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I Gave My Employer a Chicken That Had No Bone: Joint Firm-State Responsibility for Line-Speed-Related Occupational Injuries

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ARTICLE

I GAVE MY EMPLOYER A CHICKEN THAT HAD NO BONE: JOINT FIRM-STATE RESPONSIBILITY FOR LINE-SPEED-RELATED OCCUPATIONAL INJURIES

Marc Linder†

"We're not trying to make shit palatable. But under the new system, we'll be able to tell you how much shit you'll be eating." ¹

I. "PAGE UPTON SINCLAIR!"²

The insanitary conditions in which the laborers work and the feverish pace which they are forced to maintain inevitably affect their health. . . .

. . . The whole situation . . . in these huge establishments tends necessarily . . . to the moral degradation of thousands of workers, who are forced to spend their work-

† © Professor of Law, University of Iowa. Please direct all individual reprint requests to Professor Marc Linder, University of Iowa—College of Law, Iowa City, Iowa 52242. Dianne Avery, Gail Hollander, Herb Hovenkamp, Andy Morriss, Larry Norton, and Larry Zacharias brought the full weight of their chickenological expertise to bear on the drafts.

1. George Anthan, Inspectors Tell Fears for Safe Poultry, DES MOINES REG., Jan. 14, 1989, at 1A, 11A (quoting David Carney, president of the North Central Council of Food and Inspection Locals, AFL-CIO, quoting Dr. John Prucha, Assistant Deputy Administrator, USDA's Food Safety and Inspection Service, who was responding to Carney's charge that the agency would soon be requiring inspectors to "eat contamination away"). Refusing to publish the actual quotation verbatim, the newspaper substituted the word "excrement" in square brackets. Telephone Interview with George Anthan (Feb. 20, 1995).

ing hours under conditions that are entirely unnecessary and unpardonable, and which are a constant menace not only to their own health, but to the health of those who use the food prepared by them.

Who sets the speed of the disassembly line for 200,000 production workers in poultry processing, the fastest growing factory employment in the United States—the workers themselves, their employers, the Occupational Safety and Health Administration (OSHA) of the Department of Labor (DOL), or the Food Safety and Inspection Service (FSIS) of the United States Department of Agriculture (USDA)? Although presumably no one is naive enough to imagine that U.S. workers have the right to co-determine the rate at which the life is sucked out of them, even cynics may be mildly surprised to learn that this basic working condition of U.S. poultry workers has never been controlled by the agency charged with protecting the safety and health of workers. Rather, the agency charged with certifying the healthiness of (dead) chickens—in collusion with the firms it is supposed to be policing—is responsible for regulating their working conditions. How did this regulatory perversion come about?

Poultry workers’ lack of control over such a basic condition of their work, lives, and existence is not new. Nor is the state’s failure to intervene to protect workers from overreaching employers unique. Nor, finally, is the connection between unsafe working conditions and unsafe consumer products unprecedented. This entire conflict played itself out almost a century ago in the meat packing plants of Chicago. Indeed, the epigraph to this section, which is taken from a report that President Theodore Roosevelt commissioned and transmitted to Congress in 1906 in the wake of Upton Sinclair’s galvanizing novel, *The Jungle*, could just as well describe the “Animal Auschwitz” that is today’s chicken processing plants.

3. JAMES BRONSON & CHARLES NEILL, CONDITIONS IN CHICAGO STOCK YARDS, H.R. DOC. NO. 873, 59th Cong., 1st Sess. 8-10 (1906).
6. BRONSON & NEILL, supra note 3.
Although Sinclair was motivated by a concern for the workers' safety rather than meat safety, the legislation that Congress enacted that year ignored the workers. The state's current neglect of the quasi-penal conditions to which the unremitting drive for low costs and high profits has subjected poultry workers is so systematic that the late-twentieth-century version may not even rise to the level of farcical repetition of the tragic process ninety years earlier.

One of the principal reasons that the speed of the production line has become crucially important for workers' health and safety lies in its impact on the incidence of cumulative trauma disorder. Between 1980 and 1993, repetitive trauma disorders, as a proportion of all newly reported occupational illnesses, rose from 18% to about 60%. The poultry processing industry recorded the second highest incidence of repetitive trauma disorders in 1990—696 per 10,000 full-time workers. The highest incidence was recorded in the related meat packing industry. Together, these two industries also recorded the highest number of such newly reported illnesses—35,000. In part as a result of these extraordinary rates, poultry processing and meat packing also ranked sixth and second among all industries in total case incidence rates for injuries and illnesses—42.4 and 26.9 per 100 workers respectively. The situation in 1992, the latest year for which data have been published, was similar. Meat packing and poultry slaughtering and processing plants ranked first and third in incidence rates of disorders associated with repeated trauma—1395.6 and 693.4 per 10,000 full-time workers respectively. This combined industry group accounted

1990) (describing the conditions of chickens on factory farms); Peter Singer, Animal Liberation 95-119 (1990) (detailing chicken factory farming methods).


12. Id.

13. Id. at 2.

for 36,500 new recorded cases of such occupational related disorders, the second highest industry group figure for 1992.\textsuperscript{15}

A health hazard evaluation of the large Perdue Farms processing plant in Lewiston, North Carolina, which the National Institute for Occupational Safety and Health (NIOSH) carried out in 1989, illustrates these dangers.\textsuperscript{16} The agency found that 36% of the employees had work-related cumulative trauma disorders during the previous year, while 20% had current work-related disorders.\textsuperscript{17} Those working in high-exposure departments such as eviscerating and deboning were four times as likely to have experienced disorders as those in low-exposure jobs such as maintenance, sanitation, and clerical.\textsuperscript{18} More than 99% of participants in high-exposure positions were black and 86% were women, compared with 44% and 63% respectively of the low-exposure participants.\textsuperscript{19} In an industry staffed largely by unskilled and unorganized workers, many of whom are women and minorities, social-psychological factors may also explain the incidence of musculoskeletal disorders. In particular, "when the influence over the work process is limited [and when] the work is performed under time pressure . . . the tolerance to repetitive work can be further reduced."\textsuperscript{20}

The National Broiler Council, the companies' trade association, and others claimed that production is so automated that chickens arrive in stores "almost untouched by human hands."\textsuperscript{21} If these claims were true, they would imply that only inhuman hands could withstand the pain caused by as many as 40,000 daily repetitions\textsuperscript{22} of a single defined movement. In fact, it is human hands that must make the same knife or scissors cut to slit open carcasses from

\textsuperscript{15} Id. at 9.


\textsuperscript{17} Id. at 27.

\textsuperscript{18} Id.

\textsuperscript{19} Id.


\textsuperscript{21} Barbara Goldoftas, Inside the Slaughterhouse, S. Exposure, Summer 1989, at 25, 27-28 (quoting Bill Roenigk); see also Glenn E. Bugos, Intellectual Property Protection in the American Chicken-Breeding Industry, 66 BUS. HIST. REV. 127, 155 (1992) ("Every day of 1968 . . . Perdue ran eighteen birds per minute . . . down three eviscerating lines, seldom touched by human hands."); Ben A. Franklin, From Womb to Tomb on the Chicken Farm, N.Y. TIMES, May 27, 1979, at C3. ("[C]hickens . . . are eviscerated, inspected and chilled . . . before they are touched by human hands.").

\textsuperscript{22} Goldoftas, supra note 21, at 26.
anus to breast or the same twist of the hand to yank out viscera at a grueling pace, set by a relentless conveyor belt and reinforced by circulating foremen, while workers are standing in pools of water and grease in temperatures that range from freezing to ninety-five degrees and being pelted by flying fat globules or dripping blood. The painful damage to tendons and nerves can permanently cripple fingers, hands, wrists, arms, and shoulders. It has required thousands of poultry workers to undergo corrective surgery and made it difficult or impossible for them to perform such simple motions or tasks as raising their arms above their heads, holding things, sweeping, washing dishes, or removing clothes from a washing machine.

Business Week's characterization of these epidemically spreading injuries as "the first major postindustrial illness" must surely have been meant tongue-in-cheek. Not even Karl Marx himself could have wished for more fitting material for an update of his analysis of classical industrial capitalist exploitation than the methods of speed-up and intensification that prevail in chicken processing factories. The annual rate of increase in output and output per employee between 1963 and 1991 amounted to 6.2% and 2.7% respectively; during the eighteen-year period from 1973 to 1991 the corresponding figures were a far above-average 7.4% and 3.9%


respectively. Not surprisingly, however, "[i]ncreased mechanization did not lead to safer, more healthful poultry plants."27

Efforts by workers or the state to regulate the speed of factory conveyor belts meet with massive resistance by the owners and managers of U.S. industrial firms. The speed and volume of flow, or as Alfred Chandler, the dean of United States business historians, calls it, "throughput," lies at the basis of the modern regime of mass production:

Mass production industries can then be defined as those in which technological and organizational innovation created a high rate of throughput and therefore permitted a small working force to produce a massive output.

In modern mass production ... economies resulted more from speed than from size. It was not the size of a manufacturing establishment in terms of numbers of workers and the amount of value of productive equipment but the velocity of throughput and the resulting increase in volume that permitted economies that lowered costs and increased output per worker and per machine.28

Individual firms and the class of owners and investors will seek to mobilize their considerable structural power to prevail upon the state to refrain from regulatory intervention that would deprive them of what are deemed prerogatives to invest their capital and manage their businesses with as little interference from workers or the state as possible. The USDA and its subdepartments have historically proven themselves to be extraordinarily compliant or captured agencies devoted to serving the interests of agribusiness. From the perspective of the poultry processing oligopolies, lodging regulation of line-speed with the USDA would therefore be optimal. In contrast, OSHA has always been a beleaguered agency, unable to serve effectively the class interests of the workers, whom it is mandated to protect.29 Capital was, for example, extraordi-

29. See generally CHARLES NOBLE, LIBERALISM AT WORK: THE RISE AND FALL OF OSHA (1986) (explaining how and why OSHA has been unable to protect workers in the
narily successful during the 1970s in using its political-economic power to defang the radical potential inherent in the broad mandate that Congress conferred on the agency, and transformed it into a virtual captured agency during the Reagan and Bush administrations. Nevertheless, for capital, OSHA remains an untrustworthy agency to be circumvented wherever possible. With regard to linespeed, the large poultry corporations have thus far succeeded in avoiding intervention that would interrupt the maximum flow of chickens and the profit they embody.

Interest-group liberalism is not a useful approach to understanding the state’s structurally biased accommodation of one class in direct clash with its antagonistic class over one of the most critical issues—the speed at which surplus is extracted and health undermined. Abandoning neutrality and the legitimation of the social order, the state recedes into its role as a facilitator of capital accumulation scarcely less ruthless than individual capitalists themselves. Relying on hard times to convince workers that capital accumulation is a worker’s best and only friend in a world in which only consumption gives meaning to life, the state recreates instrumentalist class rule.31

At a time when a market-knows-best congressional majority threatens to dismantle what little workplace safety and health protection workers have been able to wring from the national state, this Article, using the example of a particularly brutal industry, analyzes in depth how, in the absence of worker control of the process of production, government regulation has either expressly adopted (the USDA) or failed to transcend (OSHA) capital’s agenda. The study begins with an overview of the origins, development, and structure of the chicken processing industry. The focus throughout is on broilers—“young chicken[s] . . . of either sex, that [are] tender-meated”32—production of which bulks three to four times larger than that of turkeys; though the production processes are similar, the rate of throughput is lower in turkey plants because the larger size and greater physical variability of turkeys have impeded mechanization and automation.33 Following an ac-

way Congress intended).

30. Id.
32. United States Classes of Ready-to-Cook Poultry, 7 C.F.R. § 70.201(c) (1995).
33. U.S. Bureau of the Census, Statistical Abstract of the United States:
count of the legislative history of national poultry plant regulation, this Article proceeds to a detailed analysis of the evolution and consequences for workers and consumers of the USDA’s capital-biased policy of elevating throughput über alles. After exploring the lawfulness of the USDA’s line-speed regulations from the perspective of administrative law, the Article focuses on OSHA’s failure to assert its power to control line-speeds in order to hold employers to their duty to provide workers with safe employment. In the final section, conclusions are presented linking the specific case of chicken processors to the broader issues of the division of labor and the relationship between producers and consumers in an undemocratic political economy.

II. OF PULLULATING PULLETS AND POULTRYCIDGE: THE RISE OF THE BROILER INDUSTRY

New technologies in poultry production made it possible to segregate out the routine, repetitive jobs so they could be centrally supervised and efficiently performed by relatively unskilled labor.34

Two decades passed between the rise of the broiler industry and Congress’s action in 1957 introducing in poultry plants the mandatory inspection that it had imposed on meat plants a half-century earlier. During this period, “[h]istorically speaking, the broiler industry . . . spr[ang] up from nothing to a gigantic business almost overnight.”35 The industry underwent an initial process of vertical integration that made large-scale operations possible by means of manifold scientific and technical advances and the merger of feed manufacturing and poultry raising, processing, and marketing in a form that left farmers who had sought to make a living in this new business extraordinarily dependent on processors.36 In the

34. NATIONAL COMM’N ON FOOD MARKETING, ORGANIZATION AND COMPETITION IN THE POULTRY AND EGG INDUSTRIES 10 (1966) [hereinafter POULTRY AND EGG].
area of mechanical and engineering technology, broiler housing
design and high-volume mechanized killing and evisceration were
particularly important. European firms have even developed broiler
harvesters, large tractor-like machines with foam-rubber paddles
that “gently sweep” broiler-house birds on to a conveyor belt at the
rate of 5,000 per hour—five to eight times as many as two work­
ers can catch manually.37 By the mid-1950s, one dissertation writ­
er found it questionable whether broiler producers were farmers be­
because the production process was “really a sort of rural manufac­
tural activity in which purchased raw materials—feed and
chicks—are converted into broilers.”38 Two decades later the
USDA could boast that “broiler production [was] industrialized in
much the same way as the production of cars.”39

As the young chicken arguably became “the most researched
animal in this much-researched world,”40 the development of fast­
growing strains of chickens bred for meat and a new understanding
of poultry nutritional requirements pushed the industry towards
higher levels of production. By the early post-World War II period,
the USDA characterized the industry’s genetic engineering cam­
paign (“The Chicken of Tomorrow”) as “the first real demonstra­
tion of production aimed at marketing.”41 This integrated system
succeeded in reducing the amount of feed required to produce one
pound of liveweight broiler meat (the feed conversion rate) by
more than half from 4 pounds in 1940 to 1.9 pounds in the early
1990s.42 During the same period, the time required to raise a
broiler chicken and take it to market was reduced from 10 weeks
to 6.5 weeks.43 Similarly, market weight rose from 3.1 to 4.5
pounds.44 Less touted by the industry, however, are the unintended

43. Id.
44. Id.; see also ROBERT BISHOP ET AL., USDA, THE WORLD POULTRY MAR-
consequences of the subtherapeutic doses of antibiotics that are added to chicken feed to neutralize or minimize the stresses and economically ruinous contagions of confinement that exist in broiler houses with 40,000 other chickens: the bacteria that have become resistant to the antibiotics, such as salmonella, E. coli, and campylobacter jejuni, cause thousands of cases of diarrheal disease and deaths annually.45

In many ways the new broiler industry has mirrored the development of the meat packing industry, which preceded it by a century. At the turn of the century the fledgling meat packing industry prompted the comment that "it would be difficult to find another industry where division of labor has been so ingeniously and microscopically worked out."46 This extreme subdivision of labor enabled the oligopolies to deskill the labor force, gain control over and speed up the production process, and reconstitute the labor market. Since the late 1960s, the large meatpacking firms have set in motion yet another wave of mechanization and subdivision of labor, resulting in yet higher conveyor belt speeds and speeds at which individual workers must complete their increasingly narrowed tasks. The concomitant rise in injuries, especially of repetitive trauma disorders, has been startling. Relocation of plants to rural areas in the Great Plains and the hiring of workers exposed to low wages and high unemployment rates have enabled a diminishing number of oligopolies to weaken a once powerful union.47
Large poultry firms have faced few obstacles in their transformative project. The broiler industry (and the widespread custom of eating chicken) did not—apart from small-scale sporadic and seasonal efforts in New Jersey and New Hampshire—even exist before the mid-1920s, when Mrs. Wilmer Steele of Ocean View, Delaware, began selling whole broods.\(^{48}\) Prior to the 1930s, chicken as meat was either an incidental by-product of egg production\(^{49}\) or derived from small "backyard" flocks. From 1923 to 1934 broiler production in Delaware expanded from 1,000 to 7,000,000.\(^{50}\) By the beginning of World War II, Delaware alone accounted for more than a quarter of total U.S. production, while the Delmarva peninsula produced 43%.\(^{51}\) As underscored by the famous Schechter Poultry case,\(^{52}\) New York City in the early 1930s was the destination of almost three-fourths of all live poultry shipments in the United States;\(^{53}\) four-fifths of that amount, in turn, was sold to Jewish consumers after having been slaughtered in accordance with Jewish religious dietary prescriptions.\(^{54}\) New York City, whose "poultry racket ha[d] become one of the most outrageously . . . corrupt and vile industries known to the criminal world,"\(^{55}\) was also the overwhelmingly dominant site of consumption of dressed poultry.\(^{56}\) It was only a decade later that process-

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\(^{49}\) Problems in the Poultry Industry, supra note 35, at 3 (testimony of Hermon I. Miller, Director, Poultry Division, Agricultural Marketing Service, U.S. Dep't of Agric.).

\(^{50}\) Johnson, supra note 48, at 6.

\(^{51}\) Id. at 12.


\(^{53}\) See Local 167, International Bhd. of Teamsters v. United States, 291 U.S. 293, 295 (1934) ("Live poultry for sale and consumption in the New York metropolitan area continuously moves in great volume from points in distant States.").


\(^{56}\) Robert Slocum, U.S. Dep't of Agric., Marketing Poultry 1-5 (Farmers' Bulletin No. 1377, 1927).
ing plants were first established.\textsuperscript{57} Since chickens were sold uneviscerated until after World War II, the technology was primitive.\textsuperscript{58} Not until 1941 was processing automation introduced in the form of manually operated mechanical poultry pickers to rough off feathers.\textsuperscript{59}

The history of Perdue Farms, the third largest poultry producer in the United States, illustrates this development. Perdue Farms was founded on the Delmarva peninsula\textsuperscript{60} in 1920 as a "backyard flock of table-egg layers."\textsuperscript{61} Three decades later, the company was still merely selling chickens to large meat companies such as Swift and Armour. Not until 1968, when it bought a poultry processing plant in Maryland from Swift, did Perdue complete its initial integration of poultry operations.\textsuperscript{62}

The processing industry was initiated at a more advanced technological level than was the case in late-nineteenth-century meat slaughtering. Consequently, poultry firms did not need to struggle for control over production with an entrenched group of skilled butchers. Indeed, by the 1950s, processors, operating in markets increasingly dominated by retail chain stores, began to offer chicken parts cut by low-wage factory workers in order to accommodate retailers' strategy of deskillling their in-store high-wage butcher force.\textsuperscript{63} As early as 1951, at a time when workers on conveyor-
belts in modern processing plants still performed most of the work by hand, the Amalgamated Meat Cutters union conceded that "the retail meat cutter is seldom required to draw a chicken anymore." Because many butchers deemed it "beneath their dignity" to cut chicken, the union did not even resist the new division of labor. Finally, because broiler chickens are much smaller and have been much more amenable to physical standardization through genetic engineering than cattle or hogs, the disassembly process, early on, attained much higher speeds than meat packing has ever achieved.

During the early post-World War II years, a dual geographic shift from small urban poultry slaughter plants to large rural plants and from Delmarva and the Midwest to the South occurred. This shift was made possible by the lower wages, lower feed costs, and improvements in transportation and refrigeration available in these areas. By concentrating their plants in rural southern areas beset by depressed farms and high rates of unemployment, and hiring largely impoverished women and minority workers, companies have had to confront much less resistance to progressive deskilling from atomized workers or unions.

The existence of alternative production areas strongly affected the structural development of the broiler subsector by allowing technological and organizational innovations to occur at a faster rate than would have been possible in traditional production areas. Producers in the new areas were not hampered by capital investment based on prior production methods or existing institutions governing the


66. Telephone Interview with Bill Burns, former Assistant Research Director, Amalgamated Meat Cutters (Apr. 20, 1995).
68. RED FABER, U.S. DEP'T OF AGRIC., COMMERCIAL POULTRY SLAUGHTER PLANTS IN THE UNITED STATES: NUMBER, SIZE, LOCATION, OUTPUT 5-11 (Agricultural Marketing Service 379, 1960). See generally DELMARVA'S POSITION supra note 60 (analyzing the factors contributing to the broiler industry's decline in growth in this area).
production, financing, and marketing of broilers.\textsuperscript{69}

Even where workers have managed to overcome the obstacles erected by employers\textsuperscript{70} and the law, and elected a union to bargain on their behalf, the largest poultry producers have not been above engaging in blatantly illegal union-busting, such as interfering with elections or having employees arrested for distributing union literature or firing employees for asking co-workers to support the union.\textsuperscript{71}

The initial target of vertical integration was not the working class but formally independent farmers. Production contracts were the pivotal points that enabled the feed grain oligopolies such as Ralston Purina, Cargill, Continental Grain, and Pillsbury to take control of chicken production in the late 1950s and early 1960s.\textsuperscript{72}

Broiler production contracts between processors and farmers, as a USDA study notes, "basically are devices used by contractors to lease production facilities and hire labor owned by the contract producers. Contractors retain title to the birds and their ownership of other production inputs is so complete as to make the contractor rather than the farmer the real producer."\textsuperscript{73} Under this contract production system, the integrators are relieved of much of the investment cost whereas the farmers' income often sinks below the equivalent of the minimum wage. From 1950 to 1965, for example, according to USDA calculations, returns to operators and family labor on broiler farms in the key state of Georgia ranged between 54 cents and 1 cent per hour.\textsuperscript{74} Recent figures stating that growers still receive only about 59 cents per hour could be written off as an advocate's massaging of the data since they are calculated on the basis that "[t]he grower is expected to care for the flock 24 hours a day, 7 days a week."\textsuperscript{75} Yet, Perdue Farms proudly boasts

\begin{itemize}
\item \textsuperscript{69} REIMUND ET AL., supra note 36, at 8.
\item \textsuperscript{70} Local 425 Strikes Tyson's, Wages Consumer Boycott, BUTCHER WORKMAN, Nov.-Dec. 1965, at 2, 2-3.
\item \textsuperscript{71} Holly Farms Corp. v. NLRB, 48 F.3d 1360 (4th Cir. 1995), petition for cert. filed, 64 U.S.L.W. 3103 (U.S. Aug. 4, 1995) (No. 95-210).
\item \textsuperscript{72} HARRISON WELLFORD, SOWING THE WIND: A REPORT FROM RALPH NADER'S CENTER FOR STUDY OF RESPONSIVE LAW ON FOOD SAFETY AND THE CHEMICAL HARVEST 104 (1972); FRANCES MOORE LAPPÉ ET AL., FOOD FIRST: BEYOND THE MYTH OF SCARCITY 304-07 (1981).
\item \textsuperscript{73} REIMUND ET AL., supra note 36, at 15.
\item \textsuperscript{74} PACKERS AND STOCKYARDS ADMIN., U.S. DEP'T OF AGRIC., THE BROILER INDUSTRY: AN ECONOMIC STUDY OF STRUCTURE, PRACTICES AND PROBLEMS, 21 tbl. 18 (1967) [hereinafter THE BROILER INDUSTRY].
\item \textsuperscript{75} Mary Clouse, Farmer Net Income from Broiler Contracts (Rural Advancement
that “[f]amilies who commit to raising Perdue chickens wear beep­ers to warn them even in their sleep if the temperature begins to go too high or too low for sensitive birds.”

Such low effective wages explain in part why predictions proved incorrect that it would be impossible to compete with the old system of poultry raising in which the farmer’s wife supplied almost all the labor “free.” Getting the worst of both worlds, the farmers, though they may view themselves as “little more than low-paid employees” and “hired hands,” are treated by the companies as independent contractors and thus “robb[ed]” of their entitlement to workers’ compensation, health insurance, or paid vacations. The National Commission on Food Marketing soberly described the calculus that made “contract farming” a more profitable mode of coordination for processors than formal ownership: “many underemployed farmers with facilities available were willing to sell their labor at very low rates because they had few or no alternatives. Also, contracts were attractive to integrators because they involved no social security, workman’s compensation, and other similar employee costs.” In addition to these cost-cutting measures, outright cheating, in the form of purposely underweighing the broilers raised by the farmers, is also available to integrators.

One of the chief economic advantages that favored the shift of the center of the broiler industry during the 1950s to the South—which increased its share of output from 42% to 70% during that decade—was the “availability of large amounts of low wage labor which has been employed in the highly labor intensive broiler processing industry.” The South had an “abundant...
labor surplus"84 and a lack of "alternative opportunities for labor,"85 and consequently wage rates were less than two-thirds of those prevailing in the North.86 As a result, particularly in the South, "[t]he problem . . . [wa]s the weak bargaining position of the grower."87 The farmers' vulnerability was exacerbated once they had committed $10,000 to an investment in buildings, equipment, and land that "ha[d] scarcely any value in alternative uses in the absence of a broiler contract. A return on this investment depend[ed] upon having a broiler contract."88 Yet farmers faced a lack of "effective competition" for broiler contracts.89 In the big producing states of Alabama, Georgia, and Arkansas, for example, the four largest firms accounted for one-quarter of all federally inspected slaughter.90 Under these circumstances, a grower was "reluctant to complain about what he consider[ed] to be unfair or offensive trade practices" for fear of being "labeled a 'problem' producer."91 The oppressiveness of the contracting system is illustrated by the fact that a "problem grower" included anyone who even "attempted to obtain a written copy of his contract."92 In many localities the presence of only a single integrator made resistance, in the face of a thin market, financially suicidal.

Emblematic of the lopsided power structure in the industry was the USDA Packers and Stockyards Administration's issuance of a complaint in 1965 against Tyson Foods, Inc. and Ralston Purina Company for boycotting and blacklisting broiler growers known to be or suspected of being members of an organization seeking to promote the farmers' interests.93 Even a cooperative farming company, Gold Kist Inc., the second or third largest poultry producer,

84. Westerlund, supra note 63, at 6.
86. Thirty Years Behind Our Time, Butcher Workman, Jan. 1960, at 18 (citing hourly wage rates of about $1.00 in the South and $1.50 and above in the North).
87. The Broiler Industry, supra note 74, at 63.
88. Id.
89. Id.
90. Id. at 34.
91. Id. at v.
92. The Broiler Industry, supra note 74, at 26 n.29.
93. Arkansas Valley Indus., Inc. v. Freeman, 415 F.2d 713, 713-14 (8th Cir. 1969) (summarizing the complaint); The Broiler Industry, supra note 74, at 3; see also Marshall Durbin Farms, Inc. v. National Farmers Org., Inc., 446 F.2d 353 (5th Cir. 1971) (granting preliminary injunction in favor of broiler processors in suit that alleged they had violated the Sherman Act).
has been suspected by the USDA of “locking poultry growers into a ‘feudal-serf production system’ in which farmers are just piece-rate workers.”94 Having formed a consciousness appropriate to their new conditions, more than 99% of the member-growers of the Texas Broiler Association voted in 1958 to affiliate with the Amalgamated Meat Cutters and Butcher Workmen of North America,95 thus heralding, in the words of the Association’s President, “the emancipation of broiler growers from the bonds forged by cruel exploitation of the Big Rich under a system of peonage far more galling and cruel than anything under the old sharecropper system.”96

In the typical vertically integrated broiler production, all steps, with the exception of the primary breeding of parent stock chicks, are combined into one efficient operation. . . . [T]he cycle has only one major input (feed ingredients) and one major output (product sold). In a modern, vertically integrated broiler production complex, these are the only transactions that actually occur and all other steps involve merely an internal transfer of resources. The entire operation thus relies on only one profit center. This process is highly efficient and is analogous to a single, large factory converting raw materials (feed ingredients) into finished product for the consumer (poultry products).97

For example, with the acquisition of Cobb-Vantress, Inc., one of the world’s largest producers of breeding stock, Tyson Foods completed the cycle of vertical integration.98 It is this all-embracing vertical integration that has enabled firms to develop genetically

98. Although Tyson does not juridically own the broiler farms, in the 1950s and 1960s some firms, such as Armour in Delmarva, also owned the farms. TYSON FOODS, INC., 1994 ANNUAL REPORT 3 (1994); Dan McGraw, The Birdman of Arkansas, U.S. NEWS & WORLD REPORT, July 18, 1994, at 42, 44; Martin, supra note 38, at 26; Milgrim, supra note 83, at 134-38; Ewell P. Roy, Economic Integration in the Broiler Industry 105 (1955) (unpublished Ph.D. dissertation, Louisiana State University).
uniform "products" that can be processed by automated equipment and thus reduce costs in ways that meat producers have thus far been unable to imitate.99

This type of integration was exemplified by such large feed companies as Pillsbury and Ralston-Purina, which were among the four largest broiler producers by the mid-1960s.100 Pillsbury, which had produced no broilers before 1960, integrated through acquisitions to protect its feed mills in the South whose sales were threatened by a constriction of the market as integrated broiler producers began manufacturing their own feed.101 By 1970, Pillsbury was the second largest broiler processor in the United States. Ralston-Purina, the largest integrator by the early 1960s and still the largest at the end of the decade, had undergone the same process of integration five years earlier.102 Both firms divested their poultry divisions in the early 1970s, in part because the industry's cyclical character was inconsistent with an entrepreneurial strategy of a consistent flow of profits.103 ConAgra, which ultimately acquired the poultry operations of Swift and Armour,104 which abandoned poultry production in the wake of their own conglomeratization,105 also vertically integrated into the broiler industry; after having been a feed manufacturer for two decades, the then Nebraska Consolidated Mills bought a broiler operation in 1961.106

100. POULTRY AND EGG, supra note 34, at 14.
102. See SELECT COMM. ON SMALL BUSINESS, SMALL BUSINESS PROBLEMS IN THE POULTRY INDUSTRY, H. R. REP. NO. 2566, 87th Cong., 2d Sess. 9-10 (1963) (discussing the forces driving large feed companies to integrate and the integration process that Ralston-Purina began in 1955).
105. Telephone Interview with Bill Burns, former Assistant Research Director, Amalgamated Meat Cutters (Apr. 20, 1995).
106. CONAGRA, INC., ANNUAL REPORT 1994 (inside front cover) (1994) (marking
In one of the most interesting backward integration processes, Heublein, Inc., used its subsidiary, Spring Valley Foods, the tenth largest broiler processor in 1975, to supply 25% of the poultry for the 900 Kentucky Fried Chicken restaurants that it owned. When broiler prices fell and feed prices rose in the mid-1970s, however, Heublein sold its broiler operations. By the mid-1980s, the capital requirements for a million-bird-per-week broiler complex including processing plant, feed mill, hatchery, rolling stock, and broiler, breed, and pullet houses amounted to $75 million, of which the processing plant alone cost $25 million.

In the course of this transformation of producers from a quasi-home industry into a multibillion dollar business engaged in monopolistic practices and exposed to antitrust liability, the broiler industry experienced explosive growth in total production and per capita consumption. Table 1 and Figure 1 depict this development from the Great Depression to the present:

ConAgra’s entry into the chicken business in 1961 with the purchase of a broiler operation.

107. The 20 Big Ones!, BUTCHER WORKMAN, May 1976, at 27 (listing Kentucky Fried Chicken as the tenth largest broiler processor).
108. Id.
109. MOODY’S INVESTORS SERVICE, MOODY’S INDUSTRIAL MANUAL 1750 (1978); Heublein Quits Poultry, BUS. WK., Nov. 15, 1976, at 54.
Table 1: United States Broiler Production and Consumption, 1934-93

<table>
<thead>
<tr>
<th>Year</th>
<th>Production (000,000 lbs.)</th>
<th>Consumption (lbs. per capita)</th>
<th>Year</th>
<th>Production (000,000 lbs.)</th>
<th>Consumption (lbs. per capita)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1934</td>
<td>97</td>
<td>0.5</td>
<td>1964</td>
<td>7,521</td>
<td>27.6</td>
</tr>
<tr>
<td>1935</td>
<td>123</td>
<td>0.7</td>
<td>1965</td>
<td>8,111</td>
<td>29.6</td>
</tr>
<tr>
<td>1936</td>
<td>152</td>
<td>0.8</td>
<td>1966</td>
<td>8,989</td>
<td>31.9</td>
</tr>
<tr>
<td>1937</td>
<td>196</td>
<td>1.1</td>
<td>1967</td>
<td>9,183</td>
<td>32.3</td>
</tr>
<tr>
<td>1938</td>
<td>239</td>
<td>1.3</td>
<td>1968</td>
<td>9,326</td>
<td>32.6</td>
</tr>
<tr>
<td>1939</td>
<td>306</td>
<td>1.6</td>
<td>1969</td>
<td>10,048</td>
<td>34.6</td>
</tr>
<tr>
<td>1940</td>
<td>413</td>
<td>2.0</td>
<td>1970</td>
<td>10,819</td>
<td>36.5</td>
</tr>
<tr>
<td>1941</td>
<td>559</td>
<td>2.8</td>
<td>1971</td>
<td>10,818</td>
<td>36.3</td>
</tr>
<tr>
<td>1942</td>
<td>674</td>
<td>3.2</td>
<td>1972</td>
<td>11,480</td>
<td>37.9</td>
</tr>
<tr>
<td>1943</td>
<td>833</td>
<td>4.1</td>
<td>1973</td>
<td>11,220</td>
<td>36.9</td>
</tr>
<tr>
<td>1944</td>
<td>818</td>
<td>3.9</td>
<td>1974</td>
<td>11,320</td>
<td>36.1</td>
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<tr>
<td>1945</td>
<td>1,107</td>
<td>5.0</td>
<td>1975</td>
<td>11,096</td>
<td>36.5</td>
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<tr>
<td>1946</td>
<td>884</td>
<td>4.1</td>
<td>1976</td>
<td>12,481</td>
<td>39.6</td>
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<tr>
<td>1947</td>
<td>936</td>
<td>4.3</td>
<td>1977</td>
<td>12,962</td>
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</tr>
<tr>
<td>1948</td>
<td>1,127</td>
<td>5.5</td>
<td>1978</td>
<td>14,000</td>
<td>43.5</td>
</tr>
<tr>
<td>1949</td>
<td>1,570</td>
<td>7.1</td>
<td>1979</td>
<td>15,522</td>
<td>47.4</td>
</tr>
<tr>
<td>1950</td>
<td>1,945</td>
<td>8.7</td>
<td>1980</td>
<td>15,539</td>
<td>46.7</td>
</tr>
<tr>
<td>1951</td>
<td>2,415</td>
<td>10.4</td>
<td>1981</td>
<td>16,520</td>
<td>48.2</td>
</tr>
<tr>
<td>1952</td>
<td>2,624</td>
<td>11.7</td>
<td>1982</td>
<td>16,760</td>
<td>49.6</td>
</tr>
<tr>
<td>1953</td>
<td>2,904</td>
<td>12.3</td>
<td>1983</td>
<td>17,038</td>
<td>50.4</td>
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<tr>
<td>1954</td>
<td>3,236</td>
<td>13.7</td>
<td>1984</td>
<td>17,863</td>
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</tr>
<tr>
<td>1955</td>
<td>3,350</td>
<td>13.8</td>
<td>1985</td>
<td>18,851</td>
<td>55.1</td>
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<tr>
<td>1956</td>
<td>4,270</td>
<td>17.3</td>
<td>1986</td>
<td>19,651</td>
<td>56.3</td>
</tr>
<tr>
<td>1957</td>
<td>4,683</td>
<td>19.1</td>
<td>1987</td>
<td>21,523</td>
<td>56.2</td>
</tr>
<tr>
<td>1958</td>
<td>5,431</td>
<td>22.0</td>
<td>1988</td>
<td>22,464</td>
<td>56.6</td>
</tr>
<tr>
<td>1959</td>
<td>5,763</td>
<td>22.8</td>
<td>1989</td>
<td>23,979</td>
<td>58.5</td>
</tr>
<tr>
<td>1960</td>
<td>6,017</td>
<td>23.4</td>
<td>1990</td>
<td>25,631</td>
<td>61.0</td>
</tr>
<tr>
<td>1961</td>
<td>6,832</td>
<td>26.0</td>
<td>1991</td>
<td>27,203</td>
<td>63.6</td>
</tr>
<tr>
<td>1962</td>
<td>6,907</td>
<td>25.7</td>
<td>1992</td>
<td>28,829</td>
<td>66.6</td>
</tr>
<tr>
<td>1963</td>
<td>7,276</td>
<td>27.1</td>
<td>1993</td>
<td>30,592</td>
<td>68.3</td>
</tr>
</tbody>
</table>

During these six decades, broiler production in live weight increased 315-fold while per capita consumption rose 137-fold. If the chicken that Herbert Hoover had wanted to put in every pot shortly before the great crash of 1929 was still a luxury, and 90% of housewives surveyed in the early 1950s still served chicken only on Sunday, predictions made in the 1960s that per capita consumption was approaching its human limits were manifestly premature. The number of broilers produced during this period rose almost 200-fold—from 34 million to 6.7 billion. In 1992, for the first time, per capita consumption of broilers surpassed that of beef. In more recent years, this growth was spurred in part by

113. See Johnson, supra note 48, at 46 (stating that broilers are a luxury for most people).
116. Lasley, supra note 112, at 4, 8-9; National Broiler Council, Per Capita Consum-
the proliferation of chicken-using fast-food restaurants where, by the end of the 1980s, one-third of chicken production was destined for consumption.117

Despite labor-saving capital investment and productivity, this unusual growth in consumption and output brought about a strong increase in employment. In the broader poultry industry, the number of employees rose from 22,000 in 1947 and 60,000 in 1958 to 226,000 in 1994, while the number of production workers increased from 19,000 and 55,000 to 200,000.118 For the years between 1983 and 1993, the last decade for which comparative data are available, poultry slaughtering and processing exhibited the greatest relative increase in employment of all four digit SIC manufacturing industries—66%;119 the absolute increase of 86,000 ranked second.120 For the twenty years ending in 1993, the absolute increase of 110,000 employees ranked second, and the 103% relative increase fourth.121

The United States has become by far the world’s largest consumer, producer, (aggregate and per capita), as well as the leading exporter, of broilers. By the mid-1980s, U.S. per capita consumption was about two-thirds higher than that in Western Europe.122 The United States accounts for 30% of the world’s broilers, which make up three-fourths of world poultry production.123
The first major U.S. broiler export push occurred in the latter half of the 1950s, in large part as a means of overcoming the first serious overproduction crisis, which had surfaced in 1954 as "the broiler industry reached that point all industries do, where production . . . surpassed consumer demand at a profitable price." While "[i]nefficient operators [w]ere falling by the wayside [t]he promise of profit [w]as in volume, so operations [w]ere becoming larger and more efficient."124 In other words, processors and other links in the integrated production chain faced falling prices that could not be accommodated by means of lowering costs because productivity had reached a temporary plateau. Consequently, processors sought to "maintain a high rate of activity in order to meet the needs of their expanded facilities."125 While the USDA secured an informal agreement with governmental lending agencies and banks to exercise caution in making loans for further expansion of production facilities,126 firms turned to external markets to purchase the surplus. Exports were concentrated in Western Europe, especially West Germany, to which United States shipments rose from four million pounds in 1956 to 152 million pounds six years later.127 The newly formed European Economic Community made efforts to protect its members', especially France's, fledgling broiler industry by imposing levies on U.S. exports, triggering the so-called Chicken War.128 Although U.S. exports during this brief period amounted to only 3% of total production, they were seen at the time as absorbing "an important increment to the market for producers in many areas."129 In order to overcome the increased tariffs, Swift and Wilson opened poultry plants in England and Spain.130

TRY & TRADE SUMMARY] (showing U.S. and world poultry production for 1986-90); William P. Roenigk et al., World Poultry Sector Continues Dramatic Expansion, AVIAN NEWS, September 1993, at 1, 1-3.


128. TALBOT, supra note 127, at 12.

129. BERNARD TOBIN & HENRY ARTHUR, DYNAMICS OF ADJUSTMENT IN THE BROILER INDUSTRY 29 (1964).

Exports, which had averaged little more than 1% of total U.S. production from 1960 to the mid-1970s, rose almost 20-fold by 1993, and were estimated at 2.7 billion pounds or more than 11% of production by 1994. U.S. producers export almost twice as much in weight as their nearest competitors, French firms, which are, however, much more export dependent. Since 1985, U.S. broiler firms have benefited from direct subsidies for exports under the USDA’s Export Enhancement Program, which was designed to subsidize exporters competing with European firms in third-country markets and to pressure the European Community to reduce the level of its agricultural subsidies. The State also protects U.S. producers almost completely from imports, which account for less than one-half of one percent of the U.S. poultry market, by means of prohibitively expensive non-tariff health and sanitary measures. The low broiler production costs of U.S. firms, which in part reflect low wages vis-à-vis those among their Western European competitors, already make invasion of the U.S. market difficult. Finally, the industry has followed the typical trajectory of exporting manufacturing enterprises by establishing production facilities abroad. For example, in 1994, Tyson gained control over a vertically integrated Mexican poultry firm, enabling it to produce poultry for sale there.

The poultry industry has become increasingly concentrated and oligopolized as firm and plant sizes have increased. In 1964, 201 firms operated 320 slaughter plants. By 1984, 134 firms operated 238 such plants; the average slaughter per plant almost quadrupled during these two decades. From 1960 to 1987, the four largest firms increased their share of total broilers slaughtered from

134. See BISHOP ET AL., supra note 42, at 10 (noting that, at 29.9 cents per pound, U.S. tied with Thailand for the world’s lowest costs in 1986); ECONOMIC RESEARCH SERVICE, U.S. DEP’T OF AGRIC., MEASURING THE EFFECTIVENESS OF THE EXPORT ENHANCEMENT PROGRAM FOR POULTRY (Staff Report No. AGES-9016, 1990) (discussing the effectiveness of export subsidies designed to meet competition from the European community); INDUSTRY & TRADE SUMMARY, supra note 123, at 8-11; U.S. DEP’T OF COMMERCE, 1993 U.S. INDUSTRIAL OUTLOOK 31-6 (1993).
136. LASLEY, supra note 112, at 20.
137. Id.
138. Id.
12% to 38%. By another reckoning, of the 127 firms that produced and sold chicken in 1982, only 45 remained in 1989, most of which were small, regional, private companies. According to the 1987 Census of Manufacturers, the four largest companies in the poultry slaughtering and processing industry, which encompasses less concentrated branches such as turkey processing and egg processing, accounted for 28% of the value of shipments—three times the ratio for all manufacturing industries. By the same year, the average young chicken slaughtering and processing plant employed 538 employees. In 1989, the four largest firms, Tyson, ConAgra Poultry, Gold Kist, and Perdue Farms, controlled almost half (48%) of total production. Tyson alone accounted for one-quarter of all production in 1994. The extraordinarily compressed centralization in the industry can be gauged by the fact that just three decades earlier, two Harvard Business School analysts, both keen observers of the concentration dynamic of the period, had asserted that "[i]t seems altogether doubtful that the three largest entities in the business could account for as much as 50% of industry volume in the future." Even the possibility that twenty-five firms might eventually produce 75% of total output appeared to them "an ultimate limit rather than an early prospect."

A somewhat different pattern emerges from Table 2, which is based on data published by a leading trade magazine.

139. Id. at 22.
144. TOBIN & ARTHUR, supra note 129, at 108.
### Table 2: LARGEST INTEGRATED BROILER FIRMS, 1994

<table>
<thead>
<tr>
<th>Rank</th>
<th>Firm</th>
<th>Average Weekly Ready-to-Cook Production (000,000 lbs.)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>Tyson Foods</td>
<td>88</td>
</tr>
<tr>
<td>2.</td>
<td>Gold Kist</td>
<td>44</td>
</tr>
<tr>
<td>3.</td>
<td>ConAgra Poultry</td>
<td>38</td>
</tr>
<tr>
<td>4.</td>
<td>Perdue Farms</td>
<td>31</td>
</tr>
<tr>
<td>5.</td>
<td>Pilgrims' Pride</td>
<td>25</td>
</tr>
<tr>
<td>6.</td>
<td>Wayne Poultry/Continental Grain</td>
<td>20</td>
</tr>
<tr>
<td>7.</td>
<td>Hudson Foods</td>
<td>18</td>
</tr>
<tr>
<td>8.</td>
<td>Seaboard Farms</td>
<td>14</td>
</tr>
<tr>
<td>9.</td>
<td>Foster Farms</td>
<td>12</td>
</tr>
<tr>
<td>10.</td>
<td>Townsends</td>
<td>12</td>
</tr>
</tbody>
</table>

The scale of recent growth is indicated by the fact that Tyson slaughtered about 35 million broilers weekly in 1995—a volume quadruple that of the largest firm a dozen years earlier. According to this set of figures, the proportion of total industry volume accounted for by the three and five largest firms rose from 1980 to 1989 from 20% to 36% and 30% to 48% respectively. Mergers and acquisitions accounted for 80% of the increase in the four-firm concentration ratio between 1977 and 1988. Perdue’s 1995 acquisition of the twelfth largest producer, Showell Farms, Inc. further increased concentration as Perdue became the third largest producer. Other large producers include Cargill (twenty-first), which integrated forward from grain and whose chicken operations were sold to Tyson in 1995, and Campbell Soup (twenty-second), which uses all its Herider Farms production internally. As a result of this vertical integration and centralization of capital, a number of firms have become “enormous commodity conglomerates. . . . ConAgra, for example, in addition to being the nation’s

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number one flour miller and number two broiler processor and beef packer, is also the number one slaughterer of lambs and turkeys, the number two hog slaughterer. Industry observers remain convinced that further consolidation will occur regardless of whether the vehicle is internal expansion or acquisitions. As the world’s largest producer, Tyson’s annual output exceeds that of all countries except Brazil and China and equals that of the eight largest European firms combined; Tyson is also the leading United States exporter, accounting for more than 60% of total exports of the five largest firms. That market position in an industry facing uninterrupted growth in demand—the market has grown by 5% annually over the last two decades—enabled Tyson to be the number-one-ranked Fortune 500 firm, in terms of the growth rate in total returns to investors for the period 1976 to 1986, while ConAgra ranked fourth. For every ten-year period during the last decade, Tyson has ranked between first and seventh among the Fortune 500 largest industrial firms in total return to investors, and first or second within the food industry. For the decade ending 1993, Tyson ranked fourth in total return to investors and seventh in earnings per share growth. That ConAgra has made achieving at least a 15-20% after-tax cash earnings return on stockholders’ equity its “most important financial objective” suggests the pressures to which it subjects its employees.

The location of poultry plants in small rural southern towns depressed by high unemployment and the hiring of large num-
bers of minority women, especially single mothers without other options, have fostered conditions under which "poultry’s Pashas" could profit from the gap between productivity and prices on the one hand and wages on the other. Whereas output per worker nearly tripled between 1960 and 1987, wages rose only half as quickly as chicken prices.\(^{160}\) The industry also has a long tradition of paying wages within the penumbra of the mandatory minimum. In 1964, for example, when the federal minimum wage was $1.25 per hour, hourly wages in southern broiler processing plants averaged $1.29 and ranged as low as 55 cents.\(^{161}\) Processing firms paying such low wages generated lower labor costs (per unit of output) than firms with average wage rates and twice the productivity (in terms of birds per worker-hour).\(^{162}\) The wage level was so low that industry consultants (erroneously) warned firms that a failure to raise it would trigger a "severe manpower shortage" and unionization.\(^{163}\) A decade later, the Amalgamated Meat Cutters complained that "the vast majority of . . . poultry workers . . . receive incomes that are below the poverty level."\(^{164}\) Even a dissertation writer whose mission was to help processing firms lower labor costs in an industry where "less than ideal" working conditions were associated with turnover rates as high as 245%, conceded that wages were "among the lowest for industrial labor."\(^{165}\) By the 1990s, with almost half of poultry processing workers concentrated in the low-wage and antiunion states of Alabama, Arkansas, Georgia, and North Carolina,\(^{166}\) average annual payroll per employee

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162. See id.


in the industry amounted to $14,858—only slightly more than half of the $27,812 paid to the average manufacturing employee.\footnote{167}

III. THE LEGISLATIVE HISTORY OF POULTRY PLANT REGULATION

[S]lavery time isn’t over for many of the people who make it possible for the rest of us to buy cheap chickens. . . .

It’s not the kind of slavery that ended with the Civil War. No one is dragged in chains to produce those chickens and to process them.

But it is a system of virtual economic peonage. . . . Let’s acknowledge that some of the food products we expect to be delivered to us at ever-lower prices are being paid for dearly by others in both economic and . . . human terms.\footnote{168}

Not until 1959 did Congress require the Secretary of Agriculture to inspect the carcass of each bird processed as human food. Congress’s chief objective was, to be sure, the protection of the health and welfare of consumers, not a few of whom had in recent years been made ill or even killed by diseased birds that “chisellers,”\footnote{169} in the absence of independent state inspection, had been able to place in interstate commerce. Nevertheless, consumer well-being was not Congress’s only concern. As several of the chief legislative sponsors of the bills that ultimately became the Poultry Products Inspection Act repeatedly stressed, the federal government’s intervention, sparked in part by deaths among poultry processing workers who had handled diseased birds,\footnote{170} was also designed “[t]o protect the health of persons engaged in the processing and distribution of poultry and poultry products.”\footnote{171} Indeed, one of the chief movers of the legislation, Representative

\begin{footnotes}
\item[169] Poultry Inspection: Hearings Before the Subcomm. on Poultry and Eggs of the House Comm. on Agric., 84th Cong., 2d Sess. 145 (1957) [hereinafter Poultry Inspection: Hearings] (statement of Shirley Barker, Amalgamated Meat Cutters and Butcher Workmen) (defining chisellers as “operators who seek a quick and easy profit no matter what dangers or consequences result to the public or industry”).
\item[171] Id. at 2745 (quoting from H.R. 12, 85th Cong., 1st Sess. (1957) that Rep. Sullivan had introduced earlier).
\end{footnotes}
Sullivan, noted that the Amalgamated Meat Cutters and Butcher Workmen of North America had first called her attention to the problem.172 Similarly, Senator Murray, one of the most vocal advocates of the legislation, and the Committee on Labor and Public Welfare underscored that the union had rendered a great service to the health of the American people by taking the initiative in alerting Congress to the need for the legislation.173

Indeed, the Meat Cutters, which had begun an intensive drive to organize poultry workers around 1940,174 urged federal legislation as early as 1947 to deal with problems of sanitation and disease. The campaign accelerated in 1954 when the union created a poultry department.175 Under such titles as Congress Should Probe Poultry176 and Poultry Fraud and Filth Flow On,177 the organization’s monthly magazine proclaimed poultry cleanup and inspection its highest priority.178 With circumspection, the union president launched the crusade with the disclaimer that it was not intended to “damage the reputation of the poultry industry, which has literally mushroomed into a mammoth industry overnight and in a sense may still be experiencing ‘growing pains.’”179 Yet a decade earlier, when the union newspaper in a banner headline had sought to “Page Upton Sinclair!” so that The Jungle could be rewritten to focus attention on the “appalling” conditions in poultry plants, it had not only singled out the large meatpackers, but “urge[d] the poultry workers of the nation to throw off their shackles.”180

172. Id. at 11,127.
178. Hilton E. Hanna, Poultry Cleanup and Inspection Voted No. 1 Amalgamated Project, BUTCHER WORKMAN, June 1954, at 8.
Just as the meat packing oligopolies had actually supported mandatory inspection at the turn of the century both to eliminate smaller companies’ advantages and to induce European countries to lift their bans on the importation of United States meats,\textsuperscript{181} poultry companies had their own reasons for supporting mandatory inspection. In 1926, the Federal Poultry Inspection Service was created to help local government agencies carry out their food safety programs.\textsuperscript{182} Some localities’ requirement of USDA certification stimulated producers’ interest in a federal system. The significant growth in demand for poultry during and immediately after World War II transformed the industry “from one with primarily local markets to one with nationwide markets that could be effectively served only by uniform national inspection procedures and standards.”\textsuperscript{183} As early as 1952, the Institute of American Poultry Industries had begun urging a uniform sanitation code in preference to the proliferation of myriad state and local laws and ordinances regulating poultry wholesomeness subject to voluntary inspection by the USDA.\textsuperscript{184} Had this proliferation continued, processors “wishing to sell poultry across the country would find it practically impossible because of all the differences in poultry codes.”\textsuperscript{185} When the Institute of American Poultry Industries polled its members representing 1,800 plants in 1956, fewer than 5% opposed the organization’s resolution requesting mandatory federal inspection.\textsuperscript{186}

Representative Johnson, a majority member of the small Subcommittee on Poultry and Eggs of the House Committee on Agriculture, in discussing a compromise bill before the full House of Representatives, observed that all interested parties, including consumers, public health officials, USDA, poultry worker unions, and


\textsuperscript{183} \textit{Meat and Poultry Inspection, supra} note 45, at 14.


\textsuperscript{185} Sawyer, \textit{supra} note 59, at 189.

\textsuperscript{186} \textit{Id.}
poultry industry groups, "agreed on the need for adequate inspection to protect consumers and laborers in the processing plants, while at the same time not burdening the processor with extraordinary expense and redtape."\textsuperscript{187} Consequently, "[t]he objective of the poultry inspection bill [wa]s to protect the consumer and the worker in the plant from unfit and diseased poultry and to protect the producer and processor from an unworkable inspection program that might [have driven] them out of business."\textsuperscript{188}

According to John Harvey, the Deputy Commissioner of the Food and Drug Administration, who testified before the Senate Labor & Public Welfare Committee, one of the principal reasons that the legislation provided for ante mortem (in addition to post mortem) inspection of poultry,\textsuperscript{189} was "to guard against infection of plant workers."\textsuperscript{190} While rebuking the USDA for "assign[ing] little, if any, importance to the occupational hazard to workers in the industry which may be lessened by ante mortem inspection,"\textsuperscript{191} the committee itself insisted that there was "a serious problem of hazards to workers in processing plants where no ante mortem inspection is required."\textsuperscript{192} Senator Humphrey echoed this view in arguing that inspection was "a major protection for poultry workers against industrial hazards. Any diseased birds which are prevented from coming on the processing line obviously cannot infect the workers."\textsuperscript{193}

What is especially instructive about all these legislators' statements is their timing. Representative Sullivan worked closely with the Meat Cutters Union, which strongly supported mandatory poultry inspection. She included in the preamble of two early bills the following phrase: "To protect the general consuming public, to protect the health of persons engaged in the processing and distribution of poultry and poultry products."\textsuperscript{194} Less than two months after she had filed the latter of these two bills, she introduced H.R. 5398, which no longer contained the reference to workers'
Yet even as she introduced this bill, she made the speech from which the foregoing quotations concerning the impact of inspection on workers' health were taken. The other legislators' above-cited statements to the same effect were also made after the reference to worker health had disappeared from the bills.

In the late 1950s, four large unionized meatpacking firms (Swift, Armour, Wilson and Cudahy) had largely been organized by the Amalgamated Meat Cutters. Butchers in urban supermarket chains were also largely unionized. Consequently, labor unions had the ability to play a significant legislative role. After all, despite substandard conditions and brutal and racist resistance by some southern processing firms, the Amalgamated Meat Cutters purported to represent 30,000 poultry workers in the 1950s and to have contracts with 280 of 900 poultry plants in the early 1960s. Thus, although the union achieved neither broad-scale organization of the industry nor national collective bargaining as it had with the red meat companies, and poultry workers in plants owned by the large meat producers received much lower wages than those firms' meat packing workers even where the poultry operations were much more profitable, several locals were so successful that by 1959, not only were all seventeen Delmarva poultry processing plants unionized, but even fourteen of nineteen in Arkansas were under union contract. In those areas,
the union was able to negotiate uniform wage contracts. Labor unions' support of various inspection bills was predicated on the understanding that they would protect both consumers and poultry workers. Representatives of the Amalgamated Meat Cutters and of the AFL-CIO, who stressed that the poultry industry consistently showed the third highest injury frequency rate in United States manufacturing, adopted this position repeatedly in their congressional testimony with regard to bills that lacked any express reference to workers' health and safety. Leon Schachter, a vice president of the Amalgamated Meat Cutters and Butcher Workmen, explained to the Senate Committee on Labor and Public Welfare that the union had "become especially familiar with the dangers faced by poultry workers when they are forced to work in filthy surroundings and handle diseased fowls. Rashes, infections, and sometimes severe illnesses and deaths, haunt workers in sections of the industry." Moreover, the union was pressing urgently for mandatory inspection legislation because "the worker has no way to protect himself against this thing. Organizing itself won't do any good against poultry illness."

Shirley Barker, Director of the Poultry Department of the Amalgamated Meat Cutters and Butcher Workmen, listed the four major purposes of mandatory poultry inspection as protection of (1) "the health and purchases of consumers;" (2) "the health of poultry workers;" (3) "the reputable processors against dangers to his [sic] business provided by the practices of the shady operators;" and (4)

1952, at 11 (describing union gains in the Delmarva area); cf. Eastex Poultry Company Signs Contract, BUTCHER WORKMAN, Apr. 1955, at 5 (reporting a successful union strike); Faye Hendrickson, Proud of Fat Chickens, BUTCHER WORKMAN, Apr. 1952, at 5, 6 (noting that union membership in Northwest Arkansas rose from 0 to 600 in two years); Joseph M. Jacobs, There Are No Unions in Gainesville, BUTCHER WORKMAN, July 1951, at 10 (discussing union's successful organization of Jewell, County in Georgia).


207. Mandatory Poultry Inspection, supra note 173, at 52.

208. Id. at 66.
"the poultry farmers' business." Moreover, Barker characterized the achievement of "the latter two objectives [as] necessarily depend[ent] upon the first and somewhat on the second." Barker also testified that,

[a]s far as the poultry worker is concerned, ante mortem inspection and plant sanitation are the two most important protections provided in the inspection bills.

He depends upon ante mortem inspection to prevent or minimize the amount of diseased poultry coming on the processing line and possibly infecting him there.

Whereas several bills that the union opposed made ante mortem inspection discretionary, Senate Bill 1128, supported by the union, mandated such inspection. However, it left the manner of carrying out that mandate in the discretion of the Secretary of Agriculture. The mandatory language of Senate Bill 1128 was virtually identical with that of the Poultry Products Inspection Act (PPIA) and its current codified version.

Even after enactment of the PPIA, which was printed in full in the Amalgamated Meat Cutters' monthly magazine, the union continued to stress the risks to which its members were exposed. Under such titles as Don't Be Chicken; Be a Chicken Plucker, it pointed out that the injury rate in the industry was twenty times greater than in explosives manufacturing. Continuity in the understanding of the statute as subsidiarily protecting poultry workers became clear in 1968, when Congress held hearings on amendments to the PPIA. At that time, the legislative representative of the Amalgamated Meat Cutters testified that the union was persisting in its efforts on behalf of consumer-protective regulations in part out of "self-interest[.]

\begin{footnotes}
209. Inspection Act Hearings, supra note 206, at 125.
210. Id.
211. Id. at 128.
212. Id. (statement of Shirley Barker); S. 1128, 85th Cong., 1st Sess. § 5(a) (Feb. 7, 1957).
213. 103 CONG. REC. at 1646 (text of S. 1128, §§5(a)).
216. Poultry Bill Signed by President; Becomes Law, BUTCHER WORKMAN, Sept. 1957, at 10.
217. Don't Be Chicken; Be a Chicken Plucker, BUTCHER WORKMAN, May 1958, at 14.
\end{footnotes}
plants are protected from illness if the plant is clean and the product is wholesome. Federal inspectors can assure this protective cleanliness and absence of disease far better than can the union grievance machinery.\textsuperscript{219} As a result, the union expected that the legislation would “drive out of the marketplace any and all poultry which poses any possible danger to the health of consumers and poultry workers.”\textsuperscript{220}

IV. THE USDA AND THROUGHPUT ÜBER ALLES

\textit{Modern processing plants are a far cry from grabbing a chicken by the neck and whacking off its head.}\textsuperscript{221}

How far the USDA would disappoint Congress’s original intent and labor’s expectation would become very clear, very soon. One of the first consequences of the advent of mandatory inspection was the modernization of production facilities,\textsuperscript{222} resulting in an exacerbation of the already realized potential for overproduction and an effort by firms to induce Americans to double their consumption.\textsuperscript{223} The statutory ban on the processing or sale of uneviscerated (New York dressed) poultry products in interstate commerce\textsuperscript{224} created a powerful incentive for firms to mechanize.\textsuperscript{225} Since some plants were too outdated to meet new sanitary requirements, the normal process of moral obsolescence was accelerated by the need to meet regulatory deadlines. In the course of building new plants to comply in timely fashion with the USDA regulations, firms increased capacity by introducing the latest high-performance automated processing equipment; within a year to fourteen months, total processing capacity rose by about one-third:\textsuperscript{226} “If an automated processing plant, with its high capital investment, is to make a return, it has to run chickens. Heavy

\textsuperscript{219} Id. at 154 (statement of Arnold Mayer, Legislative Representative, Amalgamated Meat Cutters & Butcher Workmen of North America (AFL-CIO)).
\textsuperscript{220} Id. at 158.
\textsuperscript{221} Frantz, \textit{supra} note 143, at 6.
\textsuperscript{222} \textit{Rex Childs & Roger Walters, U.S. DEP’T OF AGRIC., MONORAIL CONVEYORS USED IN EVISCERATING POULTRY: AN INTERIM REPORT} 3 (Agricultural Marketing Service 290, 1959).
\textsuperscript{223} \textit{Chicken Big}, \textit{Newsweek}, Mar. 30, 1959, at 87, 87.
\textsuperscript{225} \textit{Faber, supra} note 68, at 16.
\textsuperscript{226} \textit{Sawyer, supra} note 59, at 190.
pressure was on the industry to increase production, and the industry had already been having some serious price problems—with a finger of blame pointed at overproduction. Thus, mandatory inspection almost immediately reinforced the forces inherent in capital accumulation to increase the rate of throughput and to concentrate and centralize production in fewer firms. From 1960 to 1964, the proportion of federally inspected slaughter accounted for by the four largest firms rose from 12% to 18%. Looked at from a slightly different perspective, if in 1960, the nineteen largest processing firms slaughtered 30% of the total poultry inspected by the USDA, by 1964 the same share was accounted for by only nine firms. Much of this increased concentration occurred through mergers or acquisitions. From 1960 to 1963 alone, the competitive "attempt to avoid an orgy of overproduction" halved the number of major firms producing three-fourths of total output from 100 to 50. This concentration of "ownership—or at least the control over decisions . . . beginning in 1959, and rapidly accelerating in 1961-62," promoted by the state’s own actions, made a mockery of the contemporaneous "firm opinion" of the House Select Committee on Small Business that the "broiler industry is an industry where small business can perform any necessary function as efficiently as a giant concern.

As the concentration of processing in the largest plants continued during the latter part of the 1960s, the USDA published a report titled, Efficiency in Poultry Evisceration and Inspection Operations, which left no doubt that workers’ welfare was of no concern to it: "The purpose of Federal inspection of poultry in processing plants is to assure a wholesome product. It is to the advantage of all people concerned—the producer, the processor, the inspector and the consumer—that Federal poultry inspection be carried out efficiently and effectively." In connection with the

227. Id.
229. Poultry and Egg, supra note 34, at 16 tbl. 3-4.
230. The Broiler Industry, supra note 74, at 8.
231. Id.
232. Western, supra note 101, at 1.
236. Agricultural Research Serv., U.S. Dep’t of Agric., Marketing Research Report No. 813, Efficiency in Poultry Evisceration and Inspection Operations 1
congressional mandate to perform a post mortem inspection of every bird produced for commerce, including the exterior, the interior, the body cavity, and the viscera, in a process that *The New York Times* called “a pretty stomach-turning affair,” the USDA established various maximum inspection rates dependant upon the configuration of the production line and the number of inspector stations on the line. Conflating its inspectional duties with its myriad other activities as facilitator of agribusiness welfare, the USDA immediately began conducting studies designed to help processing companies increase the speed at which they pushed their workers.

Within two years of the onset of federal inspections, the USDA had launched its first Tayloristic time-and-motion studies that showed employers how to reduce labor requirements on the labor-intensive evisceration line. In identifying the most efficient methods used by average workers, this program was driven by the absence of information on labor requirements and of “criteria for crew size and balance in relation to line speed and operating volume.” These time-and-motion studies revealed, for example, that reducing the time required to “[r]each for [the] next bird” enabled a worker to remove the oil gland of 36.8 birds per minute rather than a mere 33.0. The USDA also discovered that a slicing cut with a six-inch knife enabled one worker to make an opening cut on 45 birds per minute or 2,700 per hour in contrast with only 28.7 birds per minute or 1,722 per hour with a stabbing cut. Indeed, because the longest work cycle on the eviscerating line was only six seconds and because the workers were so crowded together that it was difficult to observe their hand movements, the investigators were forced to use motion picture cameras rather than stopwatches. Without pausing to relate whether the affected workers expressed their gratitude for these helpful tips on how to fill in the “time-pores” of their leisurely working day more densely, the USDA proceeded to a similar analysis of its

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238. AGRICULTURAL MARKETING SERV., U.S. DEP’T OF AGRIC., MARKETING RESEARCH REPORT NO. 549, METHODS AND EQUIPMENT FOR EVISCERATING CHICKENS 4 (1962) [hereinafter METHODS AND EQUIPMENT].
239. Id. at 5.
240. Id. at 9-10.
241. Id. at 17, 18 tbl. 7.
242. Id. at 53.
243. KARL MARX, ZUR KRITIK DER POLITISCHEN ÖKONOMIE (MANUSKRIFT 1861-1863),
inspectors’ activities. Such throughput über alles guidance fit comfortably within the pattern set by the Agricultural Experiment Stations of the southern states. They, too, were so preoccupied with advising broiler processing plant managers on how to “maximize labor efficiency” at varying line-speeds that the attention they paid to the problem of “an excessive rate of . . . mutilated, unmarketable birds” blinded them to the workers who became unmarketable.

The investigation culminated in two tables displaying the labor requirements for evisceration at production levels ranging from 30 to 90 birds per minute. The USDA stated that “[t]he plan in establishing the most economical line speeds for labor utilization is to arrive at the production level where the most birds possible are processed properly per man-hour of labor expended.” Rates per worker varied from a mere 11.7 birds per minute for gizzard removal to 78.8 birds per minute for removal of necks with a knife (achieved by a worker snipping simultaneously on two lines). These rates were not even “the maximum that can be achieved by a worker, but rather the rates that average workers can maintain throughout a day.” “Even an average worker can be expected to increase his output by 15 to 20% for short periods of time without decreasing the quality of workmanship.” The USDA did not bother to investigate how much longer than a workday workers could sustain this pace and the impact it had on their physical and mental health. Rather, what the USDA deemed crucial was “[m]aximizing labor input through optimum crew balance” and “[g]earing line speed to methods and equipment yielding the highest production rate per worker consistent with good workmanship, rather than striving for the greatest possible total production.”

The purpose of the calculations was to determine how close to these rates workers performing the various functions along the line could come at varying line-speeds and at what break points it was profitable to add another worker. The problem that the USDA was
seeking to help broiler oligopolists solve was one that is inherent in all division of labor in which “one worker directly employs . . . the other.” This “direct dependence . . . of the workers on one another compels every single one to use only the necessary time for his function,” thus forging a unique level of labor intensity, which appears as “a technical law of the process of production itself.” Various operations along the production line require varying amounts of time and thus supply varying quantities of product during the same time. Thus, if a rigid division of labor requires the same worker to perform the same operation every day, then “a fixed mathematical relationship” or proportionality between groups of detail workers has to be established for a given scale of production.

In time, firms pressured the USDA to acquiesce in their throughput über alles strategy, which also pushed individual workers’ rates to maximum levels. In an industry where “[e]conomy of scale is everything,” the firms’ interest was palpable: by the late 1950s, a southern plant could, by increasing the rate of throughput from 600 birds per hour to 9,600 per hour, reduce its processing costs from $3.69 to $2.62 per 100 live pounds, while the corresponding figures for a plant in the North were $5.13 at 150 birds per hour and $2.64 at 10,000 birds per hour. By 1964, only thirteen plants in the United States operated at more than 10,000 birds per hour.

By 1968, the USDA undertook, by means of linear programming, to determine the time required to conduct federal poultry inspection and the influence of line-speed, bird spacing, and other factors on the inspectors’ productivity in order to help management attain 100% (and even 110%) inspector and worker “utilization” and avoid certain production levels inconsistent with those goals. The USDA took the position that “[e]stablishing a universal rate of inspection is impractical . . . even in plants using

252. MARX, DAS KAPITAL, supra note 25, at 365-66.
253. Id.
254. Id. at 346.
255. Franklin, supra note 22, at C3.
258. POULTRY AND EGG, supra note 34, at 20-21 tbl. 3-9.
259. EFFICIENCY IN POULTRY EVISCERATION, supra note 236, at 1, 9.
similar equipment, because the . . . [t]ime requirements . . . vary from plant to plant." Nevertheless, it established inspection rates ranging from 18.5 to 22.7 birds per minute for differently configured lines.

The support that the USDA was providing poultry firms in the 1960s prompted sharp criticism from the Amalgamated Meat Cutters, which objected to the use of federal tax revenues for "setting employee production standards." The union charged that the USDA, "[a]pparently not content with the . . . unbelievable production and processing . . . speeds," had been experimenting with poultry automation that eliminated rather than created employment. By the end of the decade, the union was expressing concern about the pace and proliferation of labor-saving automation. In addition to mechanized killing, cutting, deboning, wrapping, packaging, and weighing, the Amalgamated Meat Cutters appeared most worried about the advent of automated eviscerating machinery, which after thirty years of experiments had met USDA inspection standards and would oust ten workers.

By the mid-1970s, USDA officials were inspecting on average 23 birds per minute; the 2-inspector configuration thus permitted slaughter line-speeds of 46 birds per minute. However, the development of automated evisceration equipment, as well as improvements in genetics, nutrition, health, and flock management, allowed the poultry industry to present uniform lots of birds to inspectors faster than inspectors could properly inspect the birds under the traditional inspection procedure. Therefore, a new inspection procedure was developed in 1978 which allowed better utilization of inspection resources and permitted the poultry industry to take advantage of these new technologies and production improvements.

260. Id. at 8 tbl. 3.
264. Id.
266. New Line Speed Inspection System for Broilers and Cornish Games Hens, 49 Fed.
Because interpretations of the “informal guidelines” for inspection rates varied, inspection rates differed from one region to another. In 1978, the Arkansas Poultry Federation sued the USDA on the ground that it was enforcing inspection rates discriminatorily. The United States District Court for the Eastern District of Arkansas found that the USDA’s 1976-77 status quo order, which froze the various maximum regional inspection rates, violated both the Poultry Products Inspection Act and the United States Constitution. The court thus enjoined the USDA from enforcing disparate rates and ordered the use of nationally uniform rate standards.

In response to the court’s order, the USDA issued a final rule on April 13, 1979, entitled, “Young Chicken Slaughter Inspection Rate Maximums; Mandatory Poultry Products Inspection.” Even before the court ordered it to issue a formal rule, the USDA had been preparing a new system. The previous or so-called traditional inspection procedure had been “satisfactory to [the agency] and the poultry industry for many years.” Under the old system, one inspector performed all the inspection tasks on each bird including any required trimming:

Line speeds for traditional inspection were based on work-measurement studies and were set at the limit at which an inspector could carry out the organoleptic examination [which requires use of at least three senses] and manipulation of each carcass presented for inspection. Also, industry was not capable of producing birds at a higher speed and therefore, these line speeds were acceptable.

269. Id; see also American Fed’n of Gov’t Employees, AFL-CIO v. Block, 655 F.2d 1153 (D.C. Cir. 1981) (upholding the USDA uniform rate standards against procedural challenges).
Presumably, the USDA meant that the speeds were acceptable to the “industry,” by which it has always meant firms’ output and profits. The USDA’s admission that it sets the workload of its own employees “at the limit,” suggests that the USDA never orients its line-speed decisions towards workers’ needs for longer lives, less plagued by physical pain and disability.

The new regime ushered in by the judicial injunction included two different responses to the throughput/productivity/profit bottleneck imposed on firms by the government’s minimal food safety standards. The USDA first created a national maximum line inspection rate merely by increasing the traditional inspection system rates to match those in effect in the Southwest Region, which the USDA found to “properly ensure adequacy of inspection.” By deeming tibia palpation superfluous, the USDA was able to increase the rate of inspection by an additional five percent. Depending on the production line configuration—the distance between birds ranged from six to twenty-four inches and the number of inspector stations ranged from one to four—the number of birds per inspector per minute varied from 25 to 15.5. As a result of this change, forty-four plants with 136 lines (or 25% of all chicken lines nationally) would be required to lower line-speeds if they continued to operate the same configurations under the traditional inspection system. A total of 122 plants with 379 lines were then authorized to operate at higher line-speeds.

Within weeks of the district court’s issuance of the injunction, The New York Times published a long article interpreting the litigation as an expression of an intra-industry struggle between the ascendant producers in Arkansas, Georgia, and Alabama and the older Delmarva producers. As the gap in prices between red meat and broilers widened, “regional scrambling for supremacy in the booming broiler market” prompted the southern producers to com-

273. Id.
275. Although the inspectors’ union, the American Federation of Government Employees (AFGE), opposed this measure as a health risk to the public, the USDA argued that the leukosis-related diseases that might go undetected created no health hazard, but merely made chickens appear “aesthetically unpleasing.” Id. at 10,320-21.
277. Id. at 22,048 n.1.
278. Id. at 22,049.
279. Id.
plain that the USDA had been unfairly favoring the Delmarva firms by permitting them to operate at higher speeds. The “strong impact on . . . profits” that a 300% increase in line-speeds from 18 to 70 birds per minute could exert was clear when “even a 1 per cent increase in line speed could net [a firm] $400,000 a year.”

Poultry companies filed comments to the USDA rule, characterizing the newly increased rates as too low, especially since the USDA had itself acknowledged that some plants were already operating at higher rates. Firms supported this claim by reference to the inevitable development of new technology that would render “the present maximum inspection rates . . . even more obsolete.”

The USDA’s response came from Carol Tucker Foreman, the Assistant Secretary for Food and Consumer Services, who had executive responsibility for poultry inspection. Her background pulled her in mutually irreconcilable ways. As a consumer advocate, she was committed to meat safety and low prices. As the wife of a vice president of the United Food and Commercial Workers, which organized poultry plant workers, she might have been thought to have aspired to avoid adopting measures that would have worsened working conditions. Finally, as a native of Arkansas, which had just surpassed Georgia as the leading broiler producer, the daughter of the head of the Arkansas Democratic Party, and the sister of the future lieutenant-governor and governor of the state, she may have felt pressured not to issue regulations that would reduce the profits of the economically dominant and politically powerful big poultry corporations such as the Arkansas-based Tyson Foods. In the event, she announced that the “USDA recognize[d] the relationship between improved technology and faster line speeds and also recognize[d] the price benefit which consumers would realize from an increased poultry supply. USDA w[ould] make every effort to identify new and improved inspection techniques which [we]re designed to increase industry productivi-

280. Franklin, supra note 22, at C3.
281. Id.
282. Young Chicken Slaughter Inspection Rate Maximums; Mandatory Poultry Products Inspection, 45 Fed. Reg. 10,319, 10,320 (1980). The USDA had solicited these comments despite the fact that it had amended the poultry inspection regulations by emergency final rule without waiting for public comment.
283. Id.
284. LASLEY, supra note 112, at 12 tbl. 5.
Foreman denied the claims of her own employees, the USDA inspectors, that new higher rates might adversely affect their health, on the grounds that their workload had in fact diminished. Finally, as to poultry workers themselves, Foreman later reported that when a meatpacking union official asked her to do something about line-speed, she replied, "I'm sorry, honey, but I don't do collective bargaining." Even that claim was disingenuous. Since the USDA inspectors were "largely unionized and, as a third force in the dispute, have tended to resist . . . increases in the speed of the lines," they were in effect engaging in surrogate bargaining on behalf of the largely unorganized production workers.

The real innovation of the late 1970s, however, was the second or modified traditional system, which the USDA unveiled at the same time in response to the injunction, and which held out the promise of alleviating production problems for the forty-four plants that were required to reduce their speeds. The modification involved the introduction of a greater division of labor among inspectors. Under the traditional system, inspectors devoted almost half of their time to positioning the carcass, whereas the alternative system reduced the number of motions required of an inspector by dividing the work between two inspectors. One inspector inspected only the exterior of a prepositioned carcass, using a mirror to see surfaces not directly visible. Company employees then repositioned the carcass and the viscera attached to it for the other inspector, who examined the interior and viscera. By achieving a maximum inspection rate of seventy birds per minute for three inspectors, the modified traditional inspection (MTI) was designed to increase inspection while saving manpower. The USDA justified this innovation by reference to the relentless drive for ever greater output:

286. Id.
287. Telephone Interview with Carol Tucker Foreman, former Assistant Secretary for Food and Consumer Services (Dec. 1994).
288. Franklin, supra note 22, at C3.
290. Id.
291. Id.
292. Id. at 22,050.
Traditional inspection of a young chicken can be accomplished in approximately 3 seconds. Even so, because of the increased production each year, in some cases, the rate of our inspection has become the limiting factor in the speed of a production line. Using the traditional inspection procedure, the only way to obtain greater speed in production lines is to hire more inspectors. Since the Government... pays for all inspection except overtime and holiday work, this becomes increasingly expensive for the taxpayer. For this reason, USDA has been investigating alternate inspection methods... to obtain at least equal inspection results with greater inspection efficiency in terms of birds inspected per minute.293

Tests revealed that one inspector examining the exterior could work at the rate of seventy birds per minute, while two other inspectors working—at positions along the line after it split294—at thirty-five birds per minute could inspect the interior and viscera.295 The USDA, foreseeing increased consumer demand for poultry as red meat prices remained high, saw MTI as achieving “greater productivity from existing facilities to meet this demand.”296 In particular, the “[i]ndustry will gain from the increased productivity of their existing production lines. The 70 birds per minute maximum line speed will be higher than any line speed currently in effect.”297 Although the innovation would impose “some costs” on industry in the form of inspection stations and selectors to aid the inspectors, they “should be quickly recovered through productivity gains.”298

Foreman was, again, a key figure in making possible the increased line-speeds of the late 1970s:

Processors wouldn’t have been able to rev up their lines if the inspection service in 1978 hadn’t started allowing companies to wash, instead of tediously trim, contaminated birds... ‘I’m responsible for that little travesty,’ says Ms. Foreman. ... ‘I never should have approved washing.’

293. Id. at 22,049.
294. Brewer et al., supra note 265.
296. Id.
297. Id.
298. Id.
She says she was misinformed by a government study involving only 180 birds from one plant that purported to show that washing worked.299

Yet a government researcher concluded that washing was futile since bacteria were found on carcasses even after 40 rinsings.300 In any event, as Foreman admitted to Congress in 1991, "the real result of [her bad decision] was to allow lines to run much faster with no loss of product to the poultry plant."301

During the Reagan-Bush period, USDA officials also conceded that once that procedure had been implemented and "the industry’s current high productivity [wa]s based on use of this equipment . . . a requirement that contaminated tissue be condemned might cost the firms hundreds of millions of dollars a year in lost output."302 Of crucial significance is the direct worker-consumer linkage. The same throughput über alles approach that injures workers by forcing them to perform the remaining manual motions to keep up with automated operations also endangers consumers: high-speed eviscerating machines often spill feces all over the surface of the body cavity, which inspectors may fail to detect.303 As a former USDA meat safety administrator observed, with the lines "running so fast, they are just unable to produce a clean product."304 As even Time recognized, "[p]oor working conditions . . . have an impact on food quality."305

By the beginning of the 1980s, firms’ increased capacity and improved processing equipment prompted them to request the USDA to increase line-speeds again.306 When in 1980 “the industry” submitted comments suggesting that “even higher rates may be

300. Id.
306. Brewer et al., supra note 265.
achievable,” the USDA gave recognition to “the price benefit which consumers would realize from an increased poultry supply and [said it would] make every effort to identify new and improved inspection techniques which [we]re designed to permit increased industry productivity.”

To that end, the USDA announced that it would conduct further tests “to determine if a higher maximum rate [could] be achieved consistent with the public health.” At the same time, the USDA acknowledged the heightened risk of injury to workers. In order to implement the MTI, the USDA had issued regulations requiring modifications in the production facilities. In particular, firms were required to provide four feet of horizontal line space for each inspector and helper. In response to firms’ comment that less space would be adequate, the USDA observed that “the inspectors’ helpers work with sharp knives and scissors. If they work too close together, and too close to the inspector, the possibility of an injury is increased.”

In fact, production workers, too, were “[p]acked tightly and work[ed] quickly with knives and scissors . . . often cut[ting] themselves and others.” NIOSH ergonomics investigators of poultry plants commonly uncover this constraint. At the Cargill plant in Buena Vista, Georgia, for example, investigators determined that, “[b]ecause the work area [wa]s already cramped, adding workers to the lines without increasing the work area could result in injuries (i.e. lacerations, amputations) from another employee.” At two Perdue plants in North Carolina, NIOSH recommended as a means of reducing the frequency of highly repetitive movements that the main conveyor belt be slowed down or that diverging conveyors off the main one be provided “so that tasks [could] be performed at slower rates.”

308. Id.
310. Id. § 381.36(c)(1)(ii).
311. Young Chicken Slaughter Inspector Rate Maximums; Mandatory Poultry Products Inspection, 45 Fed. Reg. 27,919 (1980).
What the USDA failed to make clear was that the “facilities” and “lines” from which the agency was enabling, entitling, and even compelling poultry firms to secure greater productivity were in fact human beings—namely, their employees. Here, a perverse inversion of one of the original purposes of the Poultry Products Inspection Act lies hidden. Whereas Congress intended to protect firms that sought to maintain some hygienic standards against rogue competitors who operated at speeds and under conditions guaranteed to depress the welfare of consumers and workers, two decades later the USDA depressed the entire industry’s standard by imposing nationally uniform but higher line-speeds on all firms. Indeed, the USDA stated that although it wished to give firms a choice between the traditional and MTI systems, it arrogated to itself the power, in certain instances, to “require that procedure which will result in increased inspection efficiency.”

The continuity of policy, as between the labor-friendly Carter administration and the avowedly pro-business Reagan administration, was revealed in the early 1980s when an appeals court upheld the new line-speed rules as interim rules, but ordered the USDA to institute rulemaking procedures for the promulgation of permanent rules. First, the FSIS, which the Food Safety and Quality Service was renamed in 1981, certified conformity with the cost-benefit mandate of Executive Order 12291, issued by President Reagan at the outset of his administration. The FSIS justified the certification on the ground that the line-speed regulations would not result in (1) an annual effect on the economy of $100 million or more, (2) a major increase in costs or prices for consumers, industries, government agencies, or regions, or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S. enterprises to compete with foreign enterprises in U.S. or export markets. Significantly, none of these rubrics subsumed within it the impact on poultry workers’ health.

In response to renewed "industry" comments urging the USDA to test methods permitting line-speeds in excess of seventy birds per minute, the USDA assured companies that it was not only "making every effort," but had already tested such methods.\textsuperscript{319} In rejecting firms' calls for eliminating the requirement that inspectors be furnished adjustable platforms (rather than adjustable chairs or stools), the USDA emphasized that the platforms were "required to minimize inspector's [sic] physical strain (bending or reaching) as they do their work. Excessive bending or reaching could have adverse health consequences for inspectors and also increase inspector errors due to the added fatigue."\textsuperscript{320} Although poultry production workers' work is even more strenuous and their ensuing fatigue can trigger the same increase in safety- and health-endangering errors, OSHA has not required that employers provide them with facilities to reduce their strain; moreover, inspectors receive more rest breaks and opportunities for rotation,\textsuperscript{321} which may reduce the risk of repetitive trauma syndrome injuries.

When the Republican party gained control of the Senate and the Presidency in 1981, the Agriculture Committee was quick to hold a hearing in Mississippi to provide owners of large southern chicken processing firms with a forum to complain about allegedly onerous regulation by the FSIS. Exasperated with "over-inspecting," the owner of Sanderson Farms, for example, urged elimination of the position that inspected the outside of the birds under MTI.\textsuperscript{322}

Companies' statutory obligation\textsuperscript{323} to reimburse the FSIS for inspectors' overtime (currently $31.80 per hour) formed another point of contention. That firms chafe under their congressionally created duty to pay even for overtime—which their own work procedures are responsible for causing—while the taxpayers finance the bulk of inspection costs, is ironic in light of the fact that when Congress initially mandated meat inspection in 1906, numerous senators insisted that the packing companies finance inspection

\textsuperscript{319} Id.
\textsuperscript{320} Id. at 23,433.
\textsuperscript{321} Id.
entirely: "I look upon it as a proper expense of advertising that should be charged to that account. These packers do a large amount of advertising, and certainly they do none that will yield such a tremendous return as this one of having the Government stamp on their products." Even such a Social Darwinist as Senator Henry Cabot Lodge agreed: "This tax should be paid by those who directly benefit by it, and whose business methods have made severe inspection absolutely necessary." Interestingly, when the Johnson administration sought to impose user fees on the poultry firms, the Amalgamated Meat Cutters joined the companies in opposing the bill. Whereas the firms' opposition was based on the expense, however, the union feared that inspectors on the company payroll would be subject to pressure to approve poultry that should be condemned. Since inspectors would, however, remain government employees receiving federal paychecks, the union's fear is most plausibly interpreted as a lack of confidence in the capacity of the USDA to discharge its statutory obligations impartially.

When Senator Cochran of Mississippi informed the FSIS administrator, Dr. Donald Houston, that the owners had complained about overtime charges for inspectors, the official testified that the agency had unsuccessfully contested a recent ruling by the Office of Personnel Management requiring the FSIS to reimburse slaughter line inspectors for overtime associated with changing clothes at the beginning of work and cleaning up at the end of the shift. Although Houston assured the Senator that the FSIS had already begun discussing the issue with the National Broiler Council, H.F. McCarty, President of McCarty-State Pride Farms, irately asked Houston: "Are you going to permit the labor union—that's what it amounts to—permit the labor union to dictate that we will have to pay 15 minutes . . . at the beginning of work and at the end of work for dressing purposes?" The kind of dictating that must have appealed to McCarty was Houston's admission that the

325. Id. at 8767.
327. See 112 Cong. Rec. 3846 (1966) (remarks of Sen. Tydings, Md., in opposition to the initiative on the ground that it would harm producers in his state).
industry’s “increased linespeeds. . . . [o]bviously . . . have dictated adaptive change in government inspection activities.”331 And just in case the agency lacked the Mississippi poultry companies’ animus toward unionization, McCarty’s competitor and colleague, Marshall Durbin, Jr., urged a role for the firms in the USDA’s negotiations with its inspectors’ union.332

By 1984, the USDA fulfilled its promise to the chicken oligopolists to devise a method for authorizing the broiler line to run even faster. In that year, the Reagan administration promulgated the final rule for what it called its New Line Speed (NELS) inspection system. The USDA justified the innovation by reference to the re-emergence of a throughput-productivity-profit bottleneck caused by its own inefficient inspection methods:

> Since the implementation of MTI, the poultry industry has continued to make significant technological advances. Consequently, many establishments can present uniform lots of birds to inspectors faster than 70 birds per minute. This has been made possible by the increased use of further refinement of automated equipment, and through better control of the production process. In such cases, the inspection process has again become a limiting factor in establishment productivity, and restricts the return investment on the development and installation of modern, innovative equipment and facilities. Merely expanding the use of current inspection procedures would not alleviate this restraint given the limits on the line speeds attainable under traditional or MTI inspection procedures.333

The basis for the breakthrough was devolution of the state’s inspectional duties to the private profit-making firms themselves. Although some plants had already been engaging in quality control, in other plants that relied on the USDA to provide such controls, inspectors had to assume “a burdensome quasi-supervisory role”334 that the agency deemed statutorily inappropriate. By transferring those responsibilities to the firms, the USDA was able to free up some of the post-mortem inspectors’ time. Under NELS, each one

331. *Id.* at 57 (testimony of Dr. Donald Houston).
332. *Id.* at 46.
334. *Id.*
of the three inspectors on an eviscerating line returned to the traditional system of inspecting a bird’s exterior (with a mirror), interior, and viscera, but now each inspected only every third bird. The time saving was implemented in the following manner:

After post-mortem inspection is completed . . . , plant employees independently perform any necessary trim on all passed carcasses after the giblets are harvested. Under traditional and MTI inspection procedures, the inspector is responsible for identifying those carcasses needing to be trimmed, directing the establishment employee to trim the defects, and verifying that the bird has been properly trimmed. However, the NELS inspection system shifts the responsibility of performing specified trim to the establishment employees.335

This devolution is predicated on the implementation of a poultry carcass on-line quality control program, a statistically based sampling system, which is supposed to enable a fourth inspector to monitor and review data, and sample product at critical points on the eviscerating line. The USDA claimed that individual inspection rates were no higher under NELS than under the traditional or MTI systems.336 Carol Tucker Foreman, the former Assistant Secretary of Agriculture, however, has characterized these tests as “bullshit.”337 In any event, under NELS, the maximum line-speed has become ninety-one birds per minute.338 The inspector in charge has the authority to reduce the line-speed when “birds are not presented properly or the health conditions of a particular flock dictate” more extended inspection.339 The inspector thus “can quicken or slow the pace of profits in a plant.”340 Yet, he or she “engages in a perpetual jousting with plant officials looking for new ways to enhance their profits.”341 When a plant manager screams at a line inspector who has just pushed the button to slow down or stop the line that this interference is costing the company

335. Id. For a description of inspectors’ tasks, see FOOD SAFETY INSPECTION SERV., U.S. DEP’T OF AGRIC., MEAT AND POULTRY INSPECTION MANUAL 47 (1990).
337. Telephone Interview with Carol Tucker Foreman, former Assistant Secretary U.S. Dep’t of Agric. (Dec. 1994).
339. Id.; see also 9 C.F.R. § 381.67 (1994).
341. WELLFORD, supra note 72, at 47.
$500 per minute, then, as a former FSIS plant veterinary supervisor conceded, “you have to take that into account.”\textsuperscript{342}

The enormous pressure to which inspectors are subject not to hold up the line has run the gamut from management’s deliberately creating a hostile environment that wears down inspectors to arranging forcible assaults.\textsuperscript{343} Instances in which the FSIS began to override interventionist inspectors and restored de facto control over line-speed to management, or yielded to firms’ demands that strict inspectors be transferred,\textsuperscript{344} have ultimately hardened into a perceived policy, which has made it that much more difficult for any inspectors to assert their independence.\textsuperscript{345} Vigilance is especially undermined by the USDA’s practice of stationing inspectors at one plant for many years. The social-psychological barriers to maintaining a vigorous adversarial relationship over such long periods of time are so overwhelming as to have prompted even the inspectors’ union to call on the agency to remove some of its own members from certain plants for flagging vigilance.\textsuperscript{346} Historically, this problem was accentuated in poultry plants because prior to the introduction of mandatory inspection in 1959, some firms paid the USDA for voluntary inspections, which they could discontinue at will.\textsuperscript{347} The “close relations” fostered by that regime continued after the transition to compulsory inspection.\textsuperscript{348}

Just how reflexively committed the FSIS has become to throughput über alles was later inadvertently revealed by the Clinton administration:

The driving force behind FSIS’s program changes from the 1970s on was the need to keep up with industry’s expansion and its productivity gains, including the incorporation of automation in the slaughter process that increased the rate at which carcasses could move through the slaughter facility ( . . . “line speed”). Automation has had a particu-

\begin{footnotes}
\item[342] Telephone Interview with Dr. Linda Madson, Science and Technology Division, FSIS (Feb. 16, 1995).
\item[343] 37 Fed. Reg. 9706, 9706 (1972); \textit{Wellford}, supra note 72, at 47.
\item[344] George Anthan, \textit{USDA to Alter Poultry Plant Inspections}, \textit{Des Moines Reg.}, Apr. 23, 1987, at 1A.
\item[345] \textit{Wellford}, supra note 72, at 58-63; George Anthan, \textit{Inspectors Cite Drop in Poultry Standards}, \textit{Des Moines Reg.}, Sept. 6, 1987, at 1J, 2J.
\item[346] Telephone Interview with David Carney, President of the North Central Council of Food and Inspection Locals, AFL-CIO (Dec. 1994).
\item[347] \textit{Wellford}, supra note 72, at 57.
\item[348] Id.
\end{footnotes}
larly great impact on poultry operations, where inspectors have had to face faster and faster line speeds, which today can be as high as 91 birds per minute.349

Here, the FSIS almost seems to be charging that firms imposed these line-speeds on the agency’s inspectors, having forgotten that it itself enforces the speed-ups.

Indirectly, in its responses to comments on the proposed NELS regulations, the USDA once again shed light on the adverse impact that the sharply higher line-speed would exert on workers. Responding to processing firms’ protests against the requirement that they furnish forty-two feet of line space for every three inspection stations, the USDA observed that this length was necessary because the workload of the “helpers,” company employees, assigned to work with inspectors,

varies with the disease conditions of the bird. The birds on the line are continuously moving and when the amount of work increases, helpers must be able to continue their functions. If the horizontal line space is restricted, they may not have sufficient time to carry out these functions properly.350

Mirror trimmers, company employees who cut off parts of birds as instructed by inspectors, must perform this hectic operation even on automated eviscerating lines. In connection with firms’ resistance to providing sixty-inch high inspection stations, considering them excessive, the USDA noted that “[e]rgonomic measurements made by industrial engineers revealed specific position requirements needed for an inspector to perform with a minimum of strain and fatigue. Since rotation of inspectors is required, the stations must be adjustable.”351

The impact of increased line-speed on production workers, who do not receive state mandated ergonomic relief or rotation, is easily imaginable. When the inspectors themselves pressed the very same issue on their own behalf, complaining that increased line-speed would exacerbate fatigue and stress, the USDA’s response was cynical. In addition to asserting that the amount of work would not

351. Id.
increase, the USDA claimed that "job stress is difficult to measure. It is also difficult to differentiate job stress from stress associated with other life events including the implementation of changed methods of inspection. The Department's tests and studies did not indicate that the NELS inspection system caused inspectors undue stress." Nevertheless, pressure by the inspectors' union induced the agency to establish a joint labor management committee to study the biomechanical demands imposed by the job and means of alleviating them by redesigning the workplace.

Still not satisfied with the speed-ups it had effected, the USDA returned to the task two years later. In 1986, it announced an interim emergency rule to be implemented in plants that were operating under the MTI system. The so-called Streamlined Inspection System (SIS) required one or two inspectors and a Finished Product Standards (FPS) program to evaluate the final product. The USDA expected that the industry would realize productivity gains "by maintaining optimal line speeds," and even "maximum speed," as well as savings from reduced costs for inspectors' overtime stemming from a reduced number of inspectors per line. This change, however, was depicted as driven by the agency's own personnel and budgetary shortfalls caused by the Reagan administration's hiring freeze and cutbacks. While the State demanded that the agency make do with less, poultry companies demanded more:

At the same time that the Agency has been confronted with new budgetary limits, the poultry industry has been demanding increased inspection service. The operators of federally inspected poultry processing establishments have requested inspectional coverage for new production lines and expanded operations. Many establishments that have previously operated single-working shifts have expanded to two shifts or are planning to do so in the near future. The growth of the poultry products industry is accelerating. Production in FY 1985 was increased 5.5 percent over

352. Id. at 42,553.
353. Id.
production in FY 1984 and is expected to increase by a similar percentage in FY 1986. . . . In terms of per capita consumption, poultry is now second only to beef among all meat and poultry food products.\(^{357}\)

Fortunately for the poultry companies, since the advent of MTI and NELS, “top Agency veterinarians and technical specialists hav[ing] devoted many hours” to the subject, “found that a new sequence of hand-eye movements would provide the most efficient and effective inspection procedures.”\(^{358}\) Consequently, by the mid-1980s, the Agency was able to inform the broiler industry of the “potential availability of one- or two-inspector NELS systems.”\(^{359}\) This possibility permitted “increased productivity in the poultry industry” by enabling plants operating under the older MTI system to convert to NELS.\(^{360}\) Because the USDA had not yet resolved several problems relating to uniformity of application, it did not formally propose the two-inspector NELS system. Instead, the USDA implemented SIS in MTI plants, which would offer an incentive to plants operating under the traditional system to increase their output by converting to MTI/SIS.\(^{361}\) In MTI plants, however, conversion to SIS was not voluntary. According to the USDA, “[t]he chief difference between SIS and MTI is that under the new system there is no mirror inspection station.”\(^{362}\) Instead, one or two inspection stations are placed on the processing line after the evisceration process. The maximum inspection rate is 70 birds per minute for a two-inspector team.\(^{363}\) The FSIS explains the speed-up of inspectors’ work as resulting from the recommittal to private firms of responsibility for detecting quality defects, rather than burdening the government with such tasks.\(^{364}\)

As of 1994, 263 chicken plants operating 581 processing lines were subject to USDA inspection.\(^{365}\) The SIS system accounted

357. Id. at 3571.
358. Id. at 3572.
359. Id.
360. Id.
362. Id.
363. Id. at 3572-73.
364. Telephone Interview with Dr. Isabel Arrington, Staff Officer, FSIS, Slaughter Operations (Feb. 15, 1995).
for 53% of all plants and 63% of all lines; NELS accounted for 17% of plants and 20% of lines; and the traditional system accounted for 30% of plants and 17% of lines.\footnote{66} The USDA claims that its inspectors achieve greater efficiency without mirrors and inspectors charge that the mirrors are irrelevant since the steam constantly wafting through a poultry plant renders them useless.\footnote{67} However, critics suggest that the gains are made with smoke and mirrors. The president of the inspectors' union observes that because SIS failed to introduce any physical changes in facilities, inspectors are merely working faster without being better able to detect disease.\footnote{68} As Tom Devine, Legal Director of the Government Accountability Project, argues, "[d]amn the public and full line speeds ahead. . . . SIS means that instead of examining each bird, inspectors just glance. In reality, SIS has been the Streamlined Infection System."\footnote{69}

\section*{V. The Poop on Fecal Soup}

\textit{In an industry so tightly management controlled, the paradox that not even the giant integrators can undo is the inexorable course of nature once the hatching eggs are laid. There is no opportunity to vary the rate of flow once the process is started.}\footnote{70}

The state apparatus that fully accepts and implements capital's position that slowing line-speed is out of the question has, unsurprisingly, by regulation also authorized firms since 1961 to sell chicken that has soaked up as much as 8% of its weight in chilled-tank water,\footnote{71} which critics call "fecal soup."\footnote{72} The pur-
pose of the immersion is to lower the temperature of the carcass, "not to clean it. The poultry carcasses are already washed and considered ready-to-cook before they enter the chilling system." The FSIS is constrained to admit that because "carcasses do, however, carry some bacteria . . . the rinsing action of the water . . . eventually would actually become a contaminating influence." By the late 1980s, the FSIS finally released an internal report that found washing of fecal contamination ineffective. The source of the contamination is the extraordinary confinement in which chickens are industrially raised. Occupying only one square foot of space in the broiler house, "[b]roilers are in six inches of feces by the time they're six weeks old. They're going to have salmonella all over."

The USDA has approved a process that a government microbiologist has likened to soaking birds in a toilet, merely because the alternative European method of chilling birds with blasts of cold air to avoid cross-contamination would frustrate the throughput speeds on which United States firms insist. USDA veterinarians' acknowledge that air chilling is superior to water chilling because it "[i]nevitably . . . is less likely to cause cross-contamination." Nevertheless, in the words of an official of the National Association of Federal Veterinarians, the USDA-adapted process "enables the sale of hundreds of thousands of gallons of water at poultry meat prices—a profit the industry is un-
willing to forgo.'"  

Tyson alone, it is estimated, would lose $40 million if the waterlogging and cross-contamination were eliminated by sealing carcasses in plastic bags while moving through the chiller. As a gauge of the contempt in which inspectors have come to hold firms, one USDA veterinarian, when confronted with the billions of dollars that they would have to spend to produce uncontaminated chicken, responded, "[b]ut this is only billions of dollars the industry has stolen from the public."

From the other perspective, in the late 1960s, consumers were estimated to be paying $160 million annually for the extra water. By the mid-1990s, when this sum had exceeded a billion dollars annually, firms producing red meat, which is deemed adulterated when it absorbs the same quantities of water, sued the USDA for unfairly favoring poultry. European food safety officials' belief that the United States system is "insane" and rooted in poultry firms' political influence was confirmed by the Clinton administration's accommodation of Tyson's opposition to a program of zero-tolerance for fecal material. As a cheap make-shift solution, the USDA permits firms to superchlorinate the water in the chillers. Although chlorine may produce carcinogenic chloramines when combined with chicken skin, it is also ineffective at killing bacteria because the animal protein neutralizes it. It is, however, effective in causing eye and upper respiratory irritation among production workers. Ironically, because some European Union countries permit no use of chlorine at all on poultry prod-

380. Ingersoll, supra note 299, at 300.  
381. Behar & Kramer, supra note 305, at 43-44.  
382. Anthan, supra note 376, at 9A (quoting Dr. Carl Telleen).  
383. WELLFORD, supra note 72, at 137.  
385. Behar & Kramer, supra note 305, at 44.  
388. NIOSH: TYSON, supra note 386, at 9 (stating that "elevated and variable chlorine levels in these water sprays could partially explain why workers are periodically experiencing eye and upper respiratory irritation").
the FSIS has proposed exempting products for export from its new requirements for antimicrobial treatment.\textsuperscript{390}

A major source of the fecal cross-contamination in the chill tank is precisely the high-speed automated evisceration facilities introduced during the 1970s. As the National Research Council, in a report commissioned by the FSIS, concluded, "[t]he new equipment often malfunctions . . . and the gastrointestinal tracts are frequently broken so that feces . . . contaminate the surface of the birds. . . . Decreased line speeds might eliminate many of these shortcomings, but such speeds would have to be substantially slower than those used in traditional inspection." The obsession of the FSIS with Tayloristic studies of "the effects of accelerated line speed on inspection" in order to decrease the duration of a bird inspection to less than a second\textsuperscript{391} augured poorly for a line slow-down merely to reduce contamination.

Fecal soup also plays a role earlier in the process. According to Dr. Edward Menning, head of the National Association of Federal Veterinarians and former Chief Veterinarian of the United States Air Force, the scald tank, which is positioned between killing and eviscerating to facilitate feather removal\textsuperscript{392} is a site of contamination "because many birds enter it still alive and expelling waste."\textsuperscript{393} Since firms' ability to increase throughput by the use of such equipment and processes would be jeopardized, they might lose hundreds of millions of dollars annually if the FSIS required such contaminated tissue be condemned.\textsuperscript{394}


\textsuperscript{390} 60 Fed. Reg. 6844-45 (to be codified at 9 C.F.R. §§ 381.69(b)(1) & (c)).


\textsuperscript{392} AGRICULTURAL RESEARCH SERV., USDA, GUIDELINES FOR ESTABLISHING AND OPERATING BROILER PROCESSING PLANTS 24-25, 31-32 (1982).

\textsuperscript{393} George Anthan, USDA to Look at Dubious Poultry Policy, DES MOINES REG., Jan. 11, 1989, at 1A, 7A.

\textsuperscript{394} Id.
VI. NEW DEMOCRATS ARE ALSO CHICKEN

"The poultry industry is the greatest example of the free-enterprise system on earth. We should be applauded for our economics." 395

The Clinton administration’s policy reveals continuity with that of the Reagan and Bush administrations in that the USDA has continued to promote “deregulation of poultry processing” by deputizing profit-making chicken companies as self-inspectors.396 The Clinton administration FSIS has adopted an ambiguous attitude toward its predecessors’ deregulatory programs. On the one hand, it characterized SIS as driven by the agency’s belief that “[s]ince an increasing amount of the poultry . . . supply was being produced under brand names, . . . establishments would be motivated to protect the reputation of their products by performing systematic quality control for visible, unpalatable defects.”397 On the other hand, the current FSIS concedes that “[c]onsumers often cannot trace a transitory illness to any particular food or even be certain it was caused by food. . . . This lack of marketplace accountability for foodborne illness means that meat and poultry producers and processors have little incentive to incur extra costs for more than minimal pathogen controls.”398 Consequently, the FSIS has concluded that this “market failure” and the accompanying hundreds of deaths and millions of cases of illness caused annually by meat and poultry-related pathogens continue to justify government intervention.399

To be sure, the Clinton administration has not insisted on formally debasing standards as did several Reagan-era abortive congressional bills that would have abolished mandatory inspection in the name of economy, efficiency, and flexibility.400 Nor has the

398. Id. at 6831.
399. Id. at 6781 tbl. 2, 6831; Chickens: Ain't Nobody Here But Us, ECONOMIST, July 27, 1991, at 27.
USDA yet resurrected its plans—withdrawn in 1989—for discretionary inspection driven by the agency’s self-proclaimed but implausible speculation as to whether its traditional inspectional “intensity . . . exceeds that which is necessary.”401 Although the Processed Products Inspection Improvement Act of 1986, which afforded the USDA some inspectional discretion with regard to meat for six years, did not expressly apply to the PPIA, the USDA took the position that the PPIA itself empowered it to exercise the same degree of discretion.402

Nevertheless, the Clinton administration’s new proposal foresees an across-the-board replacement of all existing methods of post-mortem inspection with a single system consisting of two USDA officials without mandating a reduction in maximum line-speeds while enabling some plants operating under the traditional inspection system to increase their production rates in the extreme case from 25 to 70 birds per minute.403 Under this new Poultry Enhancement Program, which critics regard as “‘a corporate honor system,’”404 the company workers who would sort carcasses for the inspector would assume even greater responsibility than the helpers currently bear because they would play a greater part in detecting disease and abnormality.405 The president of the North Central Council of Food Inspection Locals characterizes this proposal as “‘nothing more than a gift to the poultry industry’” precisely because company employees “‘are not going to condemn meat’ if their supervisors tell them not to.”406 Even the FSIS has...
been constrained to concede that it will have to consider extending "whistleblower" protection to such workers. USDA inspectors argue that devolution of government responsibility to firms would generate an inescapable conflict between making money and ensuring safety and health. The same inspectors complain publicly that in the two seconds or less which they have at their disposal before the next bird passes by they cannot carry out their mandate. Thus, it is clear that the USDA long ago implanted that contradiction in the government inspection program.

Under the more recent Hazard Analysis and Critical Control Point systems, not only would company self-policing be extended further, but the de-emphasis of organoleptic inspection and the heightened importance attached to detection of pathogenic microorganisms may eventually trigger yet another wave of line-speed increases. Sounding more like a lawyer than a veterinarian, the assistant deputy administrator of the FSIS during the Reagan administration insisted that even at 180 birds per minute, the agency would comply with its statutory obligation to inspect each bird: "The inspector will in fact be looking at each bird, but much quicker than ever before."

Interestingly, whereas the meat oligopolies have opposed the USDA's deregulatory program on the ground that withdrawal of governmental inspection would lower public confidence and sales, chicken firms have strongly supported the Department's march toward deregulation. "[L]ulled by continuing increases in sales," the poultry industry continues to exalt throughput über alles. Rec-

408. Jane Fullerton, Consumers Have Bone to Pick on Product Safety, ARK. DEMOCRAT, Apr. 21, 1991, at 1A.
410. Review of U.S. Department of Agric.'s Meat and Poultry Inspection Programs: Hearings Before the Subcomm. on Livestock, Dairy, and Poultry of the House Comm. on Agric., 100th Cong., 1st Sess. 325-26, 517 (1987) (statement of Rep. Neal Smith) (stating that USDA was considering regulations that would allow line-speeds of up to 180 birds per minute); Jane Fullerton, Risky Business: Arkansas Poultry Empire, Part 2: Risk to Health, ARK. DEMOCRAT, Apr. 22, 1991, at 1A (stating that USDA was considering regulations that would allow line-speeds of up to 182 birds per minute).
411. Anthan, supra note 1, at 10A (quoting Dr. John Prucha).
412. George Anthan, Untitled, Gannett News Service, Feb. 5, 1989, available in LEXIS,
ognizing that the enactment of more sweeping, across-the-board deregulatory legislation by a right-wing Republican Congress offers the opportunity for even more favorable treatment under which benefits to firms will programmatically become more important, the industry has supported postponement of the new microbial testing system.\textsuperscript{413}

The USDA acknowledges that an alternative method would also achieve its objectives of greater food safety. Under this scenario, existing procedures and techniques would be retained, but an inspector would work at the end of the line after the viscera have been removed from the carcass to identify fecal contamination. What speaks against this alternative, according to the agency, is the possibility that, given the federal government’s disinclination to incur additional personnel costs for additional inspectors, “production rates could be reduced by 30 to 50 percent if the inspectors tasks remained identical, but fewer inspectors were used to perform those functions.”\textsuperscript{414} With fewer inspectors, the production rates would necessarily be reduced “because of limits on the number of birds per minute the final inspector could examine.”\textsuperscript{415} The cost of lower production or slowed line-speeds “could reach $5.2 billion per year for chickens and turkeys.”\textsuperscript{416}

In light of the USDA’s long history as an agency that has been captured by the firms it is supposed to regulate, it is anticlimactic to hear that it judges these costs to be “unacceptable.”\textsuperscript{417} After all, the USDA’s Poultry Enhancement Project Team that developed the proposal “understands that any option chosen is subject to the . . . constraint: There should be no reduction in production line speeds.”\textsuperscript{418} The possibility that plants operating under the NELS or SIS systems might “have to operate their lines at less than optimal speeds . . . because the post-viscera-harvest inspector cannot effectively inspect more than 35 birds per minute” meant that

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\item News Library, GNS File.
\item 416. Id.
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the agency had to reject the alternative procedure under which the NELS lines would have to run at only 70 rather than 90 birds per minute, while the SIS line-speed would decline from 70 to 35 birds per minute. At "such slow rates [sic] . . . there could be a negative effect on productivity of $5.2 billion . . . during the first year of operation." Making such "substantial demands on the regulated industry" is unthinkable to the regulator, which regards as "severe" an impact that might act as "inducement for the industry to install additional poultry slaughter lines" to maintain output.

The agency's entire analysis and cost calculations, which, revealingly, it took the initiative to estimate without any prompting or input from the regulatees, underscore the profoundly pro-capital bias that has always defined the USDA's approach. The agency characterizes "optimal" speeds as those that increase firms' profits, whereas speeds as "slow" as 1.2 birds per second, which might reduce somewhat the incidence of repetitive trauma syndrome among the 220,000 very low-paid and largely female and minority workers whose shortened work-lives form the basis of the poultry corporations' profitability and the federal government's cheap food policy, are automatically rejected as "unacceptable." Thus, when USDA food safety officials observe that "[w]e just don't want to be the cap on productivity," the subtext is that "'an extra bird-per-minute or two can mean a difference of hundreds of thousands, or even millions (for the largest plants) of dollars in profits.'"

419. Id. at 10.
420. Id. at 12.
421. Id.
422. Telephone Interview with Chuck Williams, U.S. FSIS (Jan. 10, 1995).
423. See, e.g., NIOSH: PERDUE, supra note 16, at tbl. 4 (listing the large number of female minority employees who are exposed to these working conditions).
424. Kathy Sawyer, On the Chicken Line: Trying to Catch the Bad Ones, Quickly, WASH. POST, Sept. 2, 1979, at A1 (quoting Dr. Donald Houston); see also William Dubbert, The New Look of Meat and Poultry Inspection, J. OF THE AM. VETERINARY MED. ASS'N 266, 268 (1984) ("In order to overcome the justifiable criticism that we were a 'cap' on industry productivity, we chose the one realistic option: more efficient poultry inspection procedures.").
VII. PRO-CAPITAL REGULATORY BIAS

Reducing cumulative trauma disorders alone would never generate enough savings to pay for the paperwork required by OSHA’s proposed regulation. Liberty Mutual Group, the nation’s largest workers’ compensation insurer, estimates that cumulative trauma disorder claims cost less than $1 billion a year.425

The FSIS’s biased regulatory approach does have two virtues: openness and consistency. The agency’s spokespersons do not have to be coaxed into conceding that the FSIS does not now consider and has never taken into account costs associated with the adverse impact of its authorized increase in line-speeds on the health and safety of “the industry’s” workers.426 Yet, even Time reports that the incidence of repetitive motion disorders will not be significantly reduced “until the work pace is slowed down.”427 This malignant neglect conforms to employers’ interests in an industry in which labor is the main cost component, which firms were able to compress from 62% in 1955 to about 50% in the early 1980s (46% in the South).428

The course of the USDA’s regulation of chicken processing is the history of an agency’s self-identification with the self-valorization requirements of the regulated firms’ capital. One of the most spectacular illustrations of the USDA’s status as a captured regulator occurred in 1970 when it recruited and shipped strikebreakers to northern Alabama to insure the continued flow of chicken-bearing profit. The strikebreakers replaced inspectors who were honoring a picket line at Pillsbury’s and Ralston Purina’s processing plants that had been organized by chicken farmers expressing dissatisfaction with their contracts.429 The agency’s systemic pro-firm bias was highlighted, albeit in convolutedly embarrassed language,
by the National Research Council, which the FSIS hired in the 1980s to evaluate its inspection program. The Council emphasized "the peer group with which FSIS is most closely associated" as an "obstacle to analysis":

Many federal agencies have strong relationships with their industrial and business constituencies. It is a measure of a democratic government that it be accountable to all the people and groups it affects. For meat and poultry inspection, the relationship to industry is particularly close—of necessity. Honest or dishonest, good compliance record or bad . . . every operator of an establishment is subject to federal oversight every working day. The potential for conflict is always present.

The close relationship with the industry FSIS has had to develop sensitizes program officials to the effects of their program upon the manufacturers. This is not to suggest that FSIS ignores the public interest . . . or that it makes decisions that are inevitably industrially oriented . . . Nor has the agency sponsored or encouraged active debate on the shape of its program. FSIS seldom describes to a scientific or broader public policy audience the underlying rationale for its decisions. In some cases, this low level of communication with communities outside industry can lead to inappropriate decisions that may affect public health.430

Even when the USDA purports to take measures that redound to the benefit of processing plant workers, that outcome is always instrumentally dictated by exactly the same profitability considerations that the regulated firms adopt. It seems never to have occurred to the agency that measures should be taken to reduce injuries without any quid pro quo. In connection with its regulatory duty to approve construction plans for poultry plants, the USDA has issued Guidelines for Establishing and Operating Broiler Processing Plants:

Employee Comfort Facilities.—In recent years greater concern has been shown to providing workers with more comfortable personal facilities, with the expectation that worker productivity would increase, workmanship improve, morale

430. MEAT AND POULTRY INSPECTION, supra note 45, at 160.
could be maintained at acceptable levels, and lower worker turnover would result. . . . Providing for the safety of plant workers is essential to planning a satisfactory layout. Accidents are costly not only in lost productive time but also in benefits to be paid during the worker's recovery and the possibility of increased insurance premiums.431

In the meantime, the USDA has been constrained to acknowledge that its own inspectors are exposed to considerable risk of cumulative trauma disorders as well as lacerations, contusions, and back strains.432 Such a concession is hardly surprising given the fact that inspectors may perform as many as 15,750 highly repetitive motions per day on a thirty-five bird per minute per inspector SIS line433 while the FSIS's own "Wellness Training Program" labels tasks that yield as few as 840 or more repetitions per 7-hour shift "highly repetitive."434 If ergonomists define "high repetitive jobs" as those with a cycle time of less than 30 seconds,435 then even turkey plant workers, who make 15,120 cuts per shift where the line moves less quickly than in chicken plants, belong to the group of workers most vulnerable to cumulative trauma disorders.436 Chicken processors may repeat motions up to 30,000 times during an 8-hour shift.437

In the abstract, the USDA's authorization of increased line-speeds of seventy or ninety-one birds per minute, while creating, through the forces of competition, nationally uniform rates of throughput for all firms, does not necessarily mean that individual workers' workloads must rise commensurately. Staffing and configuration of the production line and of the work flow are mediating factors that can moderate or exacerbate the effects of general in-

431. BRANT ET AL., supra note 23, at 14, 18.
432. State Panel Examines Hazards Facing Workers in Food Processing Industries, 19 OCCUPATIONAL SAFETY & HEALTH REP. 2168, 2169 (1990) (according to Ronald Prucha, Associate Administrator, FSIS); Telephone Interview with Joseph Powers, Designated Agency Safety and Health Official, FSIS (Dec. 27, 1994).
434. U.S. FSIS, WELLNESS TRAINING PROGRAM 13 (n.d.).
creases in line-speed, which become the "outer limit" for firms. This relationship is manifest for the unionized USDA inspectors: whereas the three inspectors on the faster ninety-one bird per minute line inspect thirty and one-third birds per minute, the two inspectors on the slower seventy bird per minute line inspect thirty-five birds per minute. Similarly, in a plant with a very strong local union—such as the Foster Farms plant in Livingston, California, organized by the UFCW—workers are able to persuade the management to equalize working conditions on the faster and slower lines through increased staffing, reconfiguration, or rotation. For the seventy-five to eighty percent of poultry workers who have no union, however, firms are much more likely to use the opportunity created by USDA-authorized line-speed increases to intensify individual workers' loads as well. Workers who once sliced every fourth bird soon find themselves cutting every other bird. Indeed, Congress has heard testimony from former poultry line workers that companies frequently use the occasion of a line-speed increase to reduce the number of workers. Union claims that increased line-speeds are accompanied by reductions in line staffing are made plausible by the view of the OSHA ergonomist during the Bush administration, who confirmed that the repetitive stress syndrome that is caused "by just pushing workers harder and harder" could in large part be eliminated by slowing down production lines.

Several statistical indicators underscore the key role that the USDA's line-speed policy has played in strengthening poultry management's position vis-à-vis its work force. Once the significant productivity gains stemming from the wave of labor-saving automation—in killing, defeathering, evisceration, and deboning—had been realized by the end of the 1970s, the trend in the bias away

440. Telephone Interviews with Deborah Berkowitz, Director of Health and Safety Department, United Food and Commercial Workers (Dec. 1994 and Jan. 1995).
443. Fullerton, supra note 160 (quoting Dave Cochran).
444. Ahmed & Sieling, supra note 36, at 36-37.
from labor-saving and toward labor-using technological change since 1980 became associated445 with productivity increases that "were achieved without extensive investments in technical innovations. In fact, the poultry industry's capital expenditures on new and used equipment per employee averaged 45% below the per employee average for all manufacturing workers throughout the 1980's."446 In 1987, for example, the average new capital expenditure for machinery and equipment in poultry slaughtering and processing amounted to $2,195 per production worker or 41% of the $5,369 per production worker in all manufacturing industries.447 In 1991, poultry firms invested $2,461 in new machinery and equipment per production worker, but this figure amounted to only 34% of the $7,299 invested by all industries.448 Taking into account all new capital expenditures including buildings and structures, the poultry processing industry's investment per production worker has, as recorded by the Census of Manufacturers in 1977, 1982, 1987, and 1992, amounted to $1,650, $2,176, $2,942, and $2,692 respectively; these figures reached only 48%, 36%, 46%, and 30% respectively of the aggregate manufacturing level.449 To be sure, the chicken producing oligopolies' "[i]ncentives to invest in technical innovations are lessened by the comparatively low average hourly earnings in poultry."450

By 1983, the USDA's Economic Research Service was warning that "productivity gains may come more slowly than in the past . . . in production. . . . [M]achines and energy have become more costly substitutes for labor; major economies of scale have already been realized, as have the economies from coordination of the production-marketing functions."451 It was precisely this tem-

450. Hetrick, supra note 446, at 32.
porary lag in labor-saving mechanization and automation—interrupted, for example, by the introduction of a mechanical system for handling live poultry that enabled five rather than six or seven live hangers to shackle 7,200 chickens per hour—452—that presumably prompted the oligopolies to pressure the USDA during the 1980s to devise methods for further increasing line-speeds. Thus, productivity in the industry, aided, abetted, and enforced by the USDA’s “streamlined” inspection procedures, could, for the time being at least, continue to rise merely by making workers with few alternatives work faster within a minute division of labor requiring an above-average proportion of unskilled labor—453—until they are disabled and replaced by fresh recruits in an industry that repels its workers so quickly that annual turnover rates as high as 500%.454 cause managers to give precedence to recruitment over retention.455 “To keep pace on poultry production lines moving twice as fast as a decade ago, the human components of the highly automated poultry processing machinery . . . must move their arms in quick staccato fashion to slice, wrap, cut, and . . . rip apart raw chicken with their hands.”456

It is this link between productivity, profits, and wages on the one hand and the USDA’s compliant inspection and line-speed policies on the other that has enabled the large firms to record phenomenal growth rates while crippling thousands of impoverished workers. Chicken capital “can be most proud of this track record,”457 which includes a 38% increase in broilers processed (through the chiller line) per worker hour alone between 1985 and


453. Ahmed & Sieling, supra note 36, at 35-36 (describing the poultry-processing labor force as comprised mostly of “manual and semi-skilled occupations”).

454. Horwitz, supra note 23, at A8; Expert Cites Successful Programs to Curb Injuries in Poultry Plants, 20 OCCUPATIONAL SAFETY & HEALTH REP. 1716, 1716 (1991) [hereinafter Programs to Curb Injuries] (according to Travis Arterbury, Ergonomics Consultant to Tyson Foods, Inc.).

455. PRESIDENT’S TRIENNIAL REPORT ON IMMIGRATION, supra note 47, at 131.


1992 to an industry-wide average of 182.458 "The high rate of occupational injury in poultry processing derives most directly from the constant pressures to increase or maintain high line speeds. . . . This pressure underlies not only high injury rates but also creates an environment in which control over workers' time and movement is central to production."459 What is particularly ironic about the nationally uniform line-speeds imposed by the USDA is that, given the negligible levels of imports,460 the state could just as easily set lower speeds without exposing the firms to disruptive competition from low-wage countries.

This pattern of inverted regulation does not accord with Theodore Lowi's influential theory of regulatory liberalism. According to Lowi, a "loan of governmental sovereignty" was necessary in the agricultural sector because it "was so decentralized and dispersed that private, voluntary agreements to manipulate markets were obviously too difficult to reach and impossible to sustain." To this end, "[a]dministrative agencies were created to facilitate agreements."461 In poultry processing, as in meat packing, industrial-strength concentration should make the kind of "self-government" Lowi has in mind superfluous for the oligopolists. Lowi also views the DOL as a "clientele department . . . legally obliged to develop and maintain an orientation toward the interests that comprise this sector."462 Unlike the USDA, however, the DOL as a mere "feedback" agency is "simply not to be entrusted by anyone with significant direct powers over persons and property."463 Although this agentlessly formulated dictum may correctly reflect the position of the owners of the property to be regulated, bizarrely, Lowi characterizes the "national consensus standards" that Congress authorized OSHA to adopt464 "as almost pristine examples of interest-group-liberal resolutions of the problem of balancing power and interest against policy choice."465 Yet these standards were generated al-

459. GRIFFITH, supra note 323, at 176-77.
462. Id. at 77.
463. Id. at 78, 80.
465. LOWI, supra note 461, at 117.
most exclusively by trade associations without any worker or union input.\textsuperscript{466} If labor is the client, OSHA has never been a captured agency.

VIII. A LATTER-DAY IMMACULATE CONCEPTION

\textit{[N]}o one ever died of ergonomics.\textsuperscript{467}

In a news article that resembled free advertising for Tyson Foods, \textit{U.S. News \\& World Report} recently gave the firm’s chairman of the board a stage from which to proclaim his solidarity with his employees (except that “[a]nyone who refers to their 54,000 co-workers as ‘employees’ instead of ‘people’ is fined a quarter”\textsuperscript{468}):

Don Tyson has never forgotten his humble origins. “This has always been tough work. I remember back in the ‘60s how hard it was taking out that chicken’s [innards],” he says, twisting his fingers into an imaginary bird. “By the end of the day, you couldn’t move your hands anymore.”

Of course, the modern chicken processing plant is now almost fully automated, with 210 live birds a minute going in one end and fully cooked fried chicken pieces coming out the other.\textsuperscript{469}

The magazine’s characterization of today’s plant is about as realistic as “the myth that the wealthy Mr. Tyson lives simply.”\textsuperscript{470}

The worst and most grueling job is held by live-hangers. These workers shackle by the legs twenty-five birds per minute, while the chickens, which “eat one another’s germ-laden excrement and spread it on their feathers and skin” while stuffed in cages en route to the plant,\textsuperscript{471} in turn “scratch, peck and defecate all over them.”\textsuperscript{472} While workers back up malfunctioning machines on automated lines, workers on less modern lines continue to slit birds

\textsuperscript{466} NOBLE, \textit{supra} note 29, at 43-47.
\textsuperscript{468} Frantz, \textit{supra} note 143, at 1.
\textsuperscript{469} McGraw, \textit{supra} note 98, at 42.
\textsuperscript{470} Frantz, \textit{supra} note 143, at 6.
\textsuperscript{471} David Bjerkliie, \textit{The Dangers of Foul Fowl: As Poultry’s Popularity Grows, the Scourge of Salmonella Spreads}, \textit{Time}, Nov. 26, 1990, at 136, 136.
\textsuperscript{472} Horwitz, \textit{supra} note 23, at A8.
open and remove innards manually. On the eviscerating line at the ConAgra plant in Athens, Alabama, for example, an automatic venting machine was introduced in 1978, but it was not until 1991 that the firm even alleged that its “associates only back up the machine”; the automatic drawing machines introduced in 1975 did not permit a merely back-up role for “associates” until 1993. Although automation has reduced many of the workers on the eviscerating line to feeding or positioning the carcasses for the machine and to back-up positions monitoring and correcting errors of ever faster machine operations, those errors are so frequent that two workers backing up a 70 bird per minute eviscerating machine may be working at a furious pace; when, as not uncommonly occurs, the machine breaks down altogether, management expects the workers to maintain the machine-forced rate of throughput. Even those who work as a “‘back up killer’” whacking the necks of the chickens the 300 bird per minute circular saw misses suffer from repetitive stress syndrome. Those managerial expectations are reinforced, according to the USDA’s Guidelines for Establishing and Operating Broiler Processing Plants, by the deployment of “a chief supervisor and two or three line supervisors ... to assure a constant flow of product at a maximum line speed.

By around 1990, new technology for automating broiler production became available or at least began to be introduced by the larger firms. One reason adduced for the renewed onset of automation is an increase in competition as the industry moved toward more expensive specialties such as boneless chicken breast, the retail price of which is much closer to sale-priced steak than is the case for standard processed chicken. From 1962 to the mid-1990s whole birds as a share of total processed broilers declined from around 87% to 12%. Tyson, for example, which owns 18 of


475. Telephone Interview with Margo Michaels, UFCW Safety & Health Department (Feb. 15, 1995) (describing conditions in ConAgra plant in Athens, Alabama); Telephone Interview with Deborah Berkowitz, Safety and Health Director, UFCW (Mar. 6, 1995); see also Brant et al., supra note 23, at 26.

476. Behar, supra note 160, at 54 (quoting Chris Turic, a Tyson poultry worker).


the 73 further processing plants in the United States, sold almost 95% of its broiler output in cut-up form by 1995, and reputedly held 55% of the processed chicken market share in 1987. This specialization, which Tyson initiated in the 1970s when it became clear that profit margins were triple those associated with the sale of whole broilers, is, to be sure, linked to the success of the firms’ strategy to export the parts such as feet, drumsticks, and dark meat that “yuppies” do not buy, to Asia and Europe.

Whereas ten to fifteen years ago the eviscerating line was uniformly crowded with workers performing one or two motions, today on the most highly automated lines fewer purely manual operations remain. These operations are performed by inspection helpers or mirror trimmers, but are primarily performed by rehangers, who rehang birds that are unhung as a buffer measure to coordinate the kill line, which may run as fast as 300 birds per minute, with the evisceration line, which is not supposed to operate at more than 91 birds per minute.

Despite automation on the slaughter and evisceration lines, overall poultry processing employment has continued to rise as a result of the expansion of the so-called further processing line, which has been less intensely mechanized. A 1989 NIOSH study of a large Perdue plant in North Carolina, for example, revealed that whereas 182 day-shift workers were employed on the slaughter and evisceration lines, 470 worked in cut-up and deboning; at a smaller Perdue plant, the predominance of the latter group was somewhat less marked. The shift of workers from evisceration

479. Thornton, supra note 145, at 29-30; U.S. Broiler Companies, supra note 149, at 58 tbl. 5.
482. INTERNATIONAL TRADE ADMIN., U.S. DEPARTMENT OF COMMERCE, U.S. INDUSTRIAL OUTLOOK '92, at 32-6 tbl. 9 (1992); VERHEIJEN & KOK, supra note 153, at 51; George Anthan, Ag Officials See ‘Golden Era’ in Export Trade, DES MOINES REG., Feb. 19, 1995, at 1A; John Hall, Got It Down Cold, NEW ORLEANS TIMES-PICAYUNE, Mar. 20, 1994, at F1; Poultry Exports Expected to Rise, DES MOINES REG., Feb. 4, 1990, at 3W.
483. W. DALEY ET AL., Robotics and the Poultry Processing Industry, in ROBOTICS IN MEAT, FISH AND POULTRY PROCESSING 48, 50 (K. Khodabandehloo ed., 1993); Telephone Interview with Jim McCauley, Health and Safety Director, Perdue Farms, Maryland (Jan. 27, 1995); Telephone Interview with Jackie Nowell, Safety and Health Department, UFCW (Jan. 27, 1995); Telephone Interview with William Roenigk, Vice-President, National Boiler Council (Feb 3, 1995).
484. NIOSH: PERDUE, supra note 16, at 27 tbl. 1, 29 tbl. 7.
to such operations as cut-up and deboning, which also exist in more and less labor-intensive and automated versions,\textsuperscript{485} reflects the shift in output to premium-priced and higher-profit products, which as early as 1985 accounted for more than 55% of Tyson's products.\textsuperscript{486} When Don Tyson asserts that with such products his firm is "really selling time,"\textsuperscript{487} he means that he is selling (with the "mark-up" that makes his firm so profitable) the labor time that his oligopsonistic labor market provides at very low cost. Higher profits are driven by the lower level of competition, which is enforced by the higher costs of establishing such further processing facilities.\textsuperscript{488}

IX. CHEAP FOOD AND CHEAP EMPLOYERS: CLASS-BIASED COST-BENEFIT ANALYSIS AND ADMINISTRATIVE LAW

\textit{It is possible to establish performance based standards to prevent repetitive motion traumas. I will establish one right now: Don't work, don't type, don't do any heavy lifting, never strain yourself, and try to avoid breaking out in a sweat. The solution is somewhere between having a work place where no one works and a work place where something gets done. Unfortunately, neither Barbara nor anyone else knows where that point lies.}\textsuperscript{489}

The USDA steadfastly denies that it has any legal responsibility for the safety and health of poultry production workers.\textsuperscript{490} Although the legislative history of the PPIA shows that Congress regarded worker safety as a subsidiary objective of the Act, the USDA argued in the aftermath of the 1991 fire that killed twenty-

\begin{itemize}
  \item \textsuperscript{487} Frantz, \textit{supra} note 143, at 1.
  \item \textsuperscript{488} BAKER & BRUCE, \textit{supra} note 59, at 252.
  \item \textsuperscript{489} 141 \textit{Cong. Rec.} H3252 (statement of Rep. Hefley, referring to Barbara Silverstein, chief drafter of OSHA's ergonomics standard).
  \item \textsuperscript{490} Telephone Interview with Dr. Isabel Arrington, Staff Officer, FSIS, Slaughter Operations Staff (Dec. 15, 1994); Telephone Interview with Judy Riggins, assistant to Michael Taylor, FSIS Administrator (Dec. 22, 1994).
\end{itemize}
five workers at the Imperial Food Product's poultry plant in Ham­
let, North Carolina, that the inspectors, as quasi-guests on private
property, lacked the authority even to override management's deci­
sion to lock exit doors in order to prevent theft of chickens.491
Yet the FSIS requires firms, when seeking agency approval of their
construction plans, to provide numerous "welfare facilities for plant
employees" including some as mundane as lockers with sloping
tops.492 As Foreman, the former Assistant Secretary of Agricul­
ture, explained to Congress,

[T]he USDA imposes a large number of requirements on
plants, many of them complex and many of them not di­
rectly related to safe food. . . .
For example, FSIS requires that stairs in plants be "of
impervious material and have solid treads, closed risers and
side curbs 6 inches high measured at the front of the
steps;" . . . drinking fountains must be provided and, "if
placed adjoining a lavatory must be located high enough to
avoid splash from the lavatory." Those all seem like good
ideas and seem to evidence primarily a concern for the
safety of plant and inspection personnel, rather than an
obvious and direct impact on the wholesomeness of the
product produced in the plant. Yet they have been on the
books and vigorously enforced for years.

FSIS has even found the time and energy to fret about
and take on responsibility for improving the "poor public
image of the packing industry." Inspection instructions for
"Outside Premises" state, "The public as well as visitors
and workers commonly prejudge the inside of a plant by
its exterior appearance. This often neglected area of plant
sanitation is an important reason for the poor public image
of the packing industry. . . . The image of the packing
plant as a food processing establishment certainly is not
enhanced if the outsider sees it as a junk yard or public
dump. . . ."

Perhaps FSIS should give some thought to the public's
opinion of a government agency that cares more about

492. FOOD SAFETY INSPECTION SERV., U.S. DEP'T OF AGRIC., AGRICULTURE HANDBOOK
570, U.S. INSPECTED MEAT AND POULTRY PACKING PLANTS: A GUIDE TO CONSTRUCTION
AND LAYOUT 32 (1986).
clutter than the lives of its inspectors and plant employ­ees. 493

Just as the USDA disclaims all responsibility for worker safety, with alacrity firms avail themselves of the USDA’s norm-setting as a defense in litigation. When employees—or, rather, “associates,” since the firm “dropped the term ‘employee’ years ago”494—at Perdue Farms plants in North Carolina, where as many as 36% of workers suffered from cumulative trauma disorders, requested that the state OSHA, to which federal OSHA has devolved its authority, order the company to slow down the production lines, Perdue’s lawyer defended on the ground that, “[o]ur approach is as long as the USDA allows these speeds, we’ll stick to that.”495

A federal government that seems to find it so difficult to pro­tect poultry workers has, however, found ways to classify such billion-dollar enterprises as Tyson or Perdue as family farms (namely, as agriculture-related firms at least half of whose stock is controlled by 3 or fewer family members) eligible for tax defer­ments.496 That the Clinton administration has continued pro-capital (and in particular pro-Tyson) policies is hardly surprising in light of the fact that Clinton, as governor of the largest broiler-producing state, “shower[ed] the largest chicken producer, Tyson Foods, with millions of dollars in tax breaks.”497 Similarly unsurprising is that the person he chose as Secretary of Agriculture, a department that boasts of the $50 million that it and state agencies contribute annu­ally to poultry research,498 was not only from Mississippi, another leading broiler producing state,499 but also was forced to resign

493. Food Inspection: Hearings, supra note 409, at 44, 79 (statement of Carol Fore­man).
495. Cash, supra note 437 (quoting David Wylie).
497. Behar, supra note 160, at 52; see also John T. Holleman, In Arkansas Which Comes First, the Chicken or the Environment?, 6 TUL. ENVTL. L.J. 21, 22-27 (1992) (arguing that while the Arkansas poultry industry has been a boon to the state’s economy, it has gradually destroyed Arkansas’s natural environment).
under allegations of having accepted bribes from the self-same Tyson.500

The foregoing evidence demonstrates that the USDA, in setting production line-speeds, has, in addition to pursuing—albeit with questionable success—its statutory goal of insuring that poultry products will not make consumers sick, devoted itself exclusively to the financial health of the poultry oligopolies. At the same time, the USDA’s practice of neglecting the costs that its regulations impose on workers in the form of increased incidence of injuries and shortened work lives has contributed a new chapter to the federal government’s cheap food policy by reinforcing a chicken pricing strategy that fails to reflect this major component of the cost of production. Yet, Congress did not authorize the USDA, in the course of carrying out the USDA’s food safety mandate, to seek to enrich poultry companies at the expense of poultry workers’ health. This skew is, even from the standpoint of the agency’s own statutory mandate, dysfunctional since “excessive line speeds often cause workers to accidentally rupture the intestinal sacks and other internal organs of birds, increasing the rate of salmonella contamination.”501 A question therefore arises as to the lawfulness of the USDA’s regulatory actions.

To be sure, the House Agriculture Committee report accompanying H.R. 6814, which eventually became the PPIA, stated that, in connection with the requirement that the USDA examine each carcass, as was the procedure in the then voluntary inspection program, it was directing that the Secretary of Agriculture “shall at all times provide sufficient inspectors and employ such procedures as will not slow down processing operations in the plants being inspected.”502 The conference report reiterated this interpretation.503 This injunction should, however, be interpreted to mean both that processing operations were not to be slowed down for lack of inspectors and that Congress itself was signaling its commitment to fund inspections at the appropriate levels—not that Congress intended to deprive the USDA of the power to reduce

501. State Panel Examines Hazards Facing Workers in Food Processing Industry, supra note 432, at 2169 (quoting testimony of Keith R. Mestrich, Director of Special Services, AFL-CIO Food and Allied Service Trades, before New York State Assembly).
line-speeds for any reason. Indeed, the FSIS’s own regulations prescribe that “[a]ll eviscerating of poultry and further processing shall be done with reasonable speed, considering the official establishment’s facilities.”

During the 1980s, the period when the USDA was most intensively concerned with maximizing rates of throughput, the agency, like all other federal agencies, was subject to President Reagan’s Executive Order 12,291 of February 17, 1981, which was designed, *inter alia*, “to reduce the burdens of existing and future regulations.” In pursuance of the Reagan administration’s deregulatory program, the Executive Order required that,

In promulgating new regulations, reviewing existing regulations, and developing legislative proposals concerning regulation, all agencies . . . shall adhere to the following requirements:

. . . .

(b) Regulatory action shall not be taken unless the potential benefits to society for the regulation outweigh the potential costs to society;

(c) Regulatory objectives shall be chosen to maximize the net benefits to society;

(d) Among alternative approaches to any given regulatory objective, the alternative involving the least net cost to society shall be chosen; and

(e) Agencies shall set regulatory priorities with the aim of maximizing the aggregate net benefits to society, taking into account the condition of the particular industries affected by regulations, the condition of the national economy. . . .

That even market-knows-besters intended the scope of the Executive Order’s mandatory cost-benefit analysis to encompass costs and benefits to affected workers was made unambiguously, albeit maliciously, clear by a remarkable step taken by the Office of Management and Budget (OMB) during the Bush administration. The Acting Administrator and Deputy Administrator, Office of Information and Regulatory Affairs, wrote a letter to the DOL in 1992, informing it that a proposed OSHA air contaminants standard

rule that OMB had recently received was not ripe for review under Executive Order 12,291.\textsuperscript{507} OSHA's regulatory impact analysis was deficient because it "omit[ted] consideration of the rule's compliance costs on workers. The analysis [was] limited to a description of the effects of compliance on firms' sales and profits."\textsuperscript{508} In this particular case, OMB was seeking to make the extraordinary claim that OSHA had failed to take into account that the absence of health and safety measures makes it possible for employers to pay workers higher wages, which in turn enable the latter to live longer (if they are not killed at work). However, the interpretive principle entailed that what is regulatory sauce for the OSHA goose is regulatory sauce for the USDA gander.\textsuperscript{509}

At the end of the Bush administration, the Director of OMB, Richard Darman, hardened the point by issuing guidelines that agencies were required to follow in providing estimates to OMB in compliance with Executive Order 12,291. In defining the scope of "[s]ocial benefits and costs," Darman emphasized that they

\begin{quote}
    can differ from private benefits and costs as measured in the marketplace because of imperfections arising from:
    
    (i) External economies or diseconomies where actions by one party impose benefits or costs on other groups that are not compensated in the marketplace;
    
    (ii) Monopoly power that distorts the relationship between marginal costs and market prices.

    Both intangible and tangible benefits and costs should be recognized.\textsuperscript{510}
\end{quote}

Significantly, even the anti-regulatory Risk Assessment and Cost-Benefit Act of 1995, proposed by the market-knows-best 104th Congress, expressly defined "costs" to include "the direct and indirect costs to . . . wage earners."\textsuperscript{511}

The USDA line-speed regulations impose precisely the kind of social costs on chicken processing workers in the form of an increased incidence of injuries, that the Executive Order and OMB

\textsuperscript{508.} Id.
\textsuperscript{509.} Id. at 1408-10.
guidelines require regulators to take into account. These external diseconomies, including the "pain and suffering due to . . . work-related musculoskeletal disorders of the lower back, upper extremity and lower extremity,"\(^{512}\) are frequently or perhaps even typically not captured or recorded by the marketplace. These costs are not reflected in wages or passed onto consumers because the poultry oligopolies, which are simultaneously labor market labor oligopsonists confronting a seemingly inexhaustible rural reservoir of atomized unskilled workers with few alternatives, are well-positioned to extract labor without having to indemnify their employees for impairments of the value of their labor power. As the United States International Trade Commission's chief analyst of the poultry industry observed, firms have in large part been able to sustain their competitiveness by means of locating their plants in low-wage southern "one-horse towns."\(^{513}\)

Although an agency's failure to conduct a proper cost-benefit analysis may not in itself be privately actionable,\(^{514}\) the systematically and blatantly discriminatory manner in which the USDA regulated line-speed is so arbitrary and capricious that it undermines the validity of the FSIS regulations under the Administrative Procedure Act (APA).\(^{515}\) Moreover, if broiler firms have standing under the APA to sue the Federal Labor Relations Council for failing to consider the increased overtime costs to them in its decision that shift starting times are subject to negotiation between the USDA and the inspectors' union,\(^{516}\) then surely chicken processing workers have standing to challenge the USDA's line-speed regulations.


\(^{514}\) Executive Order 12,291 "is intended only to improve the internal management of the Federal government, and is not intended to create any right or benefit . . . enforceable at law by a party against the United States, its agencies, its officers or any other person." Exec. Order No. 12,291, 3 C.F.R. 133 (1982), reprinted in 5 U.S.C. § 601 (1994).


X. OSHA'S BELATED AND FECKLESS EFFORTS TO REGULATE LINE-SPEEDS

"It is true that we do not know for every tissue, for every human being, under what circumstances that tissue is going to blow out . . . . But that doesn't mean we don't know enough to take some sort of a performance-based approach to reducing exposure to those things that we know increase your risk of musculoskeletal disorders."517

It is now clear how and with what disastrous consequences the USDA has come to regulate line-speeds for human beings in the chicken processing industry. The question still remains, however, as to why OSHA has not also intervened into this crucial determinant of workplace health and safety, which would seem singularly to belong to its jurisdiction. In a very few instances, OSHA has sought to regulate line-speed by issuing citations518 to employers for violations of the so-called general duty clause of the Occupational Safety and Health Act, which provides that "[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."519 Thus far, the Secretary of Labor has failed to secure any adjudicator's authority for an order to slow down production lines as a means of abating a hazard.

In a rare, if not unique, case involving agricultural employment, for example, OSHA inspected a California spinach farm in 1988, and cited the owner for requiring workers to pull weeds by hand. Evidence showed that working from a bent position exerts extraordinary pressure on the lumbar discs, which can eventually cause disc degeneration and arthritis. More interesting than the basis for the decision dismissing the citation was the road not taken by OSHA. The administrative law judge (ALJ) found that the use of a long-handled hoe was not a feasible means of abatement because the DOL had failed to show that its use would materially reduce stooped work, which would continue to be required for

removing the weeds from the field by hand. As one of the DOL’s witnesses had testified, however, weeds could also be removed after the harvest as the crop is transported on a conveyor belt in the field or cannery. Testifying for the farmer, a field manager employed by the company for which the farmer grew the spinach testified that because “the product moves so quickly, 20 to 30 miles per hour on the harvesting conveyor and 20 tons per hour in the processing plant . . . it is virtually impossible to remove any significant amounts of weeds.” 520 Although it may well be impossible to weed objects hurtling by at those speeds, the DOL apparently did not even suggest that the line-speed be reduced to a level at which weeding would have been feasible. That this particular method of abatement might have increased costs somewhat—some or all of which may be passed on to consumers—would not invalidate it, if it is calculated to abate the potentially crippling injuries caused by stoop labor. 521

If insufficient familiarity with ergonomic issues explains the inadequate handling of this farm worker case, 522 other obstacles emerged in a case involving citations for ergonomic hazards brought against Perdue Farms by the North Carolina agency, to which OSHA devolved its powers. 523 While the fines that the agency had imposed against the company were under review by the state review board, workers at the plants intervened 524 and requested interim relief in the form of a reduction in line-speeds. The ALJ and the North Carolina Safety and Health Review Board both ultimately ruled that they lacked a legal basis to order an interim reduction in line-speed until a court determined that the company was violating work safety standards. 525 This outcome,

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521. Six years later, in its unofficial and then abandoned draft ergonomics standard, OSHA still failed to address the issue of hand-weeding, merely prohibiting the use of any tool with a handle less than four inches long where the employer has reduced employee exposure to workplace risk factors to the lowest feasible level, which nevertheless remains above a checklist score of five. OSHA's Draft Ergonomics Standard, DAILY LAB. REP., Mar. 13, 1995, at § (f)(vii), available in LEXIS, Labor Library, Daily Labor Report File.
524. In order to participate in proceedings before the Occupational Safety and Health Review Commission (OSHRC), affected workers must file a notice that “the period of time fixed in the citation for the abatement of the violation is unreasonable.” 29 U.S.C. § 659(c) (1988).
525. Judge Rejects Workers' Request for Slower Lines at Perdue, UPI, Mar. 16, 1990,
foreshadowing the legal strategy that employers would soon pursue, was at least in part generated by the plaintiffs' inability to specify a line-speed at which the ergonomic hazards would be abated. 526

Although NIOSH, based on its health hazard evaluation of the Perdue plants at Lewiston and Robersonville, recommended slowing down the main conveyor to reduce highly repetitive movements, or "diverging conveyors off the main one so that tasks can be performed at slower rates," 527 the final settlement of the case did not involve such measures. 528 Nevertheless, the initial costliness of resolution of the matter induced Perdue to break ranks with the other chicken oligopolists and to embark upon an ergonomic program. Under the "Ergonomic Agreement," into which Perdue entered with the North Carolina Commissioner of Labor in 1991, the company was obligated within thirty days to adopt a comprehensive policy ... concerning ergonomics and to provide each employee with a statement from top management setting forth such policy and commitment to ergonomically sound work environment and practices including ... [a]n expressed and implemented policy which places safety and health at a level of importance equal to that of production and which requires management to integrate production processes with safety and health protection. . . . 529

Within 180 days, Perdue became obligated to "institute feasible engineering controls in an effort to make the job fit the person." The company agreed "to explore ... engineering solutions" such as automated processes "to eliminate excessive exertion and awkward postures and to reduce repetitive motion." Perdue also agreed to investigate "feasible" administrative controls designed "to reduce the duration, frequency and severity of exposures to ergonomics stressors." The North Carolina OSHA entrusted to Perdue's discretion the choice of such controls including rest pauses, increasing the number of workers assigned to a task, job rotation, and job

available in LEXIS, News Library, UPI File.
528. See Michael Burns, Perdue Settles N.C. Injury Case: Motion Disorders Will Be Monitored, BALT. SUN, Feb. 8, 1991, at 11C.
“enlargement.” Despite outsiders’ positive comments about the program, Perdue workers still insist that “the most effective way to reduce repetitive motion injuries would be to slow down the lines or add more people.”

Perdue has not only become the industry’s ergonomic leader, but also supports issuance of some kind of ergonomic standard. The firm’s safety and health director has stated that Perdue has been able to finance the costs of the program through reduced costs incurred in workers’ compensation claims, which amounted to 70%; reduced turnover and enhanced productivity of healthier employees represent additional savings. The director believes that other firms have failed to join the ergonomics movement because they have been misadvised by short-sighted production-oriented managers to seek to extract the most from their employees for the least. Perdue advocates an ergonomic standard because it wants its competitors to be required to undertake the same expensive changes that it has. Why Perdue would want them to introduce reforms that will soon enough increase their profitability is, to be sure, puzzling.

One reason why firms may not be impelled to reduce their workers’ compensation costs is that they may have intimidated workers, perhaps unaware of their rights in nonunion plants, so that their fear of reprisal and loss of income induces them not to file or pursue claims. Far from striving to eliminate the conditions that cause repetitive trauma syndrome, some firms appear to focus on frustrating employees’ efforts even to secure workers’ compensation benefits for injuries already sustained. Thus, Bo Pilgrim, the owner of Pilgrim’s Pride, the fifth largest poultry processor in the United States, who complains that “[w]orkers’ comp eats up half of our company’s profits,” was more partial to non-workplace-related

530. Id. at 6-8.
531. Martha Quillin, Coping with Pain, GREENSBORO NEWS & OBSERVER, Sept. 26, 1993, at Bus..
533. Telephone Interview with Deborah Berkowitz, Director of Health and Safety Department, United Food and Commercial Workers (Jan. 1995); Telephone Interview with Jim McCauley, Health and Safety Director, Perdue Farms (Jan. 27, 1995).
methods of lowering such costs. On the one hand, he brazenly handed out $10,000 checks on the floor of the Texas Senate to induce (successfully) members to vote in favor of a pro-employer reform of the state workers' compensation system; on the other hand, his company has been charged with intimidating employees into not filing compensation claims. In 1994, Don Tyson could boast that his workers' compensation costs in Arkansas, his firm's principal location, are only one-third of the level elsewhere, in part because his state legislature had just rewritten its workers' compensation statute to favor employers. Two changes in particular helped reduce costs for chicken processing firms. Under a new rule, compensation is denied to any worker who fails to establish that work was the "major cause" of her repetitive motion disability. Thus, a poultry processing worker who is an "avid fisherman or gardener" may be unable to satisfy the statutory requirement of proof. Perhaps even more beneficial to Tyson and other broiler oligopolists in Arkansas is that the amended law excludes complaints of pain from repetitive trauma disorders from being considered in evaluating the extent of workers' impairment.

Punishment of workers who complain about work-related injuries also has been rife at Tyson and Perdue where preventive medicine and rehabilitation have consisted of daily dispensing of bandages, Bengay, and aspirin by company nurses. Whereas the profit-driven need to avoid the adverse impact on meat quality associated with stresses on chickens induces firms to implement elaborate engineering and behavioral controls to calm the birds—such as having "[c]aretakers . . . announce their arrival by gently knocking on the door or whistling before entering the broil-

536. Id.; see also Carol Countryman, Bo Pilgrim's Hands, TEX. OBSERVER, Aug. 5, 1994, at 6, 6.
er house—ibuprofen is Perdue’s intervention of choice for “new hires” during their probationary period.

Despite this tradition of malignant neglect, the National Broiler Council, the companies’ advocacy association, touchingly asserts that firms “are not going to abuse employees because they need them. They’re part of the family.” That “family” at Tyson, which boasts of having spent “literally thousands of dollars to improve working conditions,” apparently includes more and less privileged members. Because the company purports not to be able to afford to let all 43,000 employees participate in the ten hour ergonomics education program reserved for managers, the workers learn about it through an “osmotic approach . . . one bite at a time.” The paternalistic contempt that oozes from such an approach illustrates how unbridgeably wide the gap is between current employer health and safety practices and even the beginnings of a democratization process in which workers at the very least have a say in determining their working conditions.

OSHA’s most prominent attempt to lower line-speed, however, was directed at the now defunct Downingtown, Pennsylvania cookie factory of Pepperidge Farm, a subsidiary of the huge food producer, Campbell Soup Corporation. Some of the women at the plant slapped the tops onto the bottoms of cookies as they came out of the oven and along a conveyor belt at 1,500 per minute; others picked up the finished cookies and put them into little paper cups. Among these cappers and cuppers, “an epidemic of carpal tunnel syndrome” raged: of the sixty-nine who suffered cumulative trauma disorders, thirty-three required surgery. The incidence of carpal tunnel syndrome, 7% of full-time cookie-line workers, was forty-one times higher than among the general population. Despite the relatively high wages, the working conditions bore a certain resemblance to those prevailing in the broiler plants. The $11 per hour wage level exceeded the average in the locality for unskilled work because the workers felt “the work was so bad high pay was

544. Fullerton, supra note 23, at 8A (quoting Dr. Ken May, former head of Holly Farms’ chicken division and consultant to the National Broiler Council).
545. Programs to Curb Injuries, supra note 455, at 1716 (quoting Travis Arterbury, Ergonomics Consultant to Tyson Foods, Inc.).
the only way they could get anybody to do it." 547 Most of the women on the production line were single parents, who worked the night owl shift in order to be at home when their children go to school in the morning and when they return in the afternoon. 548

"Among working women who cannot afford to hire illegal aliens as nannies, this is called child care. It's paid for with numbing work at awful hours on little sleep." 549 Interestingly, the University of Arkansas Cooperative Extension Service includes, among the characteristics of the representative modern broiler processing plant, two shifts operating from 10 p.m. to 7 a.m. and 7 a.m. to 4 p.m., allowing "working mothers to be home when school children are home." 550

*Pepperidge Farm* 551 illustrates how defendant-employers' use of the multiple possibilities of due process can delay state intervention so inordinately that the original cohort of workers exposed to the hazard may long since have left the place of employment. In this case, seven years after the first worker complaint about carpal tunnel syndrome triggered an OSHA investigation in 1988, 552 the OSHRC still has not reviewed the ALJ's decision handed down after the longest trial in the history of OSHA. Whichever side loses will definitely appeal the Review Commission's ruling to the circuit court of appeal. Since the case is one of first impression with vast implications for much of U.S. industry, the losing party in that appeal may well request the U.S. Supreme Court to grant review of the case. In that event, a decade or more may have elapsed until final legal disposition of the issue. If OSHA were then the prevailing party, still more time would pass before ultimate implementation of OSHA's abatement order.

The nub of the ALJ's decision was that the DOL had failed to demonstrate that a reduction in line-speed was a feasible means of abating the hazard of carpal tunnel syndrome and other repetitive trauma disorders. The ALJ ruled that OSHA had carried its burden of showing the other three elements of a general duty clause case—that (1) Pepperidge had failed to free the workplace of a

547. Id. (quoting Irene Anderson, a former Pepperidge Farm worker).
548. Id.
549. Id.
550. WESTERLUND, supra note 63, at 4.
552. Id. at *1.
hazard; (2) the hazard was recognized by the employer or the industry; and (3) that the hazard was causing or likely to cause serious physical harm.553 The fourth element, feasibility, though not stated expressly by Congress, was first enunciated by the D.C. Circuit of Appeals soon after the statute had gone into effect.554 Judge Skelly Wright derived the feasibility standard from the notion that Congress intended to require employers to eliminate only preventable hazards.555 In the context of preventing misconduct by employees, the court characterized unpreventable conduct as that which would require methods "so expensive that safety experts would substantially concur in thinking the methods infeasible."556 The OSHRC then adopted the feasibility element,557 which was merely used by the D.C. Circuit to clarify the meaning of the statutory phrase, "free from . . . hazards," but the DOL has never contested its use.558

The ALJ was impressed that Barbara Silverstein, one of the government's chief expert witnesses and a "renowned epidemiologist"—who, as Special Assistant for Ergonomic Programs in OSHA, later became the official responsible for writing an ergonomics standard under the Clinton administration—could not quantify the amount of repetition that would cause carpal tunnel syndrome or the threshold below which the disease would not occur. Apparently, the ALJ was distinctly less impressed by Silverstein's testimony that the incidence of carpal syndrome among the workers on the cookie line was forty-one times greater than that among women in the general population.559 More significant, in the ALJ's view, was that "not one expert could testify at what speed the problem would be abated nor how many employees would have to be added to a line in order to abate or materially reduce the hazard."560

553. Id. at *449-50.
555. Id. at 1266.
556. Id.
557. See, e.g., John Gill Ranch, OSHRC No. 88-2679, 1989 OSHA RC LEXIS 193, at *5-6 (Oct. 24, 1989) (requiring proof that a workplace hazard can be avoided by feasible means).
558. OCCUPATIONAL SAFETY AND HEALTH LAW 116-17 (Stephen Bokat & Horace Thompson, eds., 1988).
559. Pepperidge Farm, Inc., OSHRC No. 89-0265 at *417, *422.
560. Id. at *450.
The ALJ held, without being able to cite any supporting precedent, that, "[t]o force an employer to experiment in order to bring about abatement requires a standard. Under 5(a)(1) [the general duty clause], an employer cannot be forced to experiment." Not wholly obtuse to the irony of the employer's intensive use of due process to delay implementation of any abatement, the ALJ recognized "of course that the very employers who are bitterly attacking 5(a)(1) and are arguing for the promulgation of a standard are the very industries that will come in and fight the creation of the standard and promulgation thereof, to the utmost. At least that has been the usual course." Again, ironically, the ALJ faulted the DOL's proposal to rotate workers between more and less stressful jobs for overlooking that "there do not appear to be sufficient jobs with less stress." Similarly, with regard to increasing the number of workers on the cookie line, the ALJ stated, "[i]f the Secretary could prove to my satisfaction that certain jobs took a definite number of movements and that a definite increase in workers was economically feasible, and physically feasible, then ... the Secretary may have met her burden." But in the absence of proof on these points, all the ALJ could offer the Secretary of Labor was advice to issue a standard, under which she could order the employer to experiment without having "to prove definitively and exactly what the feasible means of abatement had to be." The ALJ also characterized as "purely speculative" the DOL's argument that employees could be questioned as to their level of discomfort at reduced line-speeds: "I agree with the Secretary of Labor that a more compassionate employer would have experimented along the lines the Secretary discusses, but I also find that a standard could force a less compassionate employer such as this to experiment."

As a federal appeals court promptly glossed the ALJ's decision, the case does not prohibit OSHA from seeking to enforce ergonomics under the general duty clause; rather, it merely held that OSHA had failed to provide sufficient evidence of the feasibility of abatement. Soon thereafter, however, another ALJ granted

561. Id. at *451.
562. Id. at *453-54.
563. Id. at *456.
564. Id. at *456-57.
565. Id. at *455.
566. In re the Establishment Inspection of the Kelly-Springfield Tire Co., 13 F.3d 1160,
(without opinion) a motion for partial summary judgment that OSHA lacked the authority to use the general duty clause to protect workers from ergonomic hazards.\(^\text{567}\) Perhaps more trenchant than any learned jurisprudential critique of the ALJ’s decision was the reaction by one of the affected workers: “He seemed to say we had (the injuries), but that there was no means to prevent them. . . . Well, they could’ve slowed down the lines or hired more girls. But that costs money, so that’s not a means.”\(^\text{568}\)

In his petition appealing the ALJ’s decision to the OSHRC, Secretary of Labor Reich argued that DOL had the power, under the general duty clause and even without having promulgated specific ergonomic standards, to issue citations to employers who failed to implement proposed feasible abatement measures to reduce ergonomic hazards.\(^\text{569}\) If the ALJ’s ruling, that the DOL had to prove the extent to which the measures would be successful, was upheld, he stated, the agency’s efforts to combat ergonomic hazards would face “an insurmountable barrier.”\(^\text{570}\) Reich asserted that typically tribunals have permitted OSHA to meet the feasibility requirement by showing that health and safety experts familiar with the particular industry recognize the proposed abatement measure as feasible.\(^\text{571}\) No adjudicator, on the other hand, has ever held OSHA to the much higher standard of demonstrating precisely how many injuries would be prevented by a proposed abatement method.\(^\text{572}\)

Even where OSHA is subjectively willed to achieve its statutory objectives, it is severely hampered by the realities of work in a non-union plant managed in a manner hostile to unions.\(^\text{573}\) Securing workers’ cooperation is often difficult when they justifiably fear discrimination and retaliation for filing complaints,\(^\text{574}\) especially when they fear being blackballed by their managers.

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1167 n.3 (7th Cir. 1994).
569. Labor Department Appeals ALJ Decision Dismissing 175 Violations at Pepperidge Farm, DAILY LAB. REP., Sept. 13, 1993, at d16.
570. Id.
571. Id.
572. Id.
574. Industry Attorney Cites Risks, Burdens; Union Official Says Law As Is Does Not Work, 21 OCCUPATIONAL SAFETY & HEALTH REP. 1088, 1088 (1992) (according to
cially since the National Labor Relations Board began undermining the protections that the National Labor Relations Act affords individual nonunion workers protesting working conditions that are governed by other statutes.\textsuperscript{575} Although the Occupational Safety and Health Act prohibits such discrimination,\textsuperscript{576} years of blacklisting and unemployment might elapse before the Secretary of Labor, shielded by a grant of prosecutorial discretion, succeeds in persuading a series of federal courts to vindicate a worker’s right to complain in the form of reinstatement with back pay.

In many instances where firms have settled with OSHA rather than risk expensive litigation contesting citations for violations,\textsuperscript{577} OSHA has diluted the agreed-upon ergonomics plan by permitting firms to begin with job rotation instead of proceeding to the more effective measure of engineering controls that directly restructure the work itself. Instead of providing a rest for workers’ hands, job rotation may actually lead to a greater incidence of cumulative trauma disorders in poultry plants in which all jobs are similar and require 10,000 to 20,000 cuts per day.\textsuperscript{578}

Federal OSHA has, for example, entered into settlement agreements with other poultry processors similar to that in the \textit{Perdue} case. Based on the aforementioned Health Hazard Evaluation carried out at Cargill’s plant in Buena Vista, Georgia, OSHA in 1991 fined the firm $400,000 and required it to “acknowledge that cumulative trauma disorders . . . are an occupational illness in the poultry processing industry . . . .”\textsuperscript{579} The agreement was notable

\textsuperscript{576} 29 U.S.C. \textsection 660(c) (1988).
\textsuperscript{577} See Roger Freeman, \textit{Standards Are Largely Undefined for Repetitive-Motion Injuries}, \textit{Nat’l L.J.}, July 29, 1991, at 28, 28 (expressing that uncertainty regarding the extent of OSHA’s authority to impose fines and abatement measures has led employers to settle with OSHA, usually agreeing to undergo ergonomic assessments, to provide CTD training to employees, and to develop medical management programs).
\textsuperscript{579} Secretary of Lab. v. Cargill, Inc., OSHRC No. 89-3426 & No. 90-1257 (citing Cargill, Inc. Ergonomic and Recordkeeping Agreement I, at 1); see also OSHA Proposes $242,000 in Penalties Against Cargill Inc.’s Buena Vista, Ga. Poultry Processing Plant, PR Newswire, Oct. 23, 1989, \textit{available in LEXIS}, News Library, Wires File (describing OSHA’s response to Cargill’s alleged violations of safety and health standards); Secretary of Lab. v. Marshall Durbin Cos., OSHRC Docket No. 94-1195 (Occupational Safety and

for the candor with which it faced the proposed solutions of job rotation and job "enlargement": "Caution shall be used in deciding which jobs are used because different jobs may appear to have different stressors, but actually pose the same physical demands as the previous job."\textsuperscript{580} In other words, assigning workers seriatim to a number of body-numbing and mind-rotting operations rather than just to one may not contribute to alleviation of any ergonomic problems. A model of rotational variety in this industry is illustrated by the strategy of the strong union of \textit{schochtim}, the Jewish ritual slaughterers in New York City in the 1930s. Finishing their work at noon, and thus having much time on their hands, . . . they in turn joined up with Jewish hospitals for the purpose of performing a Jewish rite on males. They had such luck in forming their schochtem union for killing chickens that they formed a union known as mohels [circumcisers]. [T]hey were finally invited to become a local of the International Association of Meat Cutters.\textsuperscript{581}

In 1991, while \textit{Pepperidge Farm} was pending, a coalition of thirty-one labor unions led by the United Food and Commercial Workers, which organizes poultry processing workers, petitioned the Secretary of Labor to issue an emergency temporary standard on ergonomic hazards to protect workers from cumulative trauma disorders.\textsuperscript{582} Although the Secretary of Labor has statutory authority to issue such regulations "if he determines (A) that employees are exposed to grave danger from . . . new hazards, and (B) that such emergency standard is necessary to protect employees from such danger,"\textsuperscript{583} Secretary of Labor Martin denied the petition on the ground that the epidemic of crippling cumulative trauma disorders did not meet OSHA's traditional guideline that "only conditions that pose life-threatening, incurable, or fatal injury or


\textsuