITT, supra note ___, at 210-11.
[50] For a good and rich description of the influence of developments in Europe on American social policy, see DANIEL T. RODGERS, ATLANTIC CROSSINGS: SOCIAL POLITICS IN A PROGRESSIVE AGE (1998).

will fare in a globalized environment. Will this type of regulation survive and evolve, maybe even grow? Or will it wither and die, as predicted by the conventional wisdom? What is it about regulation of this particular problem that makes it likely to fall into one category or the other?[51]

The first step here is to think about the nature of the problem. Different workplace issues present different problems to be solved. The workers' compensation "problem" is different than the leave time "problem" which, in turn, is different than the low wages "problem."[52] As I will discuss, differences in the nature of the problem are likely to have important consequences for the cost of labor regulation and, hence, for the fate of labor regulation in the face of globalization.

The basic problem with workplace injuries is how to insure workers and society against the losses caused by the injuries. Workplace injuries are inevitable, but they are much more likely with some employers than others, and with certain workers. One of the principal causes of the push for workers' compensation in early 20th century America was the dangerousness of the new industrial employers, especially the railroads. In 1889, for example, 2,000 railroad workers were killed and 20,000 injured. With about 700,000 total railroad workers, this meant that in a single year one out of every 350 workers was killed and one out of every 35 was injured. But even among railroad employees, some were especially at risk. Trainmen – engineers, firemen, conductors and brakemen – were even more maimed. One in every 117 was killed and one of every twelve was injured.[53] (To provide a comparison, in 2011, one out of every 28,571 American workers was killed in an occupational accident[54] and one out of every 28 was injured enough to miss work.)[55] As a result, what we are talking about here is a type of social insurance:

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[51] Workers' compensation is a good place to begin because it is obvious that a regulatory response is necessary. Workers *will* get injured. Society *will* settle on a system for dealing with those injuries, one way or another. Even a system that says workers can never recover from employers *is* a system. In fact, as I will discuss below, such a system is pretty close to the one faced by Lars Erickson in Nebraska in 1894. Although this is obvious for the problem of injured workers, it is also generally true. If we think of regulation broadly enough to include no response, there *is* a regulatory response to all workplace problems. The key here is not to try to define some point on the continuum when very low regulation becomes no regulation, but rather to determine what fits within the category of a "workplace" problem. In the United States, most non-elderly people receive their health insurance through an employer. So that problem tends to be categorized in this country as a "workplace" problem. But that is not true in most other industrialized countries, and it may not be true forever in the United States. So the "workplace" categorization is not without problems. However, it is not one of the problems addressed by this article. I will deal only with issues that always have a close connection with work in every society, issues such as work injuries, leave time, child labor, and low wages. My consideration of these areas may well have implications for the effect of globalization on regulation in other areas, but my focus is on workplace regulation.

[52] I will discuss these other problems later. *See infra* at ___.

[53] WALTER LICHT, WORKING FOR THE RAILROAD: THE ORGANIZATION OF WORK IN THE NINETEENTH CENTURY 191 (1983).

[54] BUREAU OF LABOR STATISTICS, FATAL WORK INJURY RATES, BY AGE GROUP, 2011*, available at* http://www.bls.gov/iif/oshwc/cfoi/cfch0010.pdf.

[55] BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, WORKPLACE INJURIES AND ILLNESSES – 2011 (2012), at Table 5, *available at* http://www.bls.gov/news.release/archives/osh_10252012.pdf. The injury statistics from then and now look closer than they actually are. Today "injuries" means something serious enough

how can we provide workers and society with protection against these kinds of losses? Again, *every* system of regulation, even no regulation, will provide this protection in one way or another, for better or worse.

Given this, let's think about two possible regulatory approaches to the problem of workplace injuries. On one end of the continuum, one could imagine a less-than-tort-system response: a Hobbesian world in which injured workers simply had no recourse against employers. This world sounds odd to modern ears, but it is not unimaginable. In fact, it is pretty close to early 20th century America when the "unholy trinity" of contributory negligence, assumption of the risk, and the fellow servant rule blocked most lawsuits. This meant there was only a small window of employer liability for large injuries and, because the costs of suing were high, there was effectively no remedy at all for small injuries, even when employers were clearly at fault and workers could avoid the unholy trinity. Let's call this world "Hobbes."

First, let's think about employers in Hobbes. At first glance, one might think that employers get off scot-free. But that would be wrong. In early 20th century America, why would any worker take a job as a switchman (coupling and uncoupling railroad cars) where the chances of a disabling injury in any year was one in seven when one could work for the same railroad as an office or station employee where the chances of such an injury were only one in 167?[56] Or why would one work today selling garden equipment instead of appliances when one is more than twice as likely to be injured by garden equipment (go figure)?[57] The answer is that a worker might work at the more dangerous job if the employer paid more for that job. How much more would the employer have to pay to get people to work as switchmen and garden equipment sellers? Well, in a perfect world where the labor market is competitive, workers have perfect knowledge about job risks, and people can move freely between jobs, the extra wages would exactly compensate switchman and garden mavens for the extra risk they assume.[58] The extra wages would be enough to cover any lost wages, the pain and suffering from the injuries, and all other costs, but it would only do so by the extra probability that they would be injured. The extra employers would have to pay workers would, in turn, encourage employers to think about work injuries. In our perfect world, if they could make work safer for switchmen and garden equipment sellers, they would be willing to spend money to do so as long they saved at least that amount of money on the wage premium. On the other hand, if paying for the extra risk of injury was

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to require a day away from work or a reassignment; in the early 20th century many of the things we would classify as "injuries" today would not have been recorded as such then.

[56] LICHT, *supra* note __, at 195.

[57] BUREAU OF LABOR STATISTICS, U.S. DEPARTMENT OF LABOR, WORKPLACE INJURIES AND ILLNESSES – 2011 (2012), at Table 1, *available at* http://www.bls.gov/news.release/archives/osh_10252012.pdf. Garden equipment sellers are injured at an annual rate of 5.4 workers per 100 workers, while appliance sellers are injured at an annual rate of 2.1 workers per 100 workers. (I have cheated a little here; the "garden equipment" category is actually sellers of "building material and garden equipment and supplies" and the "appliance" category is actually "electronics and appliance stores."

[58] *See* Ronald G. Ehrenberg, *Workers' Compensation, Wages, and the Risk of Injury, in* NEW PERSPECTIVES IN WORKERS' COMPENSATION 71-81 (John F. Burton, Jr., ed., 1988).

cheaper than making the safety improvements, the employer would just pay the extra wages, again, in our perfect world. (Don't worry, we're going to get to the real world pretty soon.)

So where does this leave injured workers in Hobbes? The problem for workers is that they only receive increased wages for the extra *risk* they will be injured, not for the full cost of injuries when they occur. So even a worker who received a fair (or more-than-fair) wage premium for her extra risk of injury would come out a big loser if she got injured on her first day on the job. She would have received only a very small increase in her total wages, but suffer the full cost of an injury. On the other hand, a worker who is lucky and never gets injured would come out ahead; he would get the wage premium, but never suffer the costs of an injury. There's a solution to this problem – insurance. Insurance would equalize the experience of our two workers; the injured worker would be compensated, while the uninjured one would pay premiums. In a perfect world (here we go again), the premiums would exactly equal the wage premium for the dangerous work. In the early 20th century, the need for this type of insurance was met in a number of different ways. Commercial insurance companies offered work accident insurance; unions and other worker groups established cooperative societies for this purpose; and even some employers offered this type of insurance as an employee benefit.[59]

Let's leave Hobbes for the moment, and think about another regulatory approach to the problem of workplace injuries: workers' compensation. Compared to Hobbes, workers' compensation flips the liability question on its head. Instead of never being liable, employers are *always* liable for workplace injuries, even if the employer is not negligent at all, even if the worker's negligence contributed to her injury, even if the worker is well aware that the work is dangerous.[60] But workers do lose something: In exchange for the expansive protection, workers' compensation provides a level of compensation that, *by design*, leaves injured workers worse off than if no injury had ever occurred.[61] The primary limit on compensation is that no recovery is provided for pain and suffering. In general, workers' compensation provides medical care, rehabilitation costs, and something less than full wages, but that is all.[62] One thing this too-low level of benefits does is to provide rough protection for the system; for example, workers will not

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[59] For a good discussion of these developments, see WITT, *supra* note ___, at 71-125. On employer-provided insurance, presumably (following the reasoning in the text above) employers would provide this insurance when the costs of insuring their employees against work injury losses were lower than the wage premiums they would have had to pay otherwise

[60] This is a good description of the core bargain of workers' compensation, but obviously I'm leaving out a lot of nuance, for example, issues often arise over whether an injury really occurs in the workplace or not, whether an employee's conduct was so far beyond contributory negligence that she shouldn't be covered, and so forth.

[61] Richard A. Epstein, *The Historical Origins and Economic Structure of Workers' Compensation Law*, 16 GA. L. REV. 775, 800 (1982).

[62] In addition, there are caps on workers' compensation recoveries, so high-wage employees are not fully covered even for their wage losses. *See* STEVEN L. WILLBORN ET AL., EMPLOYMENT LAW: CASES AND MATERIALS 876-879 (5th ed. 2012). Although this is the general structure, workers compensation is a state-level program and there are significant differences between the states in how these benefits are calculated and in their generosity.

feign injuries and will take adequate care to protect themselves from injury because workers compensation, while providing some protection, leaves them worse off than if they continue working.[63] Let's call this system "WC."[64]

So in general terms, what does WC mean for employers and workers compared to Hobbes? First, employers must now provide a basic level of insurance against workplace injuries. This, in turn, should reduce the wage premium they need to pay because workers are no longer exposed to the risk of *uncompensated* workplace injuries. WC should also encourage employers to pay attention to workplace safety because they will have to pay for injuries. At the least, employers should be willing to expend money to improve safety to the extent that it costs less than the workers' compensation payments that would be required for any injuries that would occur without the safety improvements. At the same time, however, WC will not reduce the wage premium to zero because, by design, the system does not provide full coverage. Any of the expected costs resulting from workplace injuries that are *not* covered by workers' compensation will still be built into wages. As a result, today in the United States, even with workers' compensation, there is a wage premium for dangerous work.[65]

Second, the turn to WC means that all workers now have at least some insurance against workplace injuries. This will displace private commercial insurance and worker cooperatives that might have arisen otherwise. But unlike Hobbes where workers might choose to go uninsured, under WC all workers are required to be insured. So no one will be completely unprotected. However, at the same time, as indicated above, workers' compensation does not provide full coverage. For the uncovered portion of their risk, workers are still in a Hobbesian world with all that entails, such as wage premiums, differences in outcomes for injured and uninjured workers, and the possibility of private insurance.

So what might this example teach us about the race-to-the-bottom claim? Although race to the bottom proponents are often unclear about what the "bottom" might be, Hobbes is a likely candidate for the problem of workplace injuries. At the very least, it is closer to the bottom than WC. In Hobbes, the government does not require employers to provide insurance or, indeed, do anything at all about the problem of workplace injuries. By contrast, WC requires employers to provide insurance against the risk of workplace injuries, requires them to pay for it, and requires an administrative structure to administer the insurance system. So would globalization cause a race from WC to Hobbes?

