FOREWORD

OCCUPATIONAL SAFETY AND HEALTH: POLICY OPTIONS AND POLITICAL REALITY

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Many workplaces are dangerous places. The Occupational Safety and Health Administration (OSHA) estimates that each day an average of seventeen persons are killed at work and another 16,000 persons are injured.\(^1\) The estimated annual cost of occupational injuries and illnesses is in excess of $80 billion.\(^2\) This Symposium considers regulations and other incentives for employers to protect employees in order to understand why workers\(^3\) are not better protected.

Workers remain unprotected from workplace hazards for two reasons. First, the regulations requiring employers to protect workers are subject to significant constraints that weaken their impact.\(^4\) Second, although these problems could be addressed by legislative reforms, workers lack the political influence to push effective solutions through Congress and state legislatures.\(^5\) In other words, the lack of worker protection is due to both policy and political failures. Existing policies to protect workers are not strong enough and the political environment is not conducive to addressing the policy problems.

The goal of this Foreward is to review these policy failures and analyze the political hurdles to reform. Part I of this Foreward outlines the framework of incentives used to encourage employers to ensure worker health and safety and the policy flaws with this structure. The section also references several of the articles in this issue that discuss aspects of the framework. Part II of this Foreward examines why the current political environment is hostile to legislation in favor of workers, and Part III considers whether workers can change this environment for their own benefit.

This Foreward concludes that in order for workers to obtain significant reforms, they must redefine occupational safety and health in a manner that interests persons who are not directly at risk. Workers can broaden support for their cause if they appeal to the self-interest and altruism of other citizens. However, without strong presidential support, this strategy is

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2. Id.
3. For purpose of this Foreward, "workers" refers to persons employed in jobs that present safety and health risks.
unlikely to be successful in Congress.\(^6\)

I. THE POLICY FRAMEWORK

Employers take steps to reduce workers' workplace accidents and illnesses because of economic and humanitarian incentives and in response to regulatory mandates,\(^7\) but workplaces remain significantly dangerous despite these influences.\(^8\) This section describes the current level of workplace accidents and illnesses, the constraints that limit employer incentives and regulatory requirements, and what reforms might increase occupational safety and health.

A. Dangerous Workplaces

An examination of the available evidence on workplace accidents and illnesses leads to three conclusions. First, there is no authoritative measurement of accidents and illnesses\(^9\) and estimates vary by a considerable magnitude.\(^10\) Second, the available data typically understate the number of occupational accidents and, to a greater degree, the number of occupational illnesses.\(^11\) Finally, despite this consistent understatement of the problem, the evidence indicates that many workers face substantial risks at work.\(^12\)

As noted earlier, OSHA estimates that an average of seventeen workers die each day.\(^13\) This number is consistent with the estimate by Professor Spieler, in her article in this issue, that the number of occupational fatalities in 1989 ranged from 3600 to 10,400 persons,\(^14\) or between ten and

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8. Refer to notes 13-16 infra and accompanying text (summarizing estimates of workplace injuries and occupationally-related deaths).

9. See McGarity & Shapiro, supra note 5, at 5 (stating that reliable sources of data on occupational health and safety are difficult to locate).

10. See id. at 4 (giving, for example, the range of estimates from two million to eleven million nonfatal injuries suffered by American workers per year).

11. Id. at 6.

12. See id. at 4-5 (noting statistical evidence indicating the dangerousness of the American workplace).

13. Revitalized OSHA, supra note 1, at 763.

twenty-eight deaths each day. Estimates of injuries range from two to eleven million per year.\textsuperscript{15} Assuming a total of only 2.5 million injuries per year, this conservative estimate translates into about 10,000 serious injuries each working day.\textsuperscript{16} 

A 1972 government report estimated that 390,000 new cases of disabling occupational disease occur each year, with as many as 100,000 fatalities a year.\textsuperscript{17} Two recent studies estimate that the number of occupational disease-related deaths ranges from 50,000 to 95,000 deaths annually.\textsuperscript{18} Other studies place the number of disease-related fatalities between 124,000 and 210,000 annually.\textsuperscript{19} To put these estimates in perspective, occupational disease accounts for a larger percentage of cancer deaths than environmental pollution\textsuperscript{20} and it kills more persons each year than such other preventable causes of death as motor vehicle accidents, diabetes, and homicides.\textsuperscript{21}

These studies and comparisons indicate that many workplaces are unsafe. The following section summarizes the policy failures responsible for this unfortunate situation.

B. The Policy Failures

Employers take steps to reduce health risks and to increase workplace safety in response to economic, humanitarian,

\textsuperscript{15}  McGarity & Shapiro, supra note 5, at 4.

\textsuperscript{16}  Id.

\textsuperscript{17}  The President's Report on Occupational Safety and Health 111 (1972); reprinted in H.R. Doc. No. 303, 92nd Cong., 2d Sess. 111 (1972).

\textsuperscript{18}  See Philip J. Landrigan & Dean B. Baker, The Recognition and Control of Occupational Disease, 266 JAMA 676, 676 (1991) (estimating that occupational diseases account for 50,000 to 70,000 deaths annually); National Safe Workplace Institute, Beyond Neglect: The Problem of Occupational Disease in the U.S.—Labor Day '90 Report 7 (1990) [hereinafter Beyond Neglect] (estimating cases of occupational disease in 1987 at 47,877 to 95,479 persons).


\textsuperscript{20}  See Richard Doll & Richard Peto, The Causes of Cancer: Quantitative Estimates of Avoidable Risks of Cancer in the United States Today, 66 J. Nat'l Cancer Inst. 1191, 1256-57 (1981) (estimating that occupational exposures account for approximately four percent of all cancer deaths, while environmental pollution accounts for approximately two percent of such deaths). Researchers have calculated the incidence of occupational disease-related cancers to be somewhere between 1 and 15% of all cancers, while government studies have found that the incidence is between 20 and 39%. See McGarity & Shapiro, supra note 5, at 8.

\textsuperscript{21}  See Beyond Neglect, supra note 18, at 12 (drawing this conclusion from estimates based on 1987 data indicating about 70,000 fatalities due to occupational disease).
and regulatory incentives. Because of various real-world constraints, however, the impact of these influences is less than what economic and regulatory theory would predict.

1. Economic Incentives. The operation of labor markets creates economic incentives for employers to reduce employees' workplace accidents and illnesses. Economic theory predicts that workers will bargain for wage premiums as compensation for exposure to workplace hazards and that employers will abate workplace risks to the extent it is less expensive than paying higher compensation. In addition, employers have an incentive to protect existing workers whenever the cost of doing so is less than hiring and training their replacements. However, several factors limit the impact of these economic incentives in labor markets. Workers are not paid adequate wage premiums for more hazardous employment because they lack bargaining power or are ignorant of workplace risks. Moreover, many workers in especially dangerous occupations are easily replaced.

Regulation in the form of workers' compensation and tort law creates similar incentives. Employers have an incentive to abate occupational hazards to the extent that preventative action is less expensive than paying workers' compensation claims. Professor Spieler's article in this issue discusses this

22. See Leibman & Dworkin, supra note 7, at 362 (noting that regulatory schemes such as workmen's compensation systems balance employers economic and humanitarian objectives).

23. See McGarity & Shapiro, supra note 5, at 268 (noting that in an efficient labor market, employers will take steps to minimize hazards to the extent that prevention costs less than compensation).

24. See id. at 18.

25. See Elinor P. Schroeder & Sidney A. Shapiro, Responses To Occupational Disease: The Role of Markets, Regulation, and Information, 72 Geo. L.J. 1231, 1237 (1984) (noting that employers will take preventative actions when they cost less than the consequences of not taking such actions).

26. See id. at 1241.

27. See id. (citing W. Kip Viscusi, Risk By Choice: Regulating Health and Safety in the Workplace 41 (1988)) (suggesting that workers also fail to demand wage premiums because they lack the information about occupational risk necessary to take a bargaining position).

28. See James C. Robinson, Toil And Toxics: Workplace Struggles and Political Strategies for Occupational Health 75-76 (1991) (noting employers' tendency to replace highly skilled workers in hazardous work environments with less skilled workers at lower wages and subject to increased supervision and control).

29. See id. at 1245, 1250 (noting that, under workers' compensation and tort law schemes, the costs of work-related injuries and illnesses of workers become costs for the employer).

30. Id. at 1245.
form of regulation. However, as in the case of labor market incentives, real world constraints limit the effectiveness of these economic incentives in protecting workers. As Professor Spieler demonstrates, employers do not respond to increased workers' compensation costs by investing in accident and illness prevention because alternative responses are less expensive. These responses include purchasing insurance, discouraging workers from seeking compensation, and lobbying legislatures to reduce eligibility requirements and the level of compensation. Tort remedies do not make up for the inadequacies of workers compensation. Such remedies are available only when the negligence of a third party other than the employer or the worker caused a worker's injury.

2. Humanitarian Incentives. The previous section explained that economic theory assumes employers will reduce workplace hazards only if the cost of the investment is less than the consequences of not making the investment. This dour picture of employer behavior fails to recognize that employers also make safety and health improvements out of humanitarian concerns. However, this incentive is constrained in two important ways. First, not all employers are conscientious. The fatal result of a 1991 fire at the Imperial Food Products plant in Hamlet, North Carolina demonstrates this unfortunate conclusion. The plant owners had locked the fire doors to prevent theft and when a fire broke out, twenty-five

31. See Spieler, supra note 14, at Part III.
32. Id. at part III.D.
33. Id. at Part III.
34. Schroeder & Shapiro, supra note 25, at 1251. A key reason why tort law fails to supplement state workers' compensation schemes in a comprehensive way is that workers' compensation remedies are generally a worker's exclusive option. See Mary Becker, Reproductive Hazards After Johnson Controls, 31 Hous. L. Rev. 43, 91 (1994) (noting that the exclusive remedy provisions of state workers' compensation schemes preempt tort causes of action).
35. See Schroeder & Shapiro, supra note 25, at 1251 (stating that injured workers must find a third party with liability, such as a supplier or raw materials manufacturer, for pursuit in a tort action); ROBINSON, supra note 28, at 1251 (taking note that the exclusive remedy provisions of workers' compensation schemes reduces the effectiveness of tort liability as an incentive for employers to provide safe workplaces). Incidentally, many state workers' compensation schemes give an employer a right of subrogation in a worker's third party suit, so that it is reimbursed for the amount of workers' compensation benefits paid to the worker. Schroeder & Shapiro, supra note 25, at 1252. The result is even less of an incentive for an employer to reduce hazards present in the workplace. Id.
36. See also Spieler, supra note 14, at 181-85.
37. See also Becker, supra note 34, at 57-63 (discussing how employers' humanitarian concerns may sometimes be misdirected and result in policies that do more harm than good).
workers were killed and fifty-four more were injured.\textsuperscript{38} Second, as Ralph Nader points out in his address published in this issue,\textsuperscript{39} the humanitarian impulse is weakened because corporate decisionmakers are remote from the persons affected by their decisions.\textsuperscript{40} It is far easier to trade dollars for lives when employees are perceived as statistics and not as real people.\textsuperscript{41}

3. Regulatory Incentives. OSHA regulation provides the final incentive for employers to protect workers' safety. Congress enacted the Occupational Safety and Health Act ("OSH Act") in 1970\textsuperscript{42} because of the inadequacy of economic incentives to encourage employers to protect workers and because, unlike economic incentives, health and safety regulation is preventative.\textsuperscript{43} To use Professor Spieler's apt phrase, economic incentives depend on a "feedback loop."\textsuperscript{44} Employers will not take preventative actions until and unless workers obtain wage premiums or compensation.\textsuperscript{45} On the other hand, OSHA regulation has the advantage of causing employers to take precautions before employee accidents or illnesses occur. Professor McGarity's article in this issue examines the regulatory approach to workplace health and safety.\textsuperscript{46}

A thick web of administrative, legal, and political constraints limit OSHA regulation. Professor McGarity and I discussed the nature and impact of these constraints in a

\begin{footnotes}
\item[38] See Family of Worker Killed in Imperial Fire Sues Company, Manager for Gross Negligence, 21 O.S.H. Rep. (BNA) No. 16, at 429 (Sept. 18, 1991).
\item[40] See id. at 4-5.
\item[41] See generally GUIDO CALABRESI & PHILIP BOBBITT, TRAGIC CHOICES 17-28 (1978) (noting that employer trade-offs between the cost of hazard prevention and worker safety are easier when the employee victims of such decisions are not identifiable).
\item[43] See McGARITY & SHAPIRO, supra note 5, at 34 (noting that occupational safety had become a national problem when finally addressed by legislative action); Sidney A. Shapiro & Thomas O. McGarity, Not So Paradoxical: The Rationale For Technology-Based Regulation, 1991 DUKE L.J. 729, 739-40 (1991) [hereinafter Rationale for Regulation] (noting that economic incentives sometimes result in employers merely compensating victims after death or injury rather than spending money to avoid risks).
\item[44] See Spieler, supra note 14, at 127.
\item[45] See id. at 179-85.
\end{footnotes}
previous publication. We concluded that in light of the significant constraints OSHA faces, the surprise is not that OSHA has produced so little regulation but that it has produced any regulation at all. Moreover, as Professor Becker's analysis in this issue of the Johnson Controls case indicates, additional complications arise when companies attempt to meet regulatory obligations by discriminating against women.

C. Reform Options

The previous policy framework indicates the opportunities for reform. If workers are to be better protected, there must be improved economic, humanitarian, and regulatory incentives for employers. As Mr. Nader and Professors McGarity and Spieler emphasize, reformers must identify the factors that have constrained the impact of job safety incentives and remove them. The reforms most likely to accomplish this goal, however, are also the most drastic changes from the status quo.

Workers would be in a better position to demand wage premiums if they had better information and more bargaining power and better information concerning the risks that they face. Even if workers gain more information, however, their bargaining power will remain low as long as only twelve percent of the private workforce is unionized and economic recovery is slow in coming. Rather than depending on the "feedback loop" of wage premiums to encourage employers to provide safe workplaces, a better alternative is to empower workers to protect themselves directly. Professor McGarity, for example, endorses the use of labor-management safety committees that would have the power to shut down operations that

47. See Shapiro & McGarity, supra note 4, at 4-14 (noting that substantive, managerial, legal, and political constraints have delayed OSHA's ability to fulfill its original goal of making every workplace safe).
48. Id. at 3.
49. Becker, supra note 34, at 63-71 (analyzing the decision and import of International Union v. Johnson Controls, Inc., 111 S. Ct. 1196 (1991)).
50. See id. at 88-96.
51. See generally McGarity, supra note 46; Nader, supra note 39; Spieler, supra note 14.
52. Refer to notes 13-16 supra and accompanying text for a summary of evidence as to the prevalence of occupationally-related injury, illness, and death suffered by workers.
53. See Shroeder & Shapiro, supra note 25, at 1241 (concluding that workers currently fail to demand wage premiums for hazardous work because they lack these prerequisites).
pose unreasonable health and safety risks.\textsuperscript{55}

Workers would also obtain more protection if employers paid a greater share of the costs now borne by workers for accidents and illnesses.\textsuperscript{56} Professor Spieler notes that states have rejected reforming workers compensation to take this approach; the states instead are using direct efforts to promote workplace safety, such as safety and health training and consulting programs.\textsuperscript{57} She concludes that such programs are unlikely to work and that federal standards for compensation or federalization of workers compensation may be necessary.\textsuperscript{58}

On another tack, Professor McGarity proposes three types of reforms concerning OSHA regulation. He advances a “patch and repair” reform of OSHA by delegating additional regulatory authority to the agency.\textsuperscript{59} He also proposes other reforms to make it easier for workers to hold OSHA accountable when it fails to carry out its statutory responsibilities.\textsuperscript{60} A final set of reforms would empower workers to protect themselves from workplace health and safety risks.\textsuperscript{61} Professor McGarity maintains that fundamental changes are necessary to make OSHA effective, such as “burden-shifting” devices to reduce the evidentiary burden on OSHA to justify a regulation.\textsuperscript{62}

Mr. Nader also emphasizes the need for fundamental change in the current approaches to workplace health and safety. He endorses ambitious concepts that would empower workers to protect themselves, such as the right to have governmental officials dismissed if they do not do their job.\textsuperscript{63} More fundamentally, he predicts that a “major cultural jolt” will be necessary to create a public expectation that workers should be better protected.\textsuperscript{64} He proposes several innovative responses, such as requiring top OSHA officials to spend time with workers and punishing employers by requiring them to work at the site of workplace accidents.\textsuperscript{65}

The following section considers the potential fate of these and similar reform proposals in the political system. The

\begin{footnotes}
\footnote{55. \textit{See} McGarity, \textit{supra} note 46, at 116.}
\footnote{56. \textit{See} Spieler, \textit{supra} note 14, at 187.}
\footnote{57. \textit{See id.} at part IV.B.}
\footnote{58. \textit{Id.} at 264.}
\footnote{59. \textit{See} McGarity, \textit{supra} note 46, at 111-13.}
\footnote{60. \textit{Id.} at 103-06.}
\footnote{61. \textit{See, e.g., id.} at 113-17.}
\footnote{62. \textit{Id.} at 106-09.}
\footnote{63. \textit{See} Nader, \textit{supra} note 39, at 10.}
\footnote{64. \textit{Id.} at 3; \textit{see id.} at 4 (attributing the current malaise to a “pitiless abstraction” that treats workers as dispensable).}
\footnote{65. \textit{Id.} at 10-12.}
\end{footnotes}
problem for workers is that the most helpful proposals are the ones the business community is most likely to oppose. Because employers have greater political influence than workers, the solutions that are the most protective of workers are not likely to be adopted.

II. The Current Political Environment

Policy analysts have recommended various solutions to the problems of occupational accidents and disease. Whether Congress or a state legislature will adopt any solution, or even consider it, depends on the political process. The following analysis offers a model that explains the impact of the political process on proposals for workplace health and safety reforms. This section then analyzes the greater political influence of employers than workers and assesses the likelihood of reform in light of this disparity.

A. The Political Impact

Congress is unlikely to legislate until an issue is perceived as a problem, for which solutions exist, under circumstances that generate the political will to act on one of those solutions. The convergence of these elements is unpredictable because each is the product of an independent process. The result is more often "organized anarchy" rather than a

66. See, e.g., AFL-CIO Urges Congress to Give Workers Same Protection as Environment, Wildlife, 23 O.S.H. Rep. (BNA) No. 10, at 244 (Aug. 4, 1993) [hereinafter AFL-CIO Urges Congress] (stating that the current OSHA reform package proposed by the House of Representatives is opposed by business groups such as the National Association of Manufacturers, the Associated Builders and Contractors, and the American Iron and Steel Institute).


68. The decisionmaking model discussed in the text does not distinguish between Congress and state legislatures. For the sake of brevity, the text only refers to Congress for the remainder of this Foreward, unless the situation in the states differs.

69. See John W. Kingdon, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 92-93 (1990) (postulating a three step process leading to legislation, involving (1) problem recognition, (2) the generation of proposals by policy specialists, and (3) assessment of the current political environment).

70. See id. at 93 (finding that the political "stream" or environment is an independent factor, responsive neither to the identification of problems or to policies proposed for their solution).
disciplined, rational process of problem solving.  

In the context of passing workplace health safety legislation, the first step—recognition of a problem—occurs when Congress elevates a problem to its legislative agenda. This agenda is limited because, like other organizations, time and resource constraints restrict Congress' ability to consider and make decisions. Interest groups, agencies, and other political actors compete to convince Congress to take up problems of interest to them, but Congress is unlikely to put a problem on its agenda absent sufficient political demand for action.

Once Congress decides to act, interest groups and political actors then compete to influence what solutions will be adopted by advocating policies that serve their interests. At this point the policy process and the political process join. Congress' decisions will depend on the relative merits of the proposals and on the political influence of the competing parties. Thus, while it is important for an interest group to have a credible policy, it is also necessary to build political support in favor of that solution. As one commentator on the political process has noted, "Reports to Congress suggesting controversial action, unaccompanied by political momentum, ordinarily move the Congress with all the force of a bulldozer with an

71. See generally Michael D. Cohen et al., A Garbage Can Model of Organizational Choice, 17 ADMIN. SCI. Q. 1, 1, 3-4 (1972) (referring to complex yet disorganized decisionmaking systems as "organized anarchies," and dubbing the approach the "garbage can" method of processing and responding to information).

72. See KINGDON, supra note 69, at 3-4 (defining "agenda" as the subjects or problems to which government officials pay serious attention). Setting the agenda is the first step of public policy making. Id.

73. See id. at 193-95 (noting that the legislative system has a limited capacity to process agenda items).

74. See id. at 208 (noting that national mood and elected politicians are likely to prevail over organized interests in setting agendas).

75. See id. at 52 (observing that interest groups employ positive promotion to mobilize support for their solutions as well as blocking initiatives that would reduce their position); id. at 53 (noting that even if an interest group succeeds in placing an issue onto the agenda, it may lose control of the debate and enable another group's alternative to be implemented); see also BAUMGARTNER & JONES, supra note 6, at 29 (stating that policy entrepreneurs want to ensure that one problem arrives on the national agenda their solutions are adopted to solve it).

76. KINGDON, supra note 69, at 151 (noting that surviving proposals include those that are technically feasible and incorporate acceptable values). Once acceptable proposals are elevated to the political agenda, the political stream, composed of the national mood and organized political forces, presses for adoption of a proposal. Id. at 170-71.

77. Id. at 52 (observing that interest groups gain the attention of government officials by mobilizing support, writing letters, sending delegations, and stimulating allies). One respondent in Kingdon's research concluded that "the louder the squawk, the higher [the issue] gets." Id.
empty gas tank.78

In summary, an interest group needs political influence in order to convince Congress to take up a problem and to adopt the solution that the group favors. As the following section discusses, the problem for workers is that employers have more political resources and thus more influence.

B. Political Resources

An interest group’s political influence is a function of its political “resources,” or in other words, its capacity to influence individual legislators.79 A group gains influence if it has access to legislators, sufficient policy expertise to support its policy positions, or the ability to affect a legislator’s chances for reelection.80 Another important resource is having an ally in a political actor who occupies a central position in government such as the President.81 The history of the politics of health and safety regulation reveals that business dominates, but does not monopolize, such resources.82

The history of the OSH Act supports Terry Moe’s observation that “public agencies will tend to be structured in part by their enemies—who want them to fail.”83 Despite opposition from the business community, Congress passed the OSH Act because of the support of President Nixon, who wanted to wean blue color workers away from their traditional support of Democrats.84 Nevertheless, workers had to accept procedural arrangements that made it difficult for OSHA to operate

78. MICHAEL PERTSCHUK, GIANT KILLERS 45 (1986) (describing the Federal Trade Commission’s attempt to push cigarette labeling and advertising regulations through Congress).

79. See PHILIP B. HEYMANN, THE POLITICS OF PUBLIC MANAGEMENT 145 (1987) (defining “resources” as “whatever makes it possible to influence the response of other legislative or executive officials to a proposal”).

80. Id. at 150-51.

81. See id. at 148 (identifying the authority of a superior as a central and powerful form of influence).


83. Terry M. Moe, Political Institutions: The Neglected Side of the Story, 6 J.L. ECON. & ORG. 213, 230 (1990); see id. (finding that because of the necessity of compromise, an agency’s opponents inevitably influence its organizational structure and policy direction).

84. See McGARTY & SHAPIRO, supra note 5, at 34 (noting that Nixon’s somewhat reluctant occupational health and safety initiative capitalized on the activist climate of the late 1960s and the interest sparked by a mining disaster that killed 88 miners in West Virginia).
effectively. An example is the split-enforcement arrangement between OSHA and the Occupational Safety and Health Review Commission (OSHRC).

OSHA was unpopular in Congress almost immediately. Graham Wilson explains, "Congress first created an agency with a mandate for a tough regulatory approach, and then, displeased with the results . . . [it] sniped at the agency, making piecemeal alterations in its policies and weakening further its tenuous authority." In particular, Congress passed several budget amendments which restricted OSHA's jurisdiction. However, Congress failed to pass any of the numerous proposals to amend the OSH Act, including proposals to abolish the agency. OSHA avoided this fate largely because hostile bills were assigned to committees in the House and Senate that were packed with labor supporters. These committees blocked such legislation even though these proposals might well have commanded a simple majority of Congress.

Some of the anti-OSHA feeling in Congress died down during the Carter administration after Eula Bingham, OSHA's administrator, eliminated some of the inspection practices and

85. See id. at 246 (noting that the Occupational Health and Safety Review Commission (OSHRC) disputed OSHA's interpretation of its own standards, resulting in delay of OSHA's efforts to protect workers). OSHRC's inability to keep up with a backlog of appeals has also resulted in further delays of corrective action by employers. Id. at 246-47.

86. Id. at 245. OSHA is responsible for issuing and enforcing health and safety standards through the Department of Labor. Id. OSHRC is an independent commission responsible for adjudicating health and safety complaints. Id.

87. Id. at 43. One Senator proposed an amendment to OSHA to exclude small businesses from safety inspections. Id. Several bills introduced in 1973 required OSHA to pay close attention to employer costs in setting safety standards. Id. Congress in fact limited OSHA's jurisdiction in 1976 by exempting small farms from enforcement. Id.


89. See McGarity & Shapiro, supra note 5, at 43 (noting Congress' exemption of small farms, defined as those with ten or less employees, from OSHA's enforcement). A Senator introduced a bill reducing random safety inspections for workplaces with above-average safety records. Id. at 48. Although the bill was defeated, its goal was achieved through a 1979 appropriations rider, which restricted OSHA inspections of "safe" employers with ten or fewer employees. Id. at 49.

90. See Wilson, supra note 88, at 43 (noting that Northern Democrats and a significant number of Republicans support OSHA, thus warding off efforts to abolish the agency); Michael Levin, Politics and Polarity: The Limits of OSHA Reform, REGULATION, Nov.-Dec. 1979, at 33, 33 (noting that between 1973 and 1976 pro-OSHA forces repeatedly blocked attempts to restrict or abolish OSHA).

91. See Wilson, supra note 88, at 46-47 (observing the demise of bills to amend or repeal OSHA assigned to liberal, pro-union committees, such as the Senate Committee on Labor and Human Resources and the House Education and Labor Committee).
silly regulations that had angered the business community. Bingham's success, however, did not translate into more political support for OSHA. Labor union leaders did not press for legislative reforms at this time because they feared that once a bill moved out of the committees where labor unions had influence, legislators who supported employers would amend the bill to gut OSHA.

Opposition by the Reagan and Bush administrations stymied legislative reform in the 1980s. President Reagan vigorously criticized OSHA during his first presidential campaign, and his first two OSHA administrators were extremely hostile to its mandate. OSHA's subsequent leaders did not wear the same ideological blinders, but they still resisted legislative proposals for reform.

92. See McGARTY & SHAPIRO, supra note 5, at 47 (noting that the Carter administration adopted a "low key approach to enforcement" and that Bingham quickly responded to business complaints about enforcement policies); Levin, supra note 90, at 33 (noting the deletion of approximately 1000 unnecessary regulations, such as requirements for split toilet seats, coat hooks on bathroom doors, and the maximum number of knotholes in wooden ladders). As a result of Bingham's efforts, the program became both more effective and less controversial. McGARTY & SHAPIRO, supra note 5, at 47.

93. See McGARTY & SHAPIRO, supra note 5, at 48-49 (noting that during Bingham's tenure, the agency's increased efficiency led to the discovery of more serious violations). OSHA began demanding stiffer penalties and recommending prosecution. Id. at 48. Business groups responded by mounting political challenges, and eventually limited OSHA's jurisdiction with an appropriations rider in 1979. Id. at 48-49.

94. See Wilson, supra note 88, at 49 (noting that the unions' strategy was to keep bills to amend OSHA off the floor and in committees).

95. See Unions Applaud Election of Clinton; Business Braced for More Aggressive OSHA, 22 O.S.H. Rep. (BNA) No. 24, at 1185 (Nov. 11, 1992) (predicting that employers' influence over the Clinton Administration will be less than during the Bush and Reagan years, thus diminishing the confrontational attitude organized labor faced on worker health and safety issues); see also Greater Role Suggested for Workers to Improve Enforcement of Safety Rules, 22 O.S.H. Rep. (BNA) No. 40, at 1699 (Mar. 10, 1993) [hereinafter Greater Role Suggested for Workers] (quoting Professor McGarity as stating that although OSHA has been on the "legislative agenda" for a decade, a "divided government" has precluded substantive amendment of the Act).

96. McGARTY & SHAPIRO, supra note 5, at 61 (stating that Reagan "frequently invoked OSHA as a symbol of intrusive and inefficient bureaucracy").

97. See id. at 60 (stating that Reagan's first OSHA administrator, thirty-six year old Thorne Aucther, had practically no experience with worker health and safety issues and was "committed to 'stemming the flow' of health and safety standards"); id. at 98 (quoting Carter's OSHA Administrator Bingham as describing Reagan's second appointee, Robert Rowland, as "anti-worker and anti-people"); see generally id. 61-104 (describing the effect of the Reagan years on OSHA's goals and enforcement with chapter titles such as "Going Backward" and "Inching Forward").

In 1992, Senators Kennedy and Metzenbaum introduced the first comprehensive reform legislation since the creation of OSHA, but the bill died in committee. Realizing that a Republican administration made passage unlikely, the Democrats reported the bill to the entire Senate just prior to the 1992 election in an attempt to make occupational health and safety an election issue.

The following year, comprehensive reform legislation was introduced in both the Senate and the House. From the perspective of workers, the pending legislation is a strong effort to reform the regulatory approach to occupational health and safety. It gives OSHA significant new powers, grants workers the ability to force the agency to take more action, and requires employers to use employee-employer safety committees. Business groups generally oppose the legis-

quire employers with 11 or more workers to establish mandatory safety and health committees with equal employer and employee representation; Labor IG Supports OSHA Penalty Bill; Scannell Opposes Expansion of Sanctions, 20 O.S.H. Rep. (BNA) No. 39, at 1439 (Mar. 6, 1991) (noting OSHA Administrator Gerard F. Scannell's opposition to including new violations in the category of violations for which criminal sanctions are imposed, on the grounds that it would decrease voluntary compliance with new regulations).

100. Reform Bill Waiting in the Wings, OCCUPATIONAL HAZARDS, Mar. 1993, at 17; see Job Safety, GOP Boycotts Senate Committee Vote on Job Safety Bill Amid Partisan Dispute, Daily Rep. Executives (BNA), at 157 (Aug. 13, 1992) (observing that Senate Republicans blocked a vote on Senate Bill 1622 when they boycotted a Labor and Human Resources Committee meeting, making it unlikely that the bill would make it to the Senate floor in the 102d Congress).
101. See OSHA Reform, supra note 97, at A5 (stating that proponents of Senate Bill 1622 hoped for the election of a Democratic President in 1993, knowing that the bill would face certain veto from the Bush Administration).
103. See UAW Welcomes Formation of Coalition Supporting OSHA Reform, PR Newswire, Feb. 9, 1994, available in LEXIS, Nexis Library, PR Newswire File (reporting that the president of the United Auto Workers endorsed the proposed OSHA reform which gives workers an active role in decisions that affect their health and safety).
104. The Senate bill provides for implementation of safety and health committees composed of employer and employee representatives. S. 575, § 201(a)-(d). The Senate Bill also provides that "interested persons" may by petition recommend that OSHA promulgate, modify, or revoke health and safety standards, and that they may press the Secretary of Health and Human Services to issue prompt responses in the Federal Register. Id. § 401(a). The Secretary's failure or refusal to issue rules is reviewable by a United States Court of Appeals. Id. § 401(d). An action for review may be brought by any person adversely affected by the Secretary's determination or delay. Id. The House Bill also requires employers to set up committees to review workplace health and safety programs. H.R. 1280, § 201(a). It alternatively provides that an employer may employ mechanisms other than the safety and health committees, provided that employees can participate meaningfully in the safety and health activities that an employer chooses. Id.
lation, although some business spokespeople have endorsed some aspects of the bills. 106

At the time this Foreward was written, both bills were still in the committee process. The next section examines the prospects for reform in light of workers' political resources.

C. Prospects For Reform

President Clinton's election has created a "policy window," 107 or a change in the political environment, allowing occupational health and safety to return to Congress' agenda. 108 Congress was reluctant to take up OSHA reform during the last twelve years because of the likelihood of a presidential veto. 109 The possibility of such a veto meant that unless workers had the support of two-thirds of the members of Congress, they could not obtain reforms that the President opposed. In effect, this hurdle eliminated the possibility of meaningful reform.

The policy window opened by President Clinton's election will close once Congress adopts a legislative response, even if

105. See, e.g., House Republicans Unveil Legislation, Stressing Incentives, New Role for OSHA, 23 O.S.H. Rep. (BNA) No. 11, at 275 (Aug. 11, 1993) (stating that Republican members of the Labor Committee and the business community charge that the Democratic bill contains overly rigid requirements for OSHA enforcement and in its mandates for employee participation); More Funding for OSHA, NIOSH Required to Fulfill Mandate, Witnesses Tell Congress, 23 O.S.H. Rep. (BNA) No. 9, at 213 (July 28, 1993) (repeating a comment by a former top OSHA official during the Reagan Administration to the effect that there is no proof that OSHA needs reform, despite the Democrats' proposal); AFL-CIO Urges Congress, supra note 66, at 244 (reporting that a spokesperson for the National Association of Manufacturers reasoned that because OSHA has not been previously amended, it does not need to be amended now.

106. See Timothy A. Jemal, Reforming OSHA Becomes Exercise in Partisan Politics; Occupational Safety and Health Act of 1970, 95 Concrete Prods. (Maclean Hunter) No. 6, at 12 (June 1992) (stating that the NRMCA supports many of the concepts proposed by the pending OSHA legislation).

107. KINDON, supra note 69, at 173-74 (defining a "policy window" as a brief opportunity presented within policy systems when (defining advocates of proposals can "push their pet solutions," others can seek action on particular initiatives, and yet others can focus attention to special problems). A change in administrations will often open a policy window. Id. at 176.

108. See Health Care Battle Likely to Unite Industry for Battle Over Comprehensive Job Safety Bill, Daily Lab. Rep. (BNA) No. 29, at 29 (Feb. 14, 1994) (noting that the Clinton Administration has endorsed OSHA reform as a concession to organized labor over the North American Free Trade Agreement, which was opposed by organized labor).

109. See OSHA Reform, supra note 67 (noting that reform bill proponents knew that Bush would veto measures which now enjoy a reasonable chance of success at the Democratic White House).
the response is one that workers regard as inadequate. The policy window will also close if workers lack the political resources to get any reform adopted and legislators move on to other matters. The history recounted in the previous section suggests that unions and their allies will have difficulty passing those reforms that the business community most strongly opposes, such as employer-employee health and safety committees.

Other evidence also suggests that workers lack the political resources to prevail over significant employer opposition. Organized labor, often the only representative of workers in the political process, is considerably weaker today than it was in 1971 when OSHA was established. Whereas 27.3 percent of the total workforce was unionized in 1970, just prior to OSHA's establishment, only 15.8 percent was unionized in 1992. Union representation in the private workforce is even less. As noted earlier, only twelve percent of the private workforce is organized. Moreover, union membership in the states varies considerably. Although unions are strong in about twenty states, they are considerably weaker in the rest. Finally, the least skilled and least organized workers

110. Kingdon, supra note 69, at 177 (stating that a policy window closes once participants have acted in some way, regardless of whether they have fully addressed the problem).
111. See id. (finding that political actors are often unwilling to expend additional time or political capital in support of an action that does not get passed.
112. Refer to notes 53-55 supra and accompanying text.
114. See NAFTA Gotcha, supra note 54, at 4, 6.
115. See Bureau of The Census, U.S. Dept of Commerce, Statistical Abstract of the United States 421 (1992) (Table No. 671) [hereinafter Statistical Abstract] (listing percentage of unionized employees by state for the period 1984 to 1989). South Carolina, a right-to-work state, had the lowest percentage of union membership with 2.4% of its workers unionized, while Michigan, with 51.6%, had the highest percentage. Id.
116. In 1989, union membership as a percentage of workers employed in manufacturing was as follows:

<table>
<thead>
<tr>
<th>Number of States</th>
<th>Percentage of Unionized Employers</th>
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<tbody>
<tr>
<td>6</td>
<td>30 or more</td>
</tr>
<tr>
<td>12</td>
<td>20 - 30</td>
</tr>
<tr>
<td>18</td>
<td>10 - 20</td>
</tr>
<tr>
<td>14</td>
<td>0 - 10</td>
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</tbody>
</table>

Id.
are often in the most dangerous jobs.\textsuperscript{117}

As further evidence that workers are politically weak, many reforms that would significantly enhance protection for workers have not even been proposed in Congress. For example, workers can help OSHA by reporting violations, but OSHA’s ability to respond is constrained by its limited resources.\textsuperscript{118} Congress could solve this problem by authorizing private citizen suits, as it has done in the environmental area. But Congress has not considered authorizing workers to sue employers to enforce OSHA regulations.\textsuperscript{119} Other reforms that could have a significant impact, like an injury tax,\textsuperscript{120} are likewise not on the horizon for purposes of this round of reform.\textsuperscript{121}

According to Mr. Nader, workers are further hampered because some unions are unwilling to fight for worker safety, as they have for issues such as the North American Free Trade Agreement (NAFTA), which more directly affect wages and benefits.\textsuperscript{122} He notes the AFL-CIO has only one full-time staff person assigned to occupational safety and health issues.\textsuperscript{123} Another view is that because of unions’ lack of resources, they have no choice but to emphasize protection of wages and jobs.\textsuperscript{124} A recent article concludes that “with unions fading fast, and their limited resources focused on simply

\textsuperscript{117} See Robinson, supra note 28, at 75-76 (noting that once employers succeed in reducing union representation in hazardous jobs by reducing the need for highly skilled workers with more organized processes of production, presumably they bring in non-unionized, low-skilled workers); see also Carol Kleiman, Projecting Ahead: Who will be Doing What for the Next 12 Years, CHI. TRIB., Feb. 6, 1994, at C1 (noting one researcher’s concern that unless low skilled workers organize, they will have little chance for better wages).

\textsuperscript{118} See McGarity & Shapiro, supra note 5, at 324 (conceding that the number of OSHA inspectors is woefully inadequate when compared with the task of inspecting all of the workplace subject to OSHA’s jurisdiction).

\textsuperscript{119} See Greater Role Suggested for Workers, supra note 95, at 1699 (reporting Professor McGarity’s proposal for citizen suits regarding OSHA enforcement).

\textsuperscript{120} See Cass R. Sunstein, Administrative Substance, 1991 DUKE L.J. 607, 640 (suggesting as a market-based incentive for workplace safety reform a tax on employers that maintain unsafe working conditions). Other prospective reforms could include greater reliance on workers’ compensation, disclosure of risks to workers, more active bargaining, and employee involvement in monitoring workplace safety. Id.

\textsuperscript{121} See Study Finds Plants Inspected and Fined by OSHA Have 22 Percent Drop in Injury Rate, 21 O.S.H. Rep. (BNA) No. 12, at 355 (Aug. 21, 1991) (suggesting an injury tax as an alternative to increased OSHA enforcement to reduce workplace injuries).

\textsuperscript{122} Nader, supra note 39, at 6-8.

\textsuperscript{123} Id. at 7.

\textsuperscript{124} See Allan Freedman, Workers Stuffed, WASH. MONTHLY, Nov. 1992, at 27 (suggesting that the combination of organized labor’s inability and OSHA’s unwillingness has left many reforms to “gather dust on the shelf”).
protecting wages, the days are gone when they could also battle management to make mines safe and close down sweatshops—let alone push weighty legislation through an ambivalent administration and Congress."^{125}

While the political influence of organized labor has declined, the business community has become politically stronger. Employers were politically unprepared for the citizen activism of the 1960s and early 1970s, which included passage of the OSH Act, but they are now more powerful than before.^{128} One important reason is that companies’ political action committees (PACs) no longer limit their support to Republicans, but they also support key Democrats, such as committee chairpersons,^{127} which enhances employer access to these Democrats.^{128} For this reason and others, the voting patterns of key Democrats has become more closely aligned these legislators with business preferences.^{129}

These trends reflect what political scholars have known for a long time. Because health and safety legislation produces widely diffuse benefits and concentrated costs, those who pay (employers) are more likely to lobby Congress than those who benefit (workers).^{130} This imbalance is the result of two factors. First, the likelihood of collective action is greater among employers than among the much more numerous group of

125. Id.
126. See generally David Vogel, FLUCTUATING FORTUNES: THE POLITICAL POWER OF BUSINESS IN AMERICA 193-239 (1989) (documenting the political resurgence of business due to the efforts of employers to influence the prevailing political and intellectual climate and to the shift in public attitudes toward business and government).
127. See id. at 209-10 (noting that a major share of business PACs’ money went to liberal Democrats who chaired House and Senate committees in 1976); Harold W. Stanley & Richard B. Niemi, VITAL STATISTICS ON AMERICAN POLITICS 182-83 (1992) (indicating an increase in corporate PAC contributions to Democrats). In 1989 and 1990, corporate PACs gave $19.1 million to Democrats in the House compared to $17.1 million contributed to Republicans. Id. at 183.
129. Stanley & Niemi, supra note 127, at 214 (indicating that the percentage of conservative coalition victories has increased since the 1960s and early 1970s).
130. See James Q. Wilson, The Politics of Regulation, in THE POLITICS OF REGULATION 357, 370 (James Q. Wilson ed., 1980). Wilson defines “entrepreneurial politics” as the situation in which an interest group proposes a policy that confers general but small benefits on a large group with costs borne by a small segment of society. Id. Incentive is strong for the cost-bearing segment of society to oppose the policy but weak for the beneficiaries. Id.
Moreover, twelve years of hostile rulings by the National Labor Relations Board (NLRB) during the Reagan and Bush administrations have significantly raised the cost of union organizing. Second, unions are subject to "free-rider" behavior, which occurs because workers obtain the benefits of any legislation even if they do not support union lobbying efforts.

Because employers have more political resources, White House support will be important in determining the extent to which labor will have to compromise to get new legislation. Although the Department of Labor has endorsed the comprehensive reform legislation now before Congress, the White House might not be able to tip the battle in favor of workers. The President, who was elected by the smallest plurality of any president this century, has had difficulty in getting Congress to pass other legislation that he has favored. Concerning the OSHA legislation, an official of the National Association of Manufacturers has warned, "If the administration chooses to go with [the proposed legislation] it will be a fight with lots of

131. See Mancur Olson, The Logic of Collective Action: Public Goods and the Theory of Groups 44-45 (1971) (hypothesizing that, in a large group, it is unlikely that the contribution of any one individual will be perceptible, so that any one individual lacks inducement to contribute to the common good). Olson concludes that the number of individuals in a group is determinative of its ability to achieve the collective good. Id. at 45.

132. See David L. Gregory, Working for a Living, 58 Brook. L. Rev. 1355, 1367 (1993) (reviewing Thomas Geoghegan, Which Side Are You On?—Trying to Be for Labor When It's Flat on Its Back (1991)) (noting that due to the pro-employer ideology of the NLRB during the Reagan-Bush era, employers found it cost-efficient to simply terminate workers who were attempting to organize); Richard B. Freeman & Joel Rogers, A New New Deal for Labor, N.Y. Times, Mar. 10, 1993, at A19 (observing that "toothless sanctions on unfair labor practices have proved no match for employer resistance to unions."). See generally Paul Weiler, Promises To Keep: Securing Workers' Rights To Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1787-1805 (1983) (describing how the NLRB's remedies of reinstatement and back pay are inadequate to forestall employers from discharging union activist employees, and that this inadequacy of remedies combined with a significant delay in issuing remedial orders does not deter employers from taking steps to stop the momentum of a union's organizing campaign).

133. David G. Sumner, Note, Plumbers and Pipefitters: The Need to Reinterpret the Scope of Compulsory Unionism, 33 Am. U. L. Rev. 493, 497 (defining "free riders" as nonunion employees who benefit from collective bargaining by union co-workers without contributing to the costs borne by the union). Business organizations are less subject to this behavior because they have far fewer members and are in a better position to offer incentives to join. See Olson, supra note 131, at 62 (noting that in a small group members know each other, judge others' contributions, and can control membership, while in contrast, in a large group members do not know each other).

134. Reich Outlines Support For Democratic Bill, Tirling It "Investment" In Hazard Prevention, 23 O.S.H. Rep. (BNA) No. 37, at 1212 (Feb. 16, 1994).
resources used up, and I think that it will not prevail."  

III. reshaping the political environment

Employers have traditionally had the upper hand in the political process concerning workplace safety and health. After workers compromised to get the OSH Act, employers were able to keep occupational health and safety reform off Congress’ agenda for the next twenty years. Nevertheless, predicting what Congress might do in the current political environment is difficult because legislative decisions are the product of unpredictable elements. One of the few certainties is that workers will be more successful if they can gain additional political resources. This section explains how an interest group can alter a political environment by redefining a policy issue in a manner that attracts additional support for its legislative goals, and it then considers whether workers can successfully follow this strategy in support of workplace health and safety reforms.

A. Issue Redefinition

Legislative politics is characterized by long periods of relative stability, in which one group of players dominate, punctuated by abrupt changes in political outcomes, when another group of interests becomes dominant or at least gains significant political power. This pattern is related to the interaction of policy and politics in influencing Congress’ legislative agenda. A group can dominate the legislative process concerning a policy issue if it can define the issue in a manner that makes it of little or no interest to the public. Challengers can threaten this dominance if they can redefine the

135. Employers Meet with Reich, Dear to Discuss Concerns over Democratic Bill, 23 O.S.H. Rep. (BNA) No. 6, at 132-33 (July 7, 1993).
136. Refer to notes 69-84 supra and accompanying text for a discussion of the factors at play in legislative action.
137. See Baumgartner & Jones, supra note 6, at 3 (developing a model to account for both the long periods of stability when the elites control policy, and the periods of rapid change during which they find themselves losing in policy arenas).
138. Authors Baumgartner and Jones employ empirical evidence and historical comparisons to illustrate that the agenda-setting process influences policy, policy problems are the fodder for the process of setting political agenda, and stability and rapid change are both vital for a functioning equilibrium. Id. at 4.
139. See Christopher J. Bossio, Pesticides and Politics: The Life Cycle of a Public Issue 22 (1987) (stating that dominant political institutions can keep issues off the political agenda by preserving a lack of public interest and encouraging the view that the issue does not merit attention).
issue to attract more public attention. Agricultural interests, for example, dominated the politics of pesticide use when the prevailing view focused on the economic importance of eradicating pests. These interests lost control after environmentalists redefined the issue to include not only economics, but also the health and environmental damage stemming from pesticide use.

Redefinition changes the political environment by altering the political incentives of legislators. Legislators' perceptions of voter preferences influence their position on an issue. When legislators anticipate how a roll-call vote might be used against them by future opponents, they adjust their votes to forestall such challenges. Therefore, when reformers gain public attention by redefining an issue, legislators must consider the possibility that a vote in support of a special interest can be used against them in a future election. An opponent can capitalize on the public's new attention to a redefined issue by pointing out that the legislator voted against the public's policy preference.

However, redefining an issue is not easy. Cooperation of the media is essential to getting the attention of the public. Moreover, those who benefit from the political status quo will resist attempts at redefinition. One common ploy to

140. See id.; BAUMGARTNER & JONES, supra note 6, at 35-36 (noting that "losers in a policy debate" can improve their position by increasing the number of participants that take their view on the issue).

141. See BOSSO, supra note 139, at 32 (explaining how the technology of pesticides, their economic necessity and convenience for use by the individual farmer "powerfully sculpted" the agricultural community's attitudes, and led to agricultural interests dominating the debates over pesticide regulation).

142. See id. at 144, (explaining how the dramatic emergence of an "environmental public" refocused an issue on the political agenda).

143. JOHN W. KINGDON, CONGRESSMEN'S VOTING DECISIONS 60-88 (1989) [hereinafter CONGRESSMEN'S VOTING DECISIONS] (discussing the decisionmaking processes that precede congressional voting and the factors which influence that process).

144. See R. DOUGLAS ARNOLD, THE LOGIC OF CONGRESSIONAL ACTION 8-13 (1990) (describing the effect citizens' influence has on policy judgments and politicians' voting).

145. See CONGRESSMAN'S VOTING DECISIONS, supra note 143, at 60 (quoting a Congressman who described how a vote on a controversial issue may pass unnoticed, but will certainly be brought to voters' attention by an opponent during the next bid for reelection).

146. See ARNOLD, supra note 144, at 9 (describing how legislators try to anticipate how roll-call votes might be used against them when an issue shifts at election time to the forefront of the public's concerns).

147. See BAUMGARTNER & JONES, supra note 6, at 103 (stating that the media's role is essential to the agenda-setting process because the media directs attention to different parts of an issue and shifts the public's attention from one issue to another).
preserve the status quo is to exploit the public’s general distrust of government and opposition to its expansion.\textsuperscript{148} OSHA’s critics have consistently used this approach.\textsuperscript{149} To overcome the stasis of the political agenda, those seeking reform must engage in “entrepreneurial” behavior. A successful policy entrepreneur becomes the vicarious representative of groups or the public at large not generally represented in the legislative process.\textsuperscript{150} The entrepreneur builds political support for unrepresented interests by mobilizing latent public sentiment, putting opponents of reform on the defensive, and linking the proposed legislation to values widely shared by the public.\textsuperscript{151}

If workers are to succeed politically in implementing workplace health and safety reforms, they must redefine the issue of occupational health and safety\textsuperscript{152} and find allies with a shared interest in the redefined issue.\textsuperscript{153} One approach to redefining workplace safety is to educate the public that it is in their self-interest to reduce workplace risks. Another approach is to argue that reducing occupational injuries and disease would make our society more fair. The following two sections consider the likelihood that such redefinitions of the issue would be successful.

B. Self-Interest

The problem for reformers is that most Americans are not

\textsuperscript{148} See BOSSO, supra note 139, at 22 (noting that problems remain non-issues because they are “screened out of the political arena by social norms, traditions, and commonly held notions about the government’s role”); Mark A. Peterson, Political Influence in the 1990s: From Iron Triangles to Policy Networks, 18 J. HEALTH POL’Y, POL’Y & L. 395, 406 (1993) (discussing the American public’s traditional distrust of government and how the American Medical Association has used that attitude to mold public policy in the health care field).

\textsuperscript{149} See, e.g., OSHA Tagged With ‘Red Tape Award’ By Six Republican ‘Vigilante Senators’, 22 O.S.H. Rep. (BNA) No. 19, at 1036 (Oct. 7, 1992) (describing how OSHA critics awarded the first “red tape award” to OSHA to demonstrate their opinion that agency regulations strangle American businesses).

\textsuperscript{150} See WILSON, supra note 88, at 370. For example, Mr. Nader became a policy entrepreneur, in essence the driving public’s vicarious representative, in seeking improved auto safety design. Id. Likewise, Howard Jarvis was a policy entrepreneur with respect to Proposition 13 in California, and Senator Joseph McCarthy when he galvanized the public with his anti-communist crusade. Id.

\textsuperscript{151} See id. (noting that such efforts require tremendous skill by the policy entrepreneur).

\textsuperscript{152} Refer to notes 137-46 supra and accompanying text for a discussion of why issue redefinition is necessary to overcome the political agenda’s status quo.

\textsuperscript{153} Refer to notes 75-77 & 150-51 supra and accompanying text (describing how those seeking to influence the agenda-setting process increase their chances of success with a greater number of powerful allies).
directly impacted by workplace health issues, or at least perceive that they are not.\textsuperscript{154} Only a minority of employees work with or near dangerous machinery or are exposed to toxic substances, while others are not even acquainted with anyone who works in such jobs.\textsuperscript{155} Although those who work in offices are not free from workplace risks such as ergonomic injuries,\textsuperscript{156} employees perceive this work as safe and healthy.\textsuperscript{157}

Yet occupational injuries and disease impact nearly everyone. As Cass Sanstein reminds us, "In a world with Medicare and Medicaid . . . the illness of any one of us is a bill for many or even most of us."\textsuperscript{158} Although there are no precise statistics concerning what these social costs might be, the evidence suggests that they are staggering. OSHA estimates that this cost is $80 billion a year,\textsuperscript{159} while another recent estimate puts the cost at $200 billion a year.\textsuperscript{160}

The argument that the public will gain by a reduction in occupational injuries and disease is especially timely now that Congress is debating national health care reform. Because the burden that workplace accidents and illnesses place on our health care system is significant, the savings available from a reduction in these risks must likewise be significant. For example, occupational disease accounts for a larger percentage of cancer deaths than environmental pollution, and kills more persons each year than such other preventable causes of death.

\textsuperscript{154} See Wilson, supra note 88, at viii (noting that OSHA's attempts to deregulate worker safety and health have received little public attention, especially compared to EPA scandals).

\textsuperscript{155} Compare, e.g., Ilise L. Feitshans, Hazardous Substances in the Workplace: How Much Does the Employee Have the "Right to Know"? 1985 Det. C.L. Rev. 697, 699 (citing a 1983 National Occupational Hazards Survey that put the number of workers exposed to chemical source hazards at 25 million, and the number exposed to OSHA-regulated chemicals at 40 to 50 million) with Statistical Abstract, supra note 115, at 381 (indicating that the total number of non-institutionalized employed workers in 1991 was more than 118 million).

\textsuperscript{156} See, e.g., Harold J. Engel et al., OSHA Crackdown—With More to Come, C732 ALI-ABA 483, 494 (1992) (reporting three significant fines, ranging from $243,000 to $990,000, that OSHA imposed on employers for ergonomics related violations).

\textsuperscript{157} Cf. Gerger v. Campbell, 297 N.W.2d 183, 186 n.2 (Wis. 1980) (noting that although the law requires employers to provide safe workplaces, legislatures' enactment of workers' compensation statutes focus primarily on the safety of equipment and machinery as opposed to office environments).


\textsuperscript{159} Revitalized OSHA, supra note 1, at 763.

\textsuperscript{160} National Safe Workplace Institute, Basic Information on Workplace Safety and Health in the United States 2 (1992).
as motor vehicle accidents, diabetes, and homicides.\textsuperscript{161} Preventing workplace accidents and disease would therefore substantially reduce the demand for health care.

The recent effort to redefine gun control and the reduction of violence in our society as a public health issue\textsuperscript{162} suggests the saliency of this approach. It is also salient because the linkage between occupational health and safety and health care reform is obvious and should therefore be understandable to the public.\textsuperscript{163}

Nevertheless, workers may have difficulty in redefining occupational health and safety as a matter of public concern because substantial public education is needed. Less than one half of the public currently believes that it is personally important that the government increase its regulation of workplace health and safety.\textsuperscript{164} This statistic shows that "commitment to job safety and health does not run deep or wide enough to make the subject a top national priority."\textsuperscript{165} Moreover, attempts to educate the public might get lost in the complex policy debate that surrounds health care reform. Finally, the public is most likely to notice an issue when it is socially significant, apparently nontechnical, broadly defined, and above all, emotional.\textsuperscript{166} The argument that occupational injuries and diseases tax the public's health care resources may be too technical and so lacking in emotional appeal that it will not be effective in increasing public support for legislative reform.

C. Fairness

The strategy of appealing to the public's self-interest faces significant obstacles. An attempt to redefine occupational

\textsuperscript{161} Refer to notes 20-21 supra and accompanying text.
\textsuperscript{162} See A Balancing Act on Crime Control, U.S. NEWS & WORLD REP., Feb. 28, 1994, at 8, 8 (stating that there is a fervor to attack crime and, although the sides are divided, all of Congress wants a crime bill).
\textsuperscript{163} See Deborah A. Stone, Causal Stories and the Formation of Policy Agendas, 104 POL. SCI. Q. 281 (1989) (stating that political actors redefine issues by establishing a new explanation of causality).
\textsuperscript{164} Levin, supra note 90, at 39.
\textsuperscript{165} Id.
\textsuperscript{166} ROGER W. COBB & CHARLES D. ELDER, PARTICIPATION IN AMERICAN POLITICS: THE DYNAMICS OF AGENDA-BUILDING 112-24 (1972).
health as a matter of distributive justice, or fairness, may therefore be more productive for workers.

The public's traditional opposition to government programs is not simply a matter of distrust, it is also the product of how citizens think about social responsibility. The strong tradition of economic and political individualism in this country puts the burden on those who would regulate health and safety matters to justify governmental action. Moreover, because this ideology makes the individual the basic unit of analysis, it supports "a politically conservative predisposition" that avoids questioning the basic structure of society and its distributions of wealth and power and concentrates instead on questions about the behavior of individuals within that structure. In other words, individualism influences how Americans think about "what ties them together and to whom they have ties." The individualist ideology leads to the sense that no one has an obligation to pay for the risks of workers who incur injuries and diseases doing dangerous work.

Another American political tradition, often described as "communitarianism," emphasizes that individuals share a community or a common culture, and a way of perpetuating it. As Professor Glendon has recognized, "Buried deep in our rights dialogue is an unexpressed premise that we roam at large in a land of strangers, where we presumptively have no obligation towards others except to avoid the active infliction of harm." But this individualistic assumption "fits poorly with the American tradition of generosity toward the stranger, as well as the trend in our history to expand the concept of community for which we have common responsibility."

The key elements of communitarianism are the concept of mutual aid and the conviction that "a willingness to help each

167. SYLVIA N. TESH, HIDDEN ARGUMENTS: POLITICAL IDEOLOGY AND DISEASE PREVENTION POLICY 160-61 (1988) (hypothesizing that many citizens oppose health and safety intervention by government because it violates the individualistic ideology that each worker is the best judge of his or her interests).

168. Id. at 161.


170. See id. at 290 (discussing how the insurance industry, for example, fosters fragmentation of society so that the perception of commonalities is lost). The result is that the public becomes convinced that "each person should pay for his own risk." Id.

171. See id. at 289 (describing communitarianism as what binds communities together, particularly the sense of shared interests and culture).


173. Id.
other is the glue that holds people together as a society.”

The corollary is that letting workers fend for themselves fragments society by emphasizing individual differences. Workers, rather than their communities, are left solely responsible for occupational health and safety.

Professor McGarity and I have suggested that the protection of workers can and should be defined as a matter of distributive justice, or in Professor Stone’s terms, as a matter of “mutual aid.” We contend that decisions about workplace health and safety, unlike the individualistic decisions that consumers make when purchasing goods and services, define the nature of our society or community. The reason is that such decisions require citizens to define what level of workplace health and safety is “fair” and “just.”

Worker advocates, such as the National Safe Workplace Institute (NSWI), are attempting to draw on the communitarian tradition to redefine the issue of workplace health and safety. For example, NSWI emphasizes that other countries do a better job of protecting their workers. Moreover, NSWI’s director bluntly summarizes that OSHA sanctions reflect an accommodation with “human expendability” where “blue-collar blood pours too easily.” He concludes that fairness demands that workers have legislative reform.

Another way to emphasize that workers merely seek fairness is to point out that the United States has not made the same commitment to protecting workers that it has made to protecting the environment. For example, the government spends eleven times more on environmental protection than on workplace health. Furthermore, EPA regulations are stricter

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174. Stone, supra note 169, at 289; see id. (describing mutual aid among a group of individuals as “the essence of community”).
175. McGarity & Shapiro, supra note 5, at 296. McGarity and Shapiro explain that because health and safety decisions involve distributional issues, such social policy choices provide an opportunity for citizens to value certain things more highly than they do when they go to the store . . . . As consumers, we may dislike paying more for manufactured products because of the costs of protecting workers, but as citizens we can rationally vote for extremely costly . . . goals. We vote in favor of such costly goals because they permit us to reaffirm to ourselves that occupational disease is not merely inefficient—it kills people.
176. See Joseph A. Kinney, Why Did Paul Die?, Newsweek, Sept. 10, 1990, at 11, 11 (stating that a United States worker is five times more likely to die than a Swedish worker, and three times more likely to die than a Japanese worker).
177. Id.
178. Id.
than OSHA standards for the same chemicals\textsuperscript{180} and criminal penalties for violation of environmental statutes are significantly greater than for violations of the OSH Act.\textsuperscript{181} A union president recently observed concerning the criminal penalties, "[I]n the twenty-three years [since] the OSHA law was passed, only one employer has gone to jail for willfully violating OSHA law and killing a worker. In the last ten years, seven people have gone to jail for harassing wild burros on federal land."\textsuperscript{182}

Although these differences reflect the greater political support for environmental law enforcement, they are not defensible either as a matter of public policy or of human decency. After all, the "workers who build our homes, provide our food, assemble our appliances, nurse our illness, and dig our graves are part of our shared environment and are deserving of protection."\textsuperscript{183} Something is very wrong in this country "when the quality of life of a jackass is valued more than the life of a worker."\textsuperscript{184}

However, workers' appeals to fairness are not likely to be noticed unless they are widely publicized by the media.\textsuperscript{185} Media attention to workplace safety is most likely if reformers link their message with a scandal or tragedy that can symbolize the need for legislation,\textsuperscript{186} such as the fatal 1991 fire at the Imperial Food Products chicken processing plant.\textsuperscript{187} As Mr. Nader cogently notes, however, the media has only a sporadic interest in occupational safety and health, usually tied to some tragedy like the North Carolina fire.\textsuperscript{188} Moreover, workplace accidents do not directly dramatize the issue of occupational diseases because these diseases occur in scattered

\textsuperscript{180} Id.
\textsuperscript{181} See McGarity & Shapiro, supra note 5, at 220 (comparing OSHA's six month maximum penalty for a willful endangerment of an employee to the penalty for willful endangerment of a fish, a violation of the Clean Water Act which carries a maximum penalty of fifteen years).
\textsuperscript{183} McGarity & Shapiro, supra note 5, at viii.
\textsuperscript{184} AFL-CIO Delegates, supra note 182, at 527.
\textsuperscript{185} See Baumgartner & Jones, supra note 6, at 106 (noting that the media is a key factor in determining which issues receive public attention).
\textsuperscript{186} Kingdon, supra note 69, at 99-100 (stating that such an event focuses the attention of the public and government).
\textsuperscript{187} Refer to note 38 supra and accompanying text for a description of the fire.
\textsuperscript{188} Nader, supra note 39, at 6.
individuals years after exposure.\textsuperscript{189} Better media coverage is necessary to publicize the plight of workers ravaged by occupation-related disease. Without it, reformers cannot make their case to the public.\textsuperscript{190}

Workers face additional problems in redefining the issue of workplace health and safety in a way to capture public attention. An important source of altruism is an “emphatic link” with those being assisted.\textsuperscript{191} Yet, many members of the public perceive unions as a classic example of a “special interest.” For example, the public perception concerning issues such as NAFTA, is that organized labor seeks to protect the wages of their members, regardless of the impact on the country as a whole.\textsuperscript{192} Other members of the public regard union arguments about fairness as hypocritical. This position stems from the view that, concerning environmental issues, organized labor has sided with business and sought to protect jobs instead of cleaning up the environment.\textsuperscript{193} It is unclear whether organized labor can overcome the lack of empathy for its concerns prevalent among the general public.

In light of the foregoing problems, reformers will need presidential assistance in order to redefine the occupational safety issue.\textsuperscript{194} No other political actor “can focus attention as clearly, or change the motivations of such a great number of other actors.”\textsuperscript{195} The President must use his “bully pulpit”

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\item \textsuperscript{189} Schroeder & Shapiro, supra note 25, at 1234 (noting that the period before the onset of illness ranges between 4 and 40 years).
\item \textsuperscript{190} See GLENDON, supra note 172, at 178 (noting a profound lack of coverage by the mass media of workers’ health and safety issues).
\item \textsuperscript{192} Cf. William Cunningham & Segundo Mercado-Llorens, The North American Free Trade Agreement: The Sale of U.S. Industry to the Lowest Bidder, 10 HOFSTRA LAB. L.J. 413, 414 (stating that organized labor opposes NAFTA because it “is not in the best interests of the United States and its labor force”); see id. at 428-31 (finding that despite optimistic predictions to the contrary, NAFTA will force American workers to compete with cheap Mexican labor that works under substandard conditions and will ultimately produce a contracted domestic workforce).
\item \textsuperscript{194} See BAUMGARTNER & JONES, supra note 6, at 241 (drawing on studies of legislative action with regard to drugs and urban affairs to conclude that a President’s role is essential to getting an issue on the national agenda).
\item \textsuperscript{195} Id.
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if reformers are to have any chance of focusing the debate on the fairness of the status quo.

IV. CONCLUSION

This Symposium focuses on why so many workers are injured by and die from work-related causes, and on what change in policies will be most effective at stemming the tide of occupational accidents and diseases. Identifying effective responses, however, is only part of the workers' battle. They must also have sufficient political resources to influence Congress and state legislatures to pass the reforms that are needed. As the political science literature makes clear, the policies preferred by workers may not be obtainable as a political matter.

The problem for workers has been, and continues to be, too little political influence. This situation is not likely to change unless the President strongly intervenes on their behalf. Even his support, however, may not be enough to push effective reforms through Congress unless legislators perceive that the public supports strong action. Workers must therefore redefine the issue of occupational safety and health in a manner that galvanizes the public's interest.

If assisted by the President, workers can redefine the workplace safety issue by appealing both to the self-interest and to the altruistic communitarian impulses of the public. Such a redefinition will not be easy. It will require changing strongly-held ideologies and attitudes concerning the role of government in workplace health and safety. Whether the effort is successful will have significant ramifications. For workers, it will determine the level of workplace health and safety. For the rest of us, it will decide the type of society that we wish to have.