The first step is to examine the Chicago School syllogism: All labor regulation is costly, globalization will eliminate costly regulation, and therefore WC is doomed. There is no doubt

[63] Epstein, *supra* note ___, at 800..
[64] Two points about this. First, I'm using "WC" to refer to the *system* of workers' compensation, not to the payments themselves or any particular aspect of the system. Second, we all have to agree to remember that this does not refer to water closets.
[65] *See* Ehrenberg, *supra* note ___, at 78-81.

that, on its face, WC is more costly than Hobbes. Again, WC requires employers to provide insurance and to pay for it, and it requires an administrative structure; Hobbes requires none of that. But the flaw in the Chicago School syllogism is that it does not examine costs broadly enough.[66] Employers and society are not worried only about the direct costs of WC. Instead, they are worried about the overall costs of the system for dealing with workplace injuries. Even if WC imposes more direct costs on employers, society *and employers* may favor it if it reduces the overall costs of the system.[67]

The question, then, is how do the two systems, Hobbes and WC, compare on overall costs? The Chicago School generally approaches an issue like this by beginning with a formal, idealistic examination of the two systems, that is, by assuming a world in which markets are competitive, all the parties have perfect information, transactions are costless, there are no external costs, and so forth. Viewed in this way, the Chicago School syllogism is quite ironic because it means there is no difference between Hobbes and WC and, hence, no reason to favor one over the other. Under Hobbes, employers will pay more for workers at higher risk of injury, but only if it is cheaper to pay the wage premium than to make the workplace safer. Thus, employers will invest in safety until the workplace is optimally safe (or, if you prefer, dangerous).[68] At the same time, the wage premium will exactly match the worker's expected costs from the injuries that will occur from the remaining workplace risks. On the worker side, workers will be able to buy insurance at exactly the cost of the extra risk (that is, at exactly the cost of the wage premium they receive) because the insurance market will work perfectly, too. Under WC, the only difference is that the employer rather than the worker will buy the insurance, but it will be at exactly the same cost, which will produce exactly the same protection for workers and the same investments in workplace safety.[69] Thus, beginning with the costs of the system overall rather than with assumptions about the costs of government regulation, the initial Chicago

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[66] This implies that the race-to-the-bottom claim is supported by salience bias. That is, to the extent regulatory costs, such as the costs of WC, have more salience than other costs, that bias would place extra pressure on regulatory costs compared to other costs. *See generally* Jacob Goldin, *Sales Tax Not Included: Designing Commodity Taxes for Inattentive Consumers,* 122 YALE L.J. 258, 264-66 (2012); Deborah H. Schenk, *Exploiting the Salience Bias in Designing Taxes*, 28 YALE J. ON REG. 253, 272-73 (2011).

[67] In law-and-economics terms, the goal is to reduce the sum of accident costs and prevention costs. In this context, accident costs include the harm suffered by workers and any costs associated with the system for resolving disputes. Prevention costs are the expenses of avoiding workplace injuries, such as safety equipment.

[68] That is, for every remaining danger in the workplace, it will be cheaper just to pay workers for their injuries than to make the workplace any safer.

[69] A couple of additional points about this. First, one difference is that in Hobbes, but not in WC, employees would be able to choose whether to buy the insurance or not. But that would not affect overall costs. It would only mean that the group of "self-insured" workers would bear the costs of their injuries individually, rather than have the costs covered collectively through insurance. How the costs are distributed between individual workers and the insurance companies is irrelevant to overall costs. Second, this approach assumes that transactions are costless, so the administrative costs of the WC system are assumed away. But so are the administrative costs of the insurance system. More about that later. *See infra* at ___.

School analysis indicates that the systems will produce exactly the same outcomes.[70] Given this, globalization will have no effect on the choice between Hobbes and WC. Not much will. Everybody is indifferent between the two.

The real issue, however, is how do the overall costs of the two systems compare in the real, non-Chicago world? What happens when there *are* transaction costs and other market flaws? This world, the real world, is much more complicated and opaque than pristine Chicago. Consider Hobbes first. The real problem here is on the insurance side. An important factor that led to workers' compensation in the early 20th century was the failure of all the other insurance options. Commercial insurance excluded many of the most dangerous occupations; disclaimed coverage for many common situations resulting in injury (such as "voluntary exposure to unnecessary danger" and failure to use "due diligence for … personal safety"); and had great difficulty policing fraudulent claims.[71] On the last point, the most famous insurance executive from that time, Mark Twain, once quipped that his company was especially important because "[n]o man can take out a policy … and not get crippled before the year is out."[72] Another insurance possibility, worker cooperative associations, began at that time, but suffered classic unraveling through adverse selection. When workers in the safest jobs declined to join, premiums went up, which caused the next level of workers to abandon the association, causing another uptick in premiums, and so on until the whole scheme unraveled.[73]

The failure of the insurance options, of course, did not mean that the costs disappeared. Workers were still getting injured and the costs of those injuries would still be covered in some way. The ultimate distribution of the costs without insurance is especially murky, but several of the possibilities point back to employers. Most directly, workers might ask for a higher wage premium for dangerous work. If they could not insure against the bad outcome, they would need more upfront to make the job comparable to a less dangerous one. More indirectly, when uninsured workers were injured, they might fall back on public programs to pay for their medical care and to support themselves and their families. But these public programs would have to be paid for and employers would undoubtedly be one group helping to cover the costs. Costs would be distributed to others, too – taxpayers other than employers, charitable groups, injured workers and their families. But even though it is impossible to say precisely how much, there is no doubt that failure of the insurance markets for injured workers meant that employers would have to pay something extra on top of the normal wage premium for dangerous work.

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[70] Adding to the irony is that this outcome is an application of the most famous theorem in Chicago School economics, the Coase Theorem. The Coase theorem holds that in the absence of transaction costs, the efficient (most cost effective) solution will be reached through private bargaining regardless of the legal rule. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).
[71] WITT, *supra* note ___, at 75.
[72] *Id*. (quoting Mark Twain).
[73] *Id*. at 71-102. Unraveling was also a problem with commercial insurance, of course, and is one of the reasons they adopted the rules mentioned earlier in the paragraph.

One way to view WC is as a reaction to the failure of the private insurance market. Indeed, if the *only* effect of WC was to correct the *single* market flaw of the unraveling of the insurance market in Hobbes, it was certain to be a better approach to the problem of injured workers. By definition, moving from a flawed market (Hobbes) to a perfect one (WC) is an improvement. But there were many market flaws in Hobbes, not one, and WC may or may not have "solved" that flaw. When there are multiple flaws in a market, lessening one flaw will have an uncertain effect. It may worsen the outcome, make it better, or leave matters the same; it is impossible to know in theory.[74] Instead, there is no alternative to the murky, difficult business of examining the relative costs of the two systems. And WC is just as murky on costs as Hobbes: how much should employers be charged for the insurance, how generous should the benefits be, what procedures should be used to make sure injuries were really workplace injuries and to determine the proper recovery, and so forth.

What does all this mean for the basic race-to-the-bottom argument that all labor regulation is costly and, therefore, all of it is at special risk by globalization which will squeeze out costly regulation? Or, more particularly, what does it mean for the claim that WC regulation is costly and will be squeezed out in favor of Hobbes?

First, this discussion demonstrates that the claim that all labor regulation is costly and therefore at risk is sometimes simply incoherent. For worker injuries, society will have to address the issue one way or another. Even Hobbes is a type of regulation designed to address the issue. Globalization will not and cannot make the issue disappear. Thus, the basic claim is better formulated as a comparative one: globalization will put pressure on labor regulation that is more costly compared to other alternatives.

Second, the comparative evaluation required by the race-to-the-bottom argument is very complex and deeply empirical. This examination of worker injury regulation demonstrates that evaluation only of the direct costs of regulation is insufficient. That is, it is insufficient to point only to the direct costs of WC such as insurance costs to employers, payments made to injured workers, and the costs of the administrative structure. This is because every system for dealing with worker injuries occurs within a broader market for labor. Every "cost" of WC will create ripples elsewhere in the system, for example, in the level of wages and in the types of investments employers make in safety, which will affect the number of injuries. Only a comparison of the total effects of systems will be sufficient to determine which is best and, hence, which will be favored by the pressures of globalization. In fact, although this discussion has demonstrated the complexity of the comparative evaluation, I have simplified it for expository purposes. I considered only two systems, rather than the multiplicity of possible systems that might be constructed. For example, I did not consider a tort system for dealing with workplace injuries, or one requiring employers to comply with government-mandated safety standards, or various

[74] This is one aspect of a well-known principle in economics known as the general theory of second best. The seminal article is R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

combinations of the systems,[75] or even detailed versions of either Hobbes or WC. The complexity of the evaluation required by the race-to-the-bottom argument makes it unlikely that there will be a race or that it will be towards a single bottom. Complex evaluations take time and may well arrive at different conclusions about which system is best.[76]

Finally, this discussion has demonstrated that the claim by race-to-the-bottom proponents that little or no regulation will always be favored by globalization is highly questionable. Regulation dealing with worker injuries presents both empirical and theoretical reasons to doubt the claim. Empirically, the available evidence is that WC is the more efficient system and, hence, would be favored by globalization, rather than doomed by it. The historical evidence supports this. In the early 20th century, the movement away from something like Hobbes to WC was favored by *both* workers and employers.[77] This is consistent with a claim that the WC system was more efficient; both sides could come out ahead only if that was the case. Thus, it is inconsistent with the claim that less regulation is always preferable. The contemporary evidence also supports the notion that WC is the preferable system. WC is primarily based in state law and the same dynamics the race-to-the-bottom proponents claim for globalization should be in operation as states compete against one another. Thus, if Hobbes or something like it was a better system for dealing with workplace injuries, states should be under pressure to abolish WC. Yet none have. WC is still the predominant way of dealing with workplace injuries in every state. Again, this is consistent with a claim that WC is a better system than Hobbes (and other regulatory alternatives) for dealing with the problem of workplace injuries. It is inconsistent with the race-to-the-bottom claim that little or no regulation will always be favored. [78]

More broadly, workplace injuries are an example of a type of regulation that might survive, or maybe even thrive, in regulatory competition: social insurance. The situation is one in which workers are exposed to a risk which, if it occurred, would impose costs they would be unable to cover out of their own resources. Thus, some sort of insurance to spread risk across workers is required. A government program may well be the best solution to this problem when it

[75] Since the systems tend not to be exclusive, many combinations are possible. In fact, our current system, at the least, combines state WC systems with state and federal safety standards. The number of possible combinations is very large.
[76] Comment on federalism advantage here; different states with different systems are experiments for determining best system. Will talk later about one thing this means for globalization: should expect less effect in federal systems (like the US and Germany) than in non-federal systems (such as the UK).
[77] Ironically, employers supported the movement sooner than labor. Employers were beginning to be burdened by tort liability and were worried about expanded liability with the passage of employer liability statutes, which eased tort standards for recovery. Unions hoped that the employer liability statutes would produce a more favorable system than WC, but eventually abandoned that belief and began to support WC. *See* Williams & Barth, supra note ___, at 13-18.
[78] The claim here is *not* that inter-jurisdictional competition has not put pressure on state WC programs. Clearly, it has. *See* Emily A. Spieler & John F. Burton, Jr., *Compensation for Disabled Workers: Workers' Compensation, in* NEW APPROACHES TO DISABILITY IN THE WORKPLACE 205, 220-224 (Terry Thomason *et al.,* eds., 1998). Rather, the claim is that such competition has not resulted in an abandonment of the workers' compensation regulatory structure in favor of a low- or no-regulation approach.

is designed to solve flaws with alternative low- or no-regulation systems. In the case of worker injuries, a no-regulation system would inevitably run into standard insurance problems, such as unraveling, that a public program may be able to avoid. A low-regulation system, such as tort law, would also encounter problems that might be addressed by WC, such as providing protection for smaller workplace injuries and holding down transaction costs. Certainly, a WC system can be designed badly and, as a result, be inferior to other ways of dealing with workplace injuries. If so, globalization would place it at special risk. But it is also possible that a WC system can be designed effectively to solve problems that cannot be solved well with less regulation. In that case, globalization should not threaten WC. Instead, it should make it more likely to survive and grow.

We have used workplace injuries as our example in this section, but other types of labor regulation also fall into this category. Unemployment compensation is another major area where labor regulation seems to be preferable to private insurance. Private insurance against the risk of unemployment is certainly possible, but maybe only as a theoretical curiosity. It turns out the adverse selection problems are just too great for a real market to develop; workers who are willing to buy this insurance know too much about their own personal risk of becoming unemployed.[79] So we see virtually no private unemployment insurance. Instead, we see government plans everywhere. If globalization increases the volatility of jobs, the risk of unemployment may well go up as globalization increases. That would mean the demand for unemployment insurance should also go up. Since it can only be provided effectively by the government, this may well mean that globalization will result in *more* of this type of labor regulation.

Workers' compensation and unemployment insurance fit easily into this category. Other classes of labor regulation may also fit, although somewhat less well. Health insurance is one possibility here, although the United States is unusual in how it ties health insurance to employment. If less closely tied to employment, health insurance fits into this category less well. (Although then it may be an example of non-labor regulation that might survive globalization. But that is a topic for a different article.) Extending further, regulation of plant closings, mass layoffs, or even discharges might fit into the category. Really stretching our wings, it may even be that regulation designed to reduce wage disparities between low and high income workers could fit into the category. This type of regulation would also reduce the impact of unemployment and other types of job volatility.[80] But the point here is not to explore the broader reach of the category. The point is to claim that there is a category like this where well-designed labor regulation is likely to survive and may even thrive in the face of globalization.

[79] *See* Ron Lieber, *Good Luck Getting Private Insurance for Unemployment*, NEW YORK TIMES, May 7, 2009.
[80] A wider income distribution means that the harm from a period of unemployment would be greater, on average. Thus, narrower wage distributions would lessen the impact of unemployment. *See* Linda Bell & Richard Freeman, *The Incentive for Working Hard: Explaining Hours Worked Differences in the U.S. & Germany*, 8 J. LAB. ECON. 181 (2001).

Lars Erickson undoubtedly would have been surprised if he had heard years after his accident that "we are all in favor of workers' compensation."[81] But that happened in the following decades. The discovery was that government regulation could solve the serious social problem presented by workplace injuries better than any of the other alternatives. The evidence from the States, which all use workers' compensation to address the issue, is that we still think that. Globalization should not threaten that consensus, and may solidify it.

B. Leave Time: Individual Benefits

> [Anthony Fioto was fired] from his job as sales manager at Manhattan Woods Golf Club after he took a day off work to be present while his dying mother underwent emergency brain surgery.
>
> Fioto v. Manhattan Woods Golf Enters.[82]
>
> [I]t is clear [because of adverse selection] that the market solution will not provide universal insurance even though all individuals are willing to pay more than it costs to insure themselves. [This suggests] that it may be optimal for the government to intervene in the provision of goods that some employers provide their workers.
>
> Lawrence H. Summers, Some Simple Economics of Mandated Benefits[83]

Anthony Fioto did not have the right to take the day off to care for his mother.[84] But he was not alone. Audrey Seidle was fired when she stayed home to care for her four-year-old son who had an ear infection.[85] Kimberly Troupe was fired when she was often tardy and absent from work because of morning sickness during her pregnancy.[86] Diane Piantanida was fired when she wanted to spend more time at home with her newborn child.[87] None of these people had any legal right to take time off work for these reasons.

At first glance, this would seem to support the basic Chicago School syllogism: labor regulation requiring leave time is costly; jurisdictional competition (in this case, mostly

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[81] *See supra* note ___.
[82] 270 F. Supp. 2d 401, 402 (S.D.N.Y. 2003).
[83] 79 AEA PAPERS & PROCEEDINGS 177, ___ (1989).
[84] The court held that he had no right to leave under the Family and Medical Leave Act, but it violated his individual employment contract for the company to fire him for his misconduct.
[85] *Seidle v. Provident Mut. Life Ins. Co.*, 871 F. Supp. 238 (E.D. Pa 1984).
[86] *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994). This case also resulted in a famous quote by one of the most famous Chicago School academics turned federal judge. In this case, Judge Richard A. Posner famously said that "[e]mployers can treat pregnant women just as badly as they treat similarly affected but non-pregnant employees." *Id*. at 738.
[87] *Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340 (8th Cir. 1997).

competition between States) will squeeze out costly regulation; therefore, none of these people had any legal rights to leave time. But as usual, the story is much more complicated. First, there is a federal law, the Family Medical and Leave Act (FMLA),[88] which provides unpaid leave for many situations, even though it was not broad enough to help these people.[89] Second, at least 22 states and dozens of localities provide greater rights to leave time than the FMLA.[90] Some of those laws, had they applied, would have protected these people. If the basic syllogism worked, all of these laws should have been squeezed out through competition from other lower regulation States and localities. Third, at least 17 of the top 20 industrialized countries have laws providing for work flexibility.[91] Most of those laws would have protected these people, too. None of these laws would exist if the basic syllogism applied.

The story about how this kind of regulation may survive is different than the story about social insurance. For social insurance, the basic story was one where insurance was required and, hence, subsidies across workers were inevitable. Workers seriously injured the first day on the job needed insurance for their losses; they needed subsidies from somewhere else. Workers compensation is a solution to that problem that may be superior to other solutions. With leave time, however, the benefit is very small scale in comparison to workplace injuries, or unemployment, or health insurance. For leave time, it is possible for every individual worker to pay for her own leave time without any subsidies from anywhere else.

So let us begin the story with a world in which every worker wants leave time to attend to sick mothers or newborn children. But providing a flexible workplace costs employers something. Employers will sometimes need to scramble to find a replacement, may have to train the replacement, may have to pay overtime to a co-worker, etc. Let us begin by also assuming that *every* individual worker is willing to pay more than it costs the employer to provide the leave time. Using normal Chicago School reasoning, one would expect to see *every* employer offer leave time in this circumstance. The employer would offer the leave time and reduce wages by somewhere between the cost to the employer and the value to the worker. (Remember, we've assumed there is a gap here.) As a result, both employer and worker would come out ahead. Would we see every employer offer leave time? Would we see *any* employer offer leave time?

Even in this extreme circumstance – even when every individual employee is willing to pay more than the costs of her leave – several things make it possible, probably even likely, that *no* employer will offer leave time. First, let's say there are two types of workers. Type X workers value leave time at $300 and it would cost employers only $250 to provide it.[92] Type Y workers

[88] 29 U.S.C. §§ 2601 *et seq*.
[89] The FMLA covers only large employers and requires unpaid leaves only in certain narrowly specified circumstances. *Id.* at §§ 2611(4), 2612(a).
[90] STEPHANIE BORNSTEIN & ROBERT J. RATHMELL, CAREGIVERS AS A PROTECTED CLASS (2009).
[91] ARIANE HEGEWISCH & JANET C. GORNICK, STATUTORY ROUTES TO WORKPLACE FLEXIBILITY IN CROSS-NATIONAL PERSPECTIVE (2008).
[92] This could be $300 and $250 per year, or $3.00 and $2.50 per hour, or $0.30 and $0.25 per hour. It does not matter for our purposes; use whichever variation suits your tastes.

value leave time at $100 and it would cost employers only $90 to provide it. In addition, let's say no employer offers leave time and these workers are each 50% of the labor force.[93] Will any employer begin to offer leave time? Consider an employer who offers leave time and reduces wages by $95. The employer will attract both types of workers, but it will lose big-time on the deal. The average cost to the employer of providing the leave would be (0.5 * $90) + (0.5 * $250) = $170. No employer will make that deal – reducing wages by $95 to provide a benefit costing $170.

The other alternative is for the employer to offer leave time and reduce wages by between $250 and $300, let's say $275. An employer that does this will attract only Type X workers and, at first glance, would appear to come out ahead on the deal; the employer would save $275 in wages while providing a benefit that costs the employer only $250 on average. But there are two important reasons for thinking that no employer would pursue this second option either. First, $300 is the average value placed on leave by Type X workers and $250 is the average cost. But some Type X workers, those who really think they will need the leave time badly, will value it even more than $300 and, probably, they will be right. And these workers will really seek out and apply for jobs with leave time as a benefit. Because it will attract a particular subset of Type X workers, the benefit will probably end up costing the employer a lot more than the average cost of $250 and, probably, even more than the amount it reduced wages, $275. If so, again, this would be a losing proposition. Even apart from these financial calculations, there is also another reason an employer may be reluctant to offer a wage/leave time package that will attract only Type X workers. Let's say, as is probably the case, that Type X workers are mostly women and Type Y workers are mostly men. (Did you get the hint?) If so, offering the package would result in a segregated workforce; the employer would attract only female workers. The employer may not want that either. So there we are. Even if *all* workers value leave time more than it costs employers to provide it, it is entirely possible, maybe even likely, that *no* employer will offer it. Even in the best case, only half the workers who want leave time would be offered it, only Type X workers. This is a classic first-mover problem.

Another problem in our hypothetical is that an employer may not really know how much workers value leave time. Think of it from the workers' perspective. An employer comes in and says, "Say, I'm thinking of reducing your wages by $1,500, but I'll provide you with two-weeks of unrestricted leave each year in return. What do you say?" Let's assume you really deep-down value the benefit at $2,000. Well, what *do* you say? The best outcome for you is to refuse to have your pay reduced, but to still get the benefit. Who knows, if you say no, enough of your co-workers may say yes that you get the benefit anyway. This is a free rider problem. Every individual worker's goal is to position herself as a free rider, somebody who gets the benefit without paying for it. But if every worker positions themselves as a free rider, the benefit is never offered. That certainly is a possible outcome. Or maybe an individual worker would say that she would think about the offer for a wage reduction of $1,000, but not $1,500. Here the goal is to

[93] This example is a variation of one in an article by Lawrence Summers. *See* Summers, *supra* note ___, at ___.

signal that the worker really would like the benefit but, hey, getting it for less would be better. And it would be. Except that if every worker did this, again, the benefit might never be offered at all, even though all employees value it more highly than it costs the employer to provide it. This is a strategic bargaining problem. In both the free rider and strategic bargaining situations, even though all employees really prefer a package of leave time and lower wages to a package of no leave time and higher wages, the employer never finds that out. Each individual employee's best strategy is to hide her true valuation. As a result, the preferred package is never offered.[94]

Finally, it may be that workers really do value leave time at more than it costs the employer to provide it, but they just do not know it. This is not as implausible as it sounds. Human beings, it turns out, are systematically and predictably over-optimistic. Most people think they are better than average drivers and that they will earn more than average earnings over their lifetimes, even though this cannot be true (averages are stubborn things).[95] Moreover, people tend to place an unduly low value on benefits that might occur in the future. For example, people often choose to receive $100 today over $110 tomorrow, even thought that is a pretty decent interest rate (roughly, an annual interest rate of 3,650%).[96] There is no dispute that people systematically deceive themselves in these ways -- this is one of the hottest areas of legal/psychological work, it has already earned one Nobel prize,[97] there are fancy technical names for the biases (in our situation, the first is called "optimism bias" and the second is called "hyperbolic discounting"), and these findings have already made their way into the statute books.[98] In our particular

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[94] Unions, of course, are a solution to this kind of problem. One of the theoretical advantages of unions is that they provide a voice for workers collectively, which eases these kinds of informational problems. *See* Richard R. Freeman & James L. Medoff, WHAT DO UNIONS DO? (1984)(one of the principal functions of unions is to provide a mechanism for employee voice). But unions are very rare in the United States, especially in the private sector. BUREAU OF LABOR STATISTICS, UNION AFFILIATION OF EMPLOYED WAGE AND SALARY WORKERS BY OCCUPATION AND INDUSTRY (2012), *available at*, http://www.bls.gov/cps/cpsaat42.pdf (in 2011, 7.6 percent of private-sector wage and salary workers and 13.0 percent of all wage and salary workers were represented by unions).

[95] *See* Sean Hannon Williams, *Sticky Expectations: Responses to Persistent Over-Optimism in Marriage, Employment Contracts, and Credit Card Use*, 84 NOTRE DAME L. REV. 733, 742-45 (2009). For examples of studies incorporating optimism bias into legal analysis, see Ron Harris & Einat Albin, *Bankruptcy Policy in Light of Manipulation in Credit Advertising*, 7 THEORETICAL INQUIRIES L. 431 (2006), and Avishalom Tor, *The Fable of Entry: Bounded Rationality, Market Discipline, and Legal Policy,* 101 MICH. L. REV. 482 (2002).

[96] *Time Discounting and Time Preference: A Critical Review*, 40 J. ECON. LITERATURE 351, 360-63 (2002).

[97] Daniel Kahneman, one of the two people most responsible for this area of research, won the Nobel Prize in Economics in 2002. (As a latecomer, this prize is officially known as the Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel). *See* Nobelprize.org, *All Prizes in Economic Sciences*, at http://www.nobelprize.org/nobel_prizes/economics/laureates.

[98] The Pension Protection Act of 2006 , Pub. L. No. 109-280, 120 Stat. 780 (2006), drew on three central findings of the behavioral economics literature as part of its restructuring of American pension policy. It provided for automatic enrollment in pension plans, (to help counter status quo bias); provided for automatic escalation of pension contributions (to counter loss aversion and endowment effect biases); and facilitated standard investment options (to counter decision paralysis and risk aversion). For a good review, see JODI DICENZO, BEHAVIORAL FINANCE AND RETIREMENT PLAN CONTRIBUTIONS: HOW PARTICIPANTS BEHAVE, AND PRESCRIPTIVE SOLUTIONS, EBRI ISSUE BRIEF NO. 301 (Jan. 2007).

situation, these types of biases may make people under-value an offer of future leave time. First, when presented with an opportunity for leave time to deal with a sick mother or a newborn child, workers may think they really will not need it. They may be over-optimistic about how well they can get along without such leave. [99] Plus, the lower wages will come right now and the leave will only come later. Thus, when an employer makes an offer of leave time in return for lower wages, workers may refuse it, even though they might be better off in the long run if they accepted it.

Where does this get us? So far, we have determined that for a variety of reasons the labor market may not provide leave time to workers even when we make the extreme assumptions that *every* worker prefers leave time and would be willing to pay more for it in reduced wages than it would cost employers to provide it. Obviously, the conclusion would also hold under less severe assumptions where, say, just a strong majority of workers rather than all of them favored leave time.[100]

This is precisely the kind of situation where labor regulation can play an important role. Because of flaws in the labor market, workers are not provided the package of leave time and wages that would make both them and employers better off. Labor regulation requiring employers to provide leave time could solve all these flaws in the labor market. Most directly, it would solve the first-mover problem. The crux of that problem was that the first employer to offer leave time would, through self-selection, attract a workforce that would skew the normal financial calculations. If a law required all employers to begin offering leave time at once, that self-selection problem would disappear. Similarly, a law requiring leave time would avoid the free rider and strategic bargaining problems. Those issues simply would not be relevant anymore. Finally, a law would overcome the behavioral biases problems that may otherwise stand in the way of making both employers and workers better off. Workers may be surprised by how much they need and like leave time after they receive it, but it would be a pleasant surprise.

If this is true, then labor regulation requiring leave time, like workers' compensation laws, may survive the pressures of globalization. The basic reason is that the first step of the Chicago School syllogism would not be met: this regulation would not impose costs. Instead, it would leave both employers and workers better off than they would be without the regulation.

We have some evidence that this is more than a theoretical curiosity. As mentioned above, at least 22 states and dozens of localities in the United States have laws requiring some type of leave time.[101] Internationally, the United States and most other countries have laws

[99] *See* Lisa Belkin, *The Opt-Out Revolution*, N.Y. TIMES, October 26, 2003 (describing the extent to which highly educated women are exiting the workforce upon childbirth).
[100] Gillian Lester has made a similar set of arguments for the underproduction of leave-time in the private, unregulated labor market. Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 10-16 (2005).
[101] *See supra* note ___.

requiring leave time, although with widely varying levels of generosity.[102] If the Chicago School syllogism were true, none of these laws could survive. Competition between the States would eliminate the State laws and competition between countries (that is, globalization) would eliminate the national laws. It is possible that all these laws impose great costs on employers and workers, but nevertheless exist because of other flaws in the race-to-the-bottom argument. But it is also possible that the laws survive because they provide real value to employers and workers.

Leave time has been our example here but, again, other types of labor regulation may fit into the category. The situation here is one in which workers may prefer a benefit and be able and willing to pay for it individually, but nevertheless the benefit is not provided because of a variety of flaws in the labor market. For example, protection against unjust discharge could fit into this category. Workers may well be willing to pay for this kind of protection, but be very hesitant to ask employers to provide it because of the signals it might send about what kind of employees they might turn out to be. ("Would you please agree not to fire me if I turn out not to be a great worker?") Similarly, employers might be reluctant to offer this kind of protection for fear that they will attract a set of workers who really, really need it. A law requiring protection from discharge would solve both these problems. This kind of protection is provided in most of the industrialized world outside of the United States and it has not been eliminated by globalization, which supports the claim that it provides value.[103] Privacy protections may also fit into the category. Protecting privacy is a costly business, but workers may well value it more than it costs. At the same time, protecting privacy is an extremely complicated business, so the costs of negotiating protections at the individual or workplace level would be high. Government rules may be able to provide expertise and economies of scale to make the protections possible. Again, privacy protections in Europe and elsewhere have survived globalization,[104] which supports this claim.

With Lars Erickson, we were able to look back and observe a labor regulation – workers' compensation – that seems to solve significant labor market flaws. It replaced a legal structure with easily observable problems and it has been relatively stable for decades. We are not in such a favorable position with Anthony Fiotto. If laws guaranteeing leave time solve the kinds of labor market flaws described here, they should become more common under the pressures of globalization. But the crystal ball is cloudy, even though there is no doubt that there will be many more Anthony Fiottos out there with sick mothers.

But despite these uncertainties, there are three central messages flowing from the discussion in this section. First, there are problems that the labor market must address. The problem of workplace safety, for example, will be addressed and, however addressed, the scheme will have some balance of costs and benefits. A no-regulation alternative that means employers

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[102] *See supra* note ___.
[103] Jeffrey M. Hirsh, *A Comparative Perspective on Unjust Dismissal Laws* (2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2095336.
[104] *See* FRANK HENDRICKX, PROTECTION OF WORKERS' PERSONAL DATA IN THE EUROPEAN UNION (2002).

will bear no costs simply does not exist. Second, net-value labor regulation should fare well in the face of inter-jurisdiction competition. The race-to-the-bottom claim is wrong to the extent it claims that all labor regulation will inevitably be hugely threatened by globalization. If the labor market works the way race-to-the-bottom proponents think it does, labor regulation that provides net-value should grow, not shrink, in the face of global competition. Third, it is exceedingly difficult to determine the net costs and benefits across different regulatory alternatives. This means that the race-to-the-bottom claim, at bottom, tends to be more a political one than an economic one. Acceptance or rejection of it, especially in the loose way it is used by labor law scholars, tends to be more a mirror of one's pre-existing views than it is a reflection of some sober analysis of the real world out there.

III. The Cost of Labor Regulation

Labor regulation that imposes net costs on society would seem to be in a different situation than net-value labor regulation. By definition, the benefits of this type of labor regulation do not exceed its costs. As a result, a jurisdiction that enacts net-cost labor regulation will be in roughly the same position as one that *fails* to enact net-value labor regulation: overall, it will be a poorer island. Under global competition, these effects will be magnified, so there will be more pressure not to enact, or to repeal, net-cost labor regulation.

The question here is whether or not this type of labor regulation would conform to the race-to-the-bottom thesis. Would it be squeezed out by global competition? As our example, let's consider a jurisdiction that enacts a minimum wage law to redistribute income to low-wage workers. Because we want to focus on net-cost labor regulation, we will assume that the costs of this regulation exceed its benefits. That is, the benefits to low-income workers in increased income are less than the costs of the regulation to employers (who are paying more than marginal productivity would justify), other workers (who may lose their jobs), and consumers (who may pay for some of the increased wages).[105]

But why would a jurisdiction enact labor regulation if it imposed net costs on society? Considering these reasons helps us sort through the race-to-the-bottom argument. One possibility is that the jurisdiction is attempting to reduce political uncertainty. In other areas, such as securities regulation, it is widely accepted that regulation on disclosure and protection of minority stockholders can improve capital markets by increasing confidence and reducing uncertainty.[106]

[105] The evidence on this is mixed. *See, e.g.*, Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997); DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995). But that's not important for our purposes. Here we are assuming that the regulation is net-cost to explore the race-to-the-bottom argument as applied to this type of regulation.

[106] *See, e.g.,* Rafael La Porta *et al., Legal Determinants of External Finance*, 52 J. FIN. 1131, 1139-46, 1149 (1997) (empirical analysis of debt and equity markets in forty-nine countries finds that strong legal protections for investors have a large positive effect); LONG FINANCE, FINANCIAL CENTRE FEATURES 40 (2012), *available at* http://www.zyen.com/PDF/GFCI%2012.pdf (of the fourteen factors used to assess world's

Similarly, it is well-accepted that a well-functioning court system, even though costly, can improve international competitiveness.[107] Finally, there is good evidence that policies that reduce income inequality foster political stability and that markets value that stability.[108] This response, of course, is cheating a bit. In essence, it argues that because of the value of political stability, even purportedly net-cost regulation is not really net-cost.[109] But the claim does support two points. First, some purportedly net-cost regulation may not be net-cost if its effects are fully accounted for. Second, and again, it is very difficult to evaluate the costs and benefits of labor regulation. Having said that, however, not all purportedly net-cost labor regulation necessarily fits into this category – some actually does impose net costs..

So let's consider another rationale for minimum wage legislation, assuming this time that it is truly net-cost. It may be that the law is enacted because of a societal preference for less income inequality. As indicated earlier, the possibility of a race to the bottom arises here, in essence, because of a disjunction between political and economic decision-making.[110] In broad outline, it is possible for a "populace" to enact a minimum wage law to satisfy its preference for less income inequality if one more than half the populace is in favor. Economic decision-making, on the other hand, is much more individualized. On an island, employers who either disagree with the law or whose business is adversely affected by the law can take certain steps – reduce employment levels, invest in other types of businesses, etc. But they cannot escape. When there is international competition, employers can go to other jurisdictions that do not have such a law. The question for us is whether this dynamic will put such pressure on net-cost labor regulations that they will disappear?

The task here is to track the connection between these extra costs and the decisions of particular employers who are prejudiced by the minimum-wage requirement. It turns out that the connection is long, complicated, and uncertain. First, employers will need to determine the extent

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top financial centers, the regulatory environment and a fair and just business environment are ranked as the second and sixth most important, respectively).

[107] *See, e.g.,* CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 211-221 (1997); AMARTYA SEN, DEVELOPMENT AS FREEDOM (1999).

[108] *See, e.g.*, Alberto Alesina & Roberto Perotti*, Income Distribution, Political Instability, and Investment*, 40 EUR. ECON. REV. 1203, 1225-26 (1996) (empirical analysis from seventy-one countries concludes that income inequality increases social and political instability which, in turn, reduces investment); Geoffrey Garrett, *Global Markets and National Politics: Collision Course or Virtuous Circle?,* 52 INT'L ORG. 787, 789, 798 (agreeing with view of others that reducing inequality increases social stability leading to greater growth).

[109] Note that I am not claiming here that there is a time asymmetry causing a net benefit, that is, a net-cost now and a larger net-benefit later because of political stability. The claim here is that the cost (extra wages) and benefits (extra stability) occur at the same time (maybe conceptualized as a lowered probability of political instability at every moment in time). I will consider time asymmetries later. *See infra* ___.

[110] *See supra* text at note ___.

to which the minimum wage law is net-cost for them.[111] This is quite difficult for a number of reasons. For example, efficiency wage theory holds that the increased wages will result in some increase in productivity; if that occurs, the net cost will go down.[112] Second, the increase will be a signal to employers that a price increase for their product might be possible. For example, all fast-food restaurants will know that all their labor costs are going up a bit, so all will know that a price bump is possible. The demand curve for their product will, of course, impose a limit on this increase but, again, any increase will lower the net cost for employers who might think of exiting.[113] The net cost of the minimum wage increase may also be offset by changes in other parts of the compensation package. If employers provide workers with any other type of benefits (health care, pensions, leave time, extra breaks), these could be cut back to re-capture some of the increased costs.[114] Finally, some employers do not employ low-income workers at all, so there would be no net cost for them from the minimum wage. The point here is not to claim that the minimum wage law is not net-cost overall; to the contrary, I am assuming that here. But the reaction of employers will depend not only on the existence of a net cost but also, and more importantly, on the magnitude and distribution of that increased cost.[115] Employers are positioned differently and have many options for reacting to labor regulation to minimize the overall cost. As the net cost gets lower, employers become less likely to race for the exits. The race-to-the-bottom claim weakens.

Broader economic adjustments may also ameliorate the effects of net-cost labor regulation. In general, two types of adjustments might be made to account for extra labor costs. First, a jurisdiction might attempt to shift costs from particular employers to the population more generally through tax policies that offset the higher costs. For a low-wage policy, this might mean enacting a wage subsidy program instead of a minimum wage law.[116] For other types of labor

[111] Again, I'm assuming here that the law is net-cost for some employers. The issue here is the magnitude of that net-cost for individual employers.

[112] For classic descriptions of efficiency wage theory, see George A. Akerlof, *Labor Contracts as Partial Gift Exchange*, 97 Q.J. ECON. 543 (1982); Carl Shapiro & Joseph E. Stiglitz, *Equilibrium and Unemployment as a Worker Discipline Device*, 74 AM. ECON. REV. 433 (1984); TRUMAN F. BEWLEY, WHY DO WAGES NOT FALL DURING A RECESSION? (1999).

[113] *See* DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (1995).

[114] This is less likely to happen with minimum wage laws than with most other types of labor regulation. For something like mandated leave time, for example, employers can make compensating adjustments in wage rates for all workers except minimum wage workers. For the minimum wage itself, workers are less likely to have other types of benefits (such as health care or pensions) against which compensating adjustments can be made.

[115] For an analysis of the disparate effects of employment protection legislation, see Marco Leonardi & Giovanni Pica, *Who Pays For It? The Heterogeneous Wage Effects of Employment Protection Legislation*, ___ ECONOMIC JOURNAL ___ (2013)(forthcoming)(finding that an increase in employment protections reduced wages, but the effects were quite heterogeneous with greater wage losses for workers who changed jobs recently, younger workers, low-wage workers, blue-collar workers and workers in low-employment regions).

[116] DAVID ELLWOOD, POOR SUPPORT: POVERTY IN THE AMERICAN FAMILY (1988); Daniel Shaviro, *The Minimum Wage, the Earned Income Tax Credit, and Optimal Subsidy Policy*, 64 U. CHI. L. REV. 405 (1997). *See also*

regulation, tax policy could provide tax credits or other adjustments to employers to offset the extra cost imposed by the labor regulation.[117] These kinds of steps would not transform net-cost labor regulation into net-benefit labor regulation (we are still assuming that overall costs exceed overall benefits), but it would affect the individual employer calculus that fuels the race-to-the-bottom claim. Second, and more broadly, in a world with flexible exchange rates, an increase in labor costs for a particular country may also lead to a depreciation of the country's currency. In theory, the argument would be that the increase in labor costs will lead to an increase in the cost of the country's products, which will reduce international demand for them, and, thus, produce a downward adjustment in the nation's currency.[118] As with tax adjustments, this would shift costs from particular employers to society more broadly.[119] It would not mean that the labor regulations would shift from net-cost to net-benefit, but it would soften the impact on particular employers and, hence, ease race-to-the-bottom pressures.

On this last point, we have recently seen a dramatic case study of the difference between using labor policy versus monetary policy to respond to international economic pressure. In Europe, an important part of the austerity measures to deal with the recent economic crisis has been to drive down labor costs both directly (through reducing public sector wages and employment) and indirectly (by reducing private labor regulation, part of the so-called "structural" adjustments). In Iceland, in contrast, currency devaluation was used as a principal mechanism to address a similar crisis and to regain the country's footing in international trade. The currency devaluation, in effect, decreased wages and benefits for Iceland's workers, but it tended to work more smoothly and quickly to address the crisis, and much less controversially.[120] Currency devaluation, of course, was not an available option in the stressed parts of the European Union. The point here, however, is not to debate the relative merits of currency devaluation versus labor adjustments as a response to international competitiveness concerns. The point here is that labor and currency adjustments are partial substitutes for each other. If labor costs increase

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Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967 (1999)(unconditional cash grants to the poor would be superior to wage subsidies because they would be easier to administer, it would be harder for employers to capture the benefits, and it would increase freedom for the poor).

[117] *See, e.g.*, Iowa Assistive Device Tax Credit Act, H.F. 2560, 78th General Assembly, 2d Sess. (Iowa 2000) (providing tax credit to small businesses for assistive devices and workplace modifications).

[118] N. GREGORY MANKIW, BRIEF PRINCIPLES OF MACROECONOMICS 291-296 (5th ed. 2008)(with tradable goods, purchasing power parity implies that increases (decreases) in the domestic cost of goods will result in a decrease (increase) in the value of the domestic currency); DAVID C. COLANDER, MACROECONOMICS 512-513 (8th ed. 2010)(flexible exchange rates permit greater freedom with monetary and fiscal policy). *But cf.* RONALD G. EHRENBERG, LABOR MARKETS & INTEGRATING NATIONAL ECONOMIES 10-12 (1994)(flexible exchange rates may reduce the loss of exports from net-cost labor regulation, but may increase the price of imports).

[119] *See supra* sources cited in note __ (prior note).

[120] Sarah Lyall, *A Bruised Iceland Heals Amid Europe's Malaise*, N.Y. Times, July 7, 2012, *available at* http://www.nytimes.com/2012/07/08/world/europe/icelands-economy-is-mending-amid-europes-malaise.html?ref=business&pagewanted=all; Charles Forelle, *In European Crisis, Iceland Emerges as an Island of Recovery*, WALL ST. J., May 21, 2012, at A1, A10, *available at* http://online.wsj.com/article/SB10001424052702304203604577396171007652042.html.

too much, a country can respond by paring back net-cost labor regulation and that is the approach viewed as inevitable and necessary by the race-to-the-bottom claim. But theory and recent experience indicates that monetary adjustments are another possible way to respond to net-cost labor regulation. To the extent that alternative is used, the claim that there will be a race to very lax labor regulation is weakened.

Even after all these individual employer and market factors that might ameliorate the extra burdens of net-cost labor regulation, we are still assuming that there are net costs remaining. The underlying conditions feeding the race are smaller and less certain than claimed by race-to-the-bottom proponents, but is it still not possible that the race will occur? There are two additional impediments to a rapid employer race to the exits. First, some jobs simply cannot be moved. Fast food servers and hair stylists, for example, cannot be out-sourced to another country.[121] Some goods cannot be imported from other countries.[122] As a result, any race is likely to occur in some sectors, but not in others. Second, every effort to out-source involves costs – the cost to establish a new business elsewhere, the cost to hire a new workforce, the cost of exporting and importing the goods, etc. The net cost of the minimum wage regulation must exceed the net cost of these out-sourcing expenses to justify a move. For many employers, even those who suffer net costs from the labor regulation, the sign of the equation will not be in a direction justifying a move.[123]

But even then, some employers may decide to exit because of the net cost of the minimum wage regulation. With respect to the race-to-the-bottom claim, how should we think about this type of regulation-induced movement of employers (or work) between jurisdictions? This part of the race-to-the-bottom claim, in essence, asserts implicitly that this type of movement will produce a convergence between countries in their minimum wages. If a country is losing employers because of a net-cost minimum wage, there will be downward pressure on the minimum wage level. On the other hand, a country receiving low-wage work may see room to increase its minimum wage (and, hence, achieve more political stability or income equality) without sacrificing its labor attractiveness relative to other higher-minimum-wage countries. Or

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[121] *See supra* notes ___ (currently notes 33-36).

[122] *See, e.g.,* Roger P. Alford, *The Self-Judging WTO Security Exception*, 2011 UTAH L. REV. 697 (2011)(discussing import restrictions based on national security concerns); Matthew Hunter Hurlock, *The GATT, U.S. Law and the Environment: A Proposal to Amend the GATT in Light of the Tuna/Dolphin Decision*, 92 COLUM. L. REV. 2098 (1992)(discussing import restrictions based on environmental concerns).

[123] This analysis should not focus only on the minimum wage regulation, but rather should combine the extra cost of all net-cost labor regulation. Necessarily, the equation's sign is more likely to point in the direction of exit if all net-cost labor regulations are included (unless the gains from net-benefit labor regulation are also included in the analysis). But this combinatorial problem re-emphasizes how complicated the location decision is for employers. They are reacting not to the costs of one labor regulation enacted at a discrete point in time, but rather trying to estimate the costs of all labor regulation (current and future) over an extended period of time. This highlights, again, the importance of the stories surrounding the race-to-the-bottom claim. These exit/no-exit decisions and the rhetoric surrounding the net cost of labor regulation are both more likely to be gestalt than fine accounting; the story accompanying the decision is likely to be very important.

the wages of low-wage workers may increase from simple economic pressure. But this begs the question of whether labor *regulation* (as opposed to wage levels themselves) in different countries really will converge, or whether there is more reason to think that it may remain quite different from country to country. If countries do not converge, the race-to-the-bottom argument is weakened.

The rationale and evidence for convergence of labor regulation is weak.[124] Convergence would be likely to occur if countries were similarly situated in their need and preferences for labor regulation. On the minimum wage, for example, countries may differ on the proportion of their populations employed in this segment of the labor market, in the schooling and training opportunities available to channel people to higher-paying jobs, in the population's preferences for income equality, in the level of segregation between high- and low-income workers, etc. Thus, a relatively high minimum wage may be desirable in some countries and not in other countries, even if there is a net cost in both. Indeed, different needs and preferences between countries may lead to a quasi-Tiebout effect in which countries provide a package of labor regulations specially fitted to a particular kind of society and labor market.[125] Some countries may attempt to develop a high-education, high-wage equilibrium, which requires investments in education and innovation and which discourages low-wage work, while others may be at a different stage of development where low-wage work is the best option available. Thus, even if low-wage employers do begin to exit for countries with more accommodating labor regulation for that type of work, this may not cause high-minimum wage countries to change their labor regulation. The labor regulation of each country may be calibrated for that country's particular circumstances; more specifically, they may be calibrated to enhance that particular country's comparative advantage.[126] This

[124] For empirical analyses, see e.g., Peter Gahan, *supra* note __ (currently note 4) (study of labor laws in six countries finds little evidence of convergence generally or of one leading to a race to the bottom); John Armour *et al., How Do Legal Rules Evolve? Evidence from a Cross-Country Comparison of Shareholder, Creditor and Worker Protection*, 57 AM. J. COMP. L. 579 (2009)(study of five countries finds little evidence of convergence in worker protection laws). The rationale for a race-to-the-bottom convergence relies, ironically, on an economic-determinism rationale – technical and market forces will force convergence. For the classic articulation of this view, see CLARK KERR, ET AL., INDUSTRIALISM AND INDUSTRIAL MAN: THE PROBLEMS OF LABOR AND MANAGEMENT IN ECONOMIC GROWTH (1960). For a more recent articulation, see Thomas C. Kohler, *Comparative Labor Law: Some Reflections on the Way Ahead*, 25 COMP. LAB. L & POL'Y J. 87, 90 (2003). Critics of this rationale focus on institutional impediments to economic determinism. *See, e.g.,* Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q.J. ECON. 1193 (2002)(original decisions about basic legal structure have a strong influence on current legal systems); PETER A. HALL & DAVID SOSKICE, EDS., VARIETIES OF CAPITALISM: THE INSTITUTIONAL FOUNDATIONS OF COMPARATIVE ADVANTAGE (2001)(legal systems develop modes of regulation that are resistant to change); Katharina Pistor, *Legal Ground Rules in Coordinated and Liberal Market Economies, in* CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES AND MARKETS IN EUROPE, JAPAN AND THE UNITED STATES (Klaus J. Hopt *et al*, eds., 2006)(different countries have distinct social preferences that are embedded in their basic legal ground rules and resistant to change). For a more theoretical critique of convergence, see Assaf Razin & Efraim Sadka, *Fiscal and Migration Competition*, National Bureau of Economic Research Working Paper No. 16224 (July, 2010).

[125] See supra note ___ (currently note 27).

[126] Basic comparative advantage analysis indicates that even if Island A is superior in productivity at every level of labor activity, it may not be competitive at some levels. For example, assume the workers of

implies that companies might well move to countries that attend best to their particular business model, but it does not imply that other countries would respond by attempting to match that regulatory model. Given different circumstances, they may be developing a set of labor regulations that attends to quite a different set of goals and preferences.

The central message of this section is that, even for net-cost labor regulation, there is a long, uncertain path from those net costs to a race to the bottom. The regulations may be buying something that the society values more than the net-cost of the labor regulation (such as political stability in our minimum-wage example); employers have many ways of offsetting the net costs of labor regulation so their burdens are likely to be much less than the raw net-cost of the labor regulation; economies have ways of adjusting to the increased costs through fiscal or monetary policy; and, finally, it may be that a particular society's labor regulations are attending to a particular type of comparative advantage.

IV. The Value and Cost of Labor Regulation: (Even More) Complications

A. Time Frame Issues

> "I don't think I'll be able to return to school until the strawberries are in," Alfedo says, not stopping to look up. "Maybe then, in a month or so." In truth, he hasn't been to school for eight months. Likely he will never go back. His parents, Jesus and Clementina, are in their late fifties and say they need him to work. "We are too old to work alone," Diaz says, watching his son. "We cannot make the money we need to live if we do not have help."[127]

Child labor regulation is a good example of difficult time frame issues presented by the race-to-the-bottom claim. The Diaz family provides a good illustration of the basic dilemma. Alfedo would be better off going to school. In the long run, he'd make more money and have a better life. But right now, Jesus and Clementina, his parents, need him to work: "We are too old to work alone. We cannot make the money we need to live if we do not have help."[128]

Societies are in a similar position, and the calculus for societies is no easier than it was for Jesus and Clementina. If a society permits children to work, it reaps the rewards of their labor (even at low wages) and it saves the costs of schooling. On the other hand, it may sacrifice the

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Island A are 10 times more productive than those of Island B in high technology and 3 times more productive in low technology. If there is high world demand, a likely outcome is that Island A will produce only high-technology goods and Island B will produce only low-technology goods. Island A's workers will demand too high a wage to permit them to work in low technology, while Island B's workers will not be productive enough to compete in high technology. For an accessible explanation of this, see PAUL KRUGMAN, POP INTERNATIONALISM, at 57-59 (1997).

[127] Bruce D. Butterfield, *The Tragedy of Child Labor in America's Shops, Eateries and Farms*, BOSTON GLOBE, April 22, 1990.

[128] Id.

longer-term benefits that might come from a better-educated populace. Given this calculus, it is easy to see why some societies might be more willing to permit child labor than others. If the society does not have the resources to provide good educational opportunities, there may be no long-term payoff. If the society is desperately poor, it may not have the luxury of deferring a payoff for a decade or more. This is, of course, a very familiar calculus. In essence, the society is deciding whether a current investment will produce enough revenue in future to be worth it.[129]

But the question for us is what effect globalization will have on the calculus. Consider first the pressures within a country that might lead to a policy permitting or prohibiting child labor. (Then, later, we will consider how globalization might affect that policy.) First, an important factor will be how important the child's labor is to household income. If Jesus, Clementina, and Alfedo simply cannot live on Jesus and Clementina's earnings alone, then something must be done, and having Alfedo work is better than many of the other options (starving, abandoning Alfedo, selling him into slavery, etc.). If this is the situation, the society is likely to permit child labor, if not encourage it.

Another factor, related to the first, is the ability to invest in the child's future. If a society cannot provide good training as an alternative to work and, as a result, children are pushed into even less desirable activities than working, then prohibiting child labor may lead to worse outcomes than permitting it. On the other hand, if good schooling can be provided as the alternative to working, then the long-term calculus may work: the increases in each child's future productivity will more than pay for the lost earnings and the cost of schooling while they are children. But, again, this can only occur if a society is sufficiently wealthy to provide the schooling.[130]

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[129] Child labor presents a subset of the training issue generally where workers (societies) decide whether to invest in current training in return for higher future returns. *See generally* PAUL G. CHAPMEN, THE ECONOMICS OF TRAINING (1993). Child labor, however, poses the question most pointedly for several reasons including (1) the moral overlay; (2) the need for social investment in schooling given the general inability of children to fund their own training; and (3) the special and long-term opportunity for training given the long payback period and the low opportunity costs for the training time. *See* CHAPMAN, *supra*, at 114; Yoram Ben-Porath, *The Production of Human Capital and the Life Cycle of Earnings*, 75 J. POL. ECON. 352 (1967).

[130] Both these factors relate to societal wealth, and the empirical evidence supports the claim that this factor is the single most important determinant of a society's child labor policy. *See* Eric Edmonds & Nina Pavcnik, *Does Globalization Increase Child Labor: Evidence from Vietnam*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPER NO. 8760 (2002)(decline in child labor in Vietnam followed increase in farm income); Kaushik Basu & Safiris Tzannatos, *The Global Child Labor Problem: What Do We Know and What Can We Do?*, 17 WORLD BANK ECON. REV. 147 (2003)(child labor mainly a function of poverty); Druscilla K. Brown, *A Transaction Cost Politics Analysis of International Child Labor Standards*, *in* SOCIAL DIMENSIONS OF U.S. TRADE POLICIES 246-64 (Alan V. Deardorff & Robert M. Stern, eds., 2000)(most effective strategy for reducing child labor is to increase economic growth); Avinash K. Dixit, *Comment, in* Deardorff & Stern, *supra*, at 267-70 (reductions in child labor in the United States occurred when real GDP per capita reached about $7,000/annum in current dollars).

In light of this, countries might have different policies on child labor. One country, let's call it "Disney," might prohibit child labor because it thinks its investment will pay off; it will defer income from child labor, invest in education, and count on higher returns later. On the other hand, another country, "Copperfield," might decide that it cannot wait; it may need the income now rather than later, or maybe it cannot afford to provide the kind of schooling that would nurture the kinds of skills that would permit a bigger payoff later.

Now let's assume both Disney and Copperfield enter global competition. First, what effect will this have on Disney's no-child-labor policy? When it initially established its policy, Disney's calculation was that it could afford to defer income and invest in education in return for higher expected returns later. The cost and quality of education will not change because of this new competition. The returns to education may increase as more markets open up for those skills. The new competition may reduce deferred income for two different reasons: (1) with competition, wages for the foregone work would probably be lower, so there would be less lost income and (2) the goods and services produced by this type of low-income labor is likely to be lower in cost than before the global competition. On balance, then, global competition would seem to re-affirm the earlier decision to prohibit child labor. The returns to education in the future may be higher, the amount of current income lost will be lower, and the cost of obtaining the goods/services produced by this type of low-income labor will also be lower. None of these factors undermine the prior decision; all cut in favor of continuing the prior no-child-labor policy.

What about Copperfield's policy permitting child labor? The same calculus that reinforces Disney's pre-competition policy decision to prohibit child labor tends to weaken Copperfield's prior decision to permit it: future returns to more education may be higher, current income from child labor may be lower, and replacing the products of child labor may be cheaper. This may not be enough to tip the balance, of course: Copperfield may still decide that, for it, permitting child labor is the better course. But for both Disney and Copperfield, the effect of competition provides some additional weight to the side of the scale in favor of prohibiting child labor.

The structure of the argument here is that a society will benefit by having child labor laws, but only over a fairly long time horizon. The society will need to make an investment in Time 1 by having children attend school rather than working (which imposes two distinct costs: the costs of school plus the foregone benefits of current work), but will gain even more in Time 2 when those children are more productive workers because of the prior investment. Some societies will clearly not make this choice for a variety of reasons (time horizon is too short; not able to afford schooling that will produce benefits in Time 2, etc.). But the argument here is not directly about that choice, but rather about how increased global competition will affect it. For both countries that choose to have child labor prohibitions in Time 1 (Disney) and those that do not

(Copperfield), the increased competition tends to push in the direction of more child labor protections, not less.[131]

More generally, time frame issues complicate the analysis required to determine if a particular labor regulation is net benefit or net cost. But apart from that, in general, it does not seem to cut uniformly or strongly in one direction or the other on the race-to-the-bottom claim.[132]

B. Different Firms, Different Effects

Firms employ different kinds of workers; they have different levels of capital investment; they are more or less mobile. These differences mean that labor regulation will inevitably affect different firms differently. Thus, the costs and benefits of labor regulation will be far from uniform. Some firms will benefit more than others; some will bear more of the costs.

To see why this is the case, let's begin with a regulation which is precisely balanced in the sense that each worker values the benefit it provides at exactly its cost to the employer. For example, consider a regulation that requires an employer to provide a certain amount of leave time (solving the collective action problems discussed earlier)[133] and assume that each worker values the leave time at exactly its cost to the employer. Under this unlikely scenario, every employer is in exactly the same position. If the law were changed to increase the number of leave days required, the wages would adjust downward to exactly counter-balance the change so there would be no change in overall compensation or in employment levels.[134]

But now let's assume that workers are heterogeneous as they inevitably are in the real world. To continue with our stylized example, let us assume that female workers value the benefit

[131] Alan Hyde's interesting brief in favor of transnational labor standards seems to recognize this. He explicitly disclaims a race-to-the-bottom in his child labor example and bases his argument instead on attempts to gain "short-term advantage." Hyde, *supra* note ___, at n. 25 (Hyde article is currently at note 5).

[132] The downward rigidity of wages presents a similar time frame issues and provides one answer to why employers might resist net-benefit labor regulations. Why, for example, would employers resist a leave-time requirement if employees value the leave time more than it costs employers so that, with the requirement, employers should be able to reduce wages enough to cover at least all the costs of the leave-time requirement, and maybe more? *See supra* …. One reason may be that wages are downwardly rigid so that employers will not be able immediately to reduce wages to account for the extra costs of leave time. Thus, as noted by Hyde, *supra* note __ (prior note), employers may suffer a short-term increase in total compensation until the increased costs/reduced wages can be incorporated into the wage system. With respect to increased global competition, an interesting question here is whether this downward wage rigidity will have the effect of harming employers through higher short-term costs or whether it will ease the problem of downward wage rigidity.

[133] *See supra* ___.

[134] Assuming a perfectly functioning market, of course.

at more than it costs the employer to provide it, while male workers value it at less.[135] One consequence of this is that assessment of the overall social benefit becomes much more complicated and, perhaps, impossible. To assess overall social value, one now has to weight the net benefits across the two different groups of workers. Doing so raises difficult (some would say impossible) inter-personal valuation problems.[136] But that is not the main issue here. The issue here is the ways in which this will cause different employers to experience the regulation differently.

Consider three possible employers. First, an employer with an all-female workforce will experience a net benefit from the leave requirement. Since all employees value the benefit at more than it costs the employer to provide it, there's a surplus to be divided somehow between employer and workers. Indeed, this employer would have had such a requirement even without a government regulation, except for the collective action problems discussed earlier.[137] If all employers were of this type, the leave-time regulation would produce an unalloyed net value and there would be no race to the bottom worries at all.

Second, an employer with an all-male workforce will experience a net loss from the leave requirement. The male workers will have their legally required leave time, but they will value it less than it will cost the employer to provide it. When possible, the employer may reduce the losses from the regulation by reducing wages to help pay for the costs of providing the leave or taking other steps.[138] But for some workers, such as minimum-wage workers, it may not be possible to reduce wages. In those cases, there will be a net increase in the employer's costs.

Thus, even though the leave-time requirement may be net-value overall, there may be a class of employers who fall on the wrong side of a distributional divide. This class of employers, then, may be attracted to another jurisdiction that does not require this benefit and, as a result, permits them to offer a compensation package that is more closely tailored to the preferences of their workers. Under our assumptions, this is not because the leave-time regulation does not provide net value overall. It may do that; indeed, we are assuming that it does. Rather, this is because of the mix of workers these employers have, which places them on the wrong side of the distributional divide. In this example, these distributional consequences raise the possibility of

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[135] It is, of course, very difficult to determine the value workers place on leave time. Despite that, this is a reasonable assumption based on the use of unpaid family leave; in the most recent survey of FMLA leave-takers, women took 58% of all FMLA leaves even though they constituted only 46% of the civilian workforce. U.S. DEPT. OF LABOR, FMLA SURVEY: BALANCING THE NEEDS OF FAMILIES & EMPLOYERS § 2.1.3 (2000), *available at* http://www.dol.gov/whd/fmla/chapter2.htm; U.S. DEPT. OF LABOR, WOMEN IN THE LABOR FORCE: A DATABOOK 23-24 (2004), *available at* http://www.bls.gov/cps/wlf-databook.pdf. See also Lester, supra note ___ (currently note 99). In any event, this is merely an assumption; the general point is that this dynamic may occur whenever there are identifiable demographic groups that value a benefit differently.

[136] For a good description of the debates over inter-personal valuation, see Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 IND. L.J. 499, 508-515 (2011).

[137] *See supra* ___.

[138] *See supra…*

competition from lower regulation states or countries and, therefore, the possibility of race-to-the-bottom pressures.

Finally, most employers will fall between these extremes and have some mix of male and female workers and this will produce a spectrum of distributional consequences for the employers between the two extremes. In this circumstance, under our crude assumption that all women value the benefit more than all men, these employers would be tempted to reduce female wages more than male wages. That would tend to keep the total compensation packages equivalent since the women will value the leave-time more than the men. But it is not an option because it would run afoul of the discrimination laws.[139] As a result, again, there would be a range of distributional consequences that, very generally, would produce greater net value as an employer's workforce tilted female and net costs as it tilted male.

The real distributional consequences will, of course, be more complicated than this. Not all women (men) will value leave-time equally, so uneven distributional consequences will occur even within all female (male) workforces. Similarly, the costs to employers of providing leave-time are not likely to be the same for all employers. Economies of scale may mean that large employers are able to comply with the regulation more cheaply than small employers, or employers of professional workers may be able to accommodate leave requests more cheaply than employers of blue-collar workers.[140]

So where does this get us on the race-to-the-bottom argument? This kind of distributional argument is regularly used to respond to the claim that some labor regulation can produce overall net value and, as a result, should be resistant to a race to the bottom. The argument is that the *overall* net value created by labor regulation is not that important because there will be particular firms on the wrong side of the cost/value balance. With globalization, those firms will be able to leave or threaten to leave, and that will begin the race-to-the-bottom dynamic.

But this argument simply does not get us very far because *non-regulation* is inevitably distributional, too. To see why this is the case, let's play the same tune backwards. Assume again

[139] Both Title VII and the Equal Pay Act prohibit sex-based wage discrimination. Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq*.; Equal Pay Act, 29 U.S.C. § 206(d). However, even this is complicated. Some workforces may be segregated by sex. If that's the case, then an employer could adjust wages to account for the differential preferences. So as an extreme example, if an employer had all male employees in job category A and all female employees in a separate job category B, it could attempt to adjust wages to account for the differential preferences. Although not as stark as the example, persistent job segregation makes this a possibility in some workplaces. *See* INSTITUTE FOR WOMEN'S POLICY RESEARCH, THE GENDER WAGE GAP BY OCCUPATION (April 2012)(39.5% of women work in traditionally female occupations, while 44.5% of men work in traditionally male occupations).

[140] *See* Marco Leonardi & Giovanni Pica, *Who Pays For It? The Heterogeneous Wage Effects of Employment Protection Legislation*, ECON. J. (forthcoming)(reporting that wage reductions in response to employment protection legislation varied based on factors such as length of tenure with the firm, type of job, and the area unemployment rate).

heterogeneous workers with women placing a higher value on leave time than men and the employer's cost of providing leave set in between the two valuations. But now assume a society that does *not* have labor regulation requiring leave time. The interesting thing about playing the tune this way is that it produces the same results, but in the opposite direction. Now, without leave time, employers with female workforces come out behind. Because of the factors discussed earlier,[141] these employers will not be able to offer leave time even though their workers would value it more than it would cost the employer to provide (so there would have been gains to distribute between employer and workers). Those with male workforces come out ahead. They are not forced to offer a benefit that would produce a net loss for them. And those with mixed workforces will come out somewhere in between, but in the opposite direction from the prior example: those benefited will be those with workforces that tilt male, and vice versa.

In the abstract, this does not point towards a race to the bottom. In our example, the two approaches to leave time produce different distributions of costs and benefits and, hence, different sets of winners and losers. For whatever reasons, a society may be more interested in attending to one set rather than the other. But there is no reason to think it would always favor the set preferring no regulation. Rather, any additional pressure from globalization could point in either direction – toward the leave-time regulation or away from it.

Having said that, to the extent there is a bias in one direction or the other, it should be in the direction of *more* labor regulation when the regulation produces net value. By definition, net-value regulation enlarges the pie, so there can be more winners, larger winners, or both. Thus, if all else is equal, those types of labor regulation should be favored. Of course, not all else is likely to be equal. But in the abstract, the bias should be towards more of this type of regulation. For the same reason, net-cost labor regulation does not enlarge the pie or makes it smaller, which places it at risk. Thus, in general terms, the bias will be in favor of net-value labor and away from net-cost labor regulation.[142] This is the same outcome we expected when we were considering only overall social gains and losses (although both consequences are filtered through very uncertain contingencies). The additional complications arising from worries about distribution do not affect the expected outcome at all.

So far, we have seen that firms will be affected differently by labor regulation because they have different mixes of employees with different sets of preferences. Firms will also be affected differently because they use labor differently and because their compliance costs will differ. Sticking with our leave-time example, consider a set of firms with mostly male workforces

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[141] *See supra* ___.

[142] This argument is similar to the efficiency of the common law claim. That claim is that efficient common law rules will be challenged less often than inefficient rules. Thus, the common law will have a bias in that direction because efficient rules will be more stable. *See, e.g.*, William M. Landes & Prichard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL. STUD. 235 (1979); George L. Priest, *The Common Law Process and the Selection of Efficient Rules*, 6 J. LEGAL STUD. 65 (1977); Paul H. Rubin, *Why is the Common Law Efficient,* 6 J. LEGAL STUD. 51 (1977).

that all fall on the wrong side of the cost/benefit balance, that is, the requirement imposes a net cost on all the firms.

Despite this similarity, for several reasons, the impact of the leave-time law on the firms will differ significantly. First, the extent to which the firms rely on labor may differ significantly. For some of these firms, labor costs may be 80% of their overall costs; for other firms, they may be 10%. Obviously, the impact of the leave-time requirement on the former firms will be much greater than the impact on the latter firms. Moreover, within either type of firm, the marginal contribution of any extra costs from the leave-time regulation is likely to be quite small. Most of a firm's labor costs (whether they total 80% or 10% of all costs) are unlikely to be significantly affected by the new leave-time regulation. There are exceptions, of course, but normally those labor costs will be largely driven by economic factors, such as prevailing wage rates, rather than changes in regulations.

Second, the costs of compliance are likely to be quite different from firm to firm. Consider, for example, two firms which are both within our set of net-loser firms: a small five-employee firm and a firm with hundreds of employees. Both will have to make changes to their rules and procedures to ensure compliance, and maybe hire a lawyer to help guide them. But these costs are not likely to increase linearly as the number of employees increases; as a result, it will be effectively cheaper for the larger employer. In addition, the larger firm should have more flexibility in providing the required leaves; for example, it might be able to use current employees to cover vacancies created by the required leaves rather than hire outsiders who would need more training and orientation. Thus, the larger firm should also be able to comply more cheaply because each leave will be less costly.[143]

Third, the costs will differ from firm to firm because of the many ways in which implementing the leave-time regulation can interact with the rest of the firms' compensation package. For example, the cost will be greater for a firm that had no pre-existing leave policy than for one that already offers leaves. At the extreme, an employer that already offers more leave than required by the regulation would incur no increased costs. More generally, an employer that offers few or no employee benefits would have to attempt to make any compensating changes in the wage rate alone. Since workers are very resistant to decreases in nominal wages,[144] it may be more difficult for this employer to make compensating changes than an employer that can attempt to make changes in other benefit programs. Similarly, the absolute magnitude of the cost increase will be related to the overall level of wages and benefits. Generally, the higher the level of wages and benefits, the lower this increase will be as a proportion of total compensation.

Again, the question is how does this set of considerations relate to the race-to-the-bottom claim? At a first cut, it is simply another way of making the same point made above. Yes, it is

[143] For an examination of this concept in another context, see C. Steven Bradford, *Does Size Matter? An Economic Analysis of Small Business Exemptions from Regulation*, 8 J. SMALL & EMERGING BUS. L. 1 (2004).
[144] *See supra* ___.

true that because employers differ in many relevant ways the costs of regulation will be distributed in many and diverse ways. But all of these differences in the distribution of costs are mirrored on the benefit side. The set of employers benefiting from the leave-time regulation (or any regulation) will also see differing levels of benefit based on these same kinds of factors. Given this, a society simply must make a choice one way or the other on the leave-time regulation issue. The diverse distributions, while relevant, do not point strongly toward or against the regulation.

But I focused on the set of employers experiencing net costs for a reason. The race-to-the-bottom claim relies on credible threats of exit by employers experiencing net costs from labor regulation; actual employer exit and threats of exit are the underlying sources of the downward pressure on labor regulation. But the uneven distribution of costs means that the set of employers who can credibly make such threats is smaller than the set of employers who suffer net costs. This is because the ability to threaten to leave depends not only on the existence of net costs, but also on the *magnitude* of the increased costs. The net costs from regulation must not only exist, but must exceed the costs of exit. This is a complicated equation involving the costs of moving and the costs of regulations in two different places (the current and future locations) over an uncertain time period during which regulations may change. It is possible, of course, that even the tiniest increase in net cost from a regulation will be the proverbial "straw" that tips the balance, but this is more likely to occur with larger increases.

Finally, firms subject to the new regulation will differ in their mobility. Some firms will be quite mobile, but there is a significant subset of firms that cannot credibly threaten to exit because of their inherent immobility. This would include firms that offer physical local services, such as construction firms and fast-food restaurants.[145] These firms can certainly exercise voice to object to costly labor regulation, and their voice may well be significant. But they cannot back up their claims with credible threats of exit. Again, one of the main pillars of the race-to-the-bottom claim is credible threats of exit.

In sum, the basic arguments about the fate of net-value and net-cost labor regulation in global competition are not significantly altered by worries about how those benefits are distributed among firms. While diverse distributional effects are inevitable, they do not point in any particular direction on the race-to-the-bottom argument. Moreover, even if they did tend to cut against a particular labor regulation, they may be too small in magnitude to provide credibility to the threats of exit that are necessary to fuel the race or they may fall mostly on firms that are not in a position to exit anyway.

C. Federal Systems

In federal systems, labor regulation can occur at a national or sub-national (state) level. (For ease of reference, I will refer to sub-national legislation as "state" legislation.) When it

[145] *See supra* ___

occurs at a state level, it has already been through a competitive crucible very similar to the crucible provided by international competition. Thus, state labor regulation in federal systems should be more resistant to a race to the bottom than national regulation in federal systems or any regulation in unitary systems. The most susceptible labor regulation will already have been weeded out in federal systems.

The extent of the buffer against change provided by state labor regulation depends on the alignment between the pressures of inter-state competition and those of international competition. If the inter-state competition were exactly the same as international competition, then one should not see any change whatsoever because of global competition. Similarly, one should not see any change if the state competition is more vigorous on every dimension than the international competition. Any race-to-the-bottom pressure should only occur if the international competition is more vigorous in some way than the inter-state competition.

In many ways, inter-state competition should be more vigorous than international competition. As described earlier, any pressure should arise as firms on the wrong side of certain legislation move or threaten to move to more hospitable environs. That movement should be easier across states than across nations: the legal systems are more similar (indeed, much of it – the federal part – will be the same); the culture will be less different; the distances may be shorter; there will be no customs problems; transferring money and resources will be easier; etc. On the other hand, a common claim is that the international competition is especially daunting because the scale of the savings may be much greater. This is usually accompanied with reference to gross wage differences; for example, in 2010 the average hourly compensation in manufacturing ranged from $57.53in Norway to $1.70 in the Philippines ($34.74 in the United States).[146] But as I discussed earlier,[147] this type of gross comparison is not how decisions will be made; the actual comparisons will involve much smaller gross differences. Given this, the overall balance of competitiveness across states versus across countries is uncertain, but there are many reasons to believe that the inter-state competition will prepare state legislation well for any subsequent international competition.

Of course, not all labor legislation in a federal system is state legislation. Federal laws in federal systems will not have gone through the competitive crucible of state legislation. Thus, at the margin, one would expect globalization to have more effect on federal legislation than on state legislation. Stated differently, to the extent globalization exerts pressure for change in labor regulation, one might expect to see about the same change in federal legislation in federal systems as one sees in legislation in unitary systems, and both will be marginally greater changes than one would see in state legislation in federal systems.

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[146] U.S. BUREAU OF LABOR STATISTICS, UNITED STATES DEPARTMENT OF LABOR, INTERNATIONAL COMPARISONS OF HOURLY COMPENSATION COSTS IN MANUFACTURING, 2010 (2011), *available at* http://www.bls.gov/news.release/pdf/ichcc.pdf.

[147] *See supra* ___.

Consequently, the overall effect of globalization in federal systems will also depend on the amount and type of labor legislation that is federal or state. Viewed in this way, another interesting byproduct of globalization may be a shift in federal systems from federal to state labor legislation. Empirically, if the race-to-the-bottom claim has viability, one ought to see greater downward movement in federal than in state labor legislation. In the United States, the balance between state and federal legislation is driven mainly by historical circumstance but, obviously, the balance is affected by many things.[148] At the margin, however, globalization provides one more reason to prefer state to federal labor legislation. State legislation provides a within-country, self-monitoring mechanism which disciplines legislatures and, as a result, helps to minimize changes resulting from globalization pressures.

V. Conclusion

The claim that globalization will result in a race to the bottom is firmly entrenched in American labor law scholarship. This is somewhat surprising since empirical support for the claim is quite weak and, even more so, because acceptance of the claim implies a view of labor regulation that is outside the academic mainstream – that labor regulation always imposes net costs. On the other hand, maybe the dominance of the race-to-the-bottom claim is not so surprising given that the narrative supporting it is powerful, intuitive, oft-repeated, and, until now, virtually unchallenged.

Whatever causes it, this consensus on the race-to-the-bottom claim has important implications for labor policy. For example, it weakens calls for aggressive labor regulation by validating the claim that such regulation is futile; it will simply hasten the movement of employers to lower-regulation jurisdictions. The claim also strengthens the notion that the labor market is just like any other market and, as such, better left alone. Why search for particular flaws in the labor market that might be corrected or important values of human flourishing and dignity that might be addressed if the race to the bottom renders impossible any effective legal response?

This article challenges the dominant narrative supporting a race to the bottom in labor law. It supplies narratives that support the empirical literature – that there may not be much of a race at all and, even if there is, it may not be as fast and sudden as advertised. The article certainly does not prove that there is never a race to the bottom. But it does demonstrate that there are plausible, alternative narratives to the dominant one. A narrative skeptical of the race-to-the-bottom hypothesis may help to re-calibrate the scales used to consider labor regulation. If we believe in a race to the bottom a bit less, we may be empowered to think more deeply and creatively about the promise and possibilities of effective labor regulation.

[148] *See* WILLBORN, *supra* note __ (currently 61), at 3-4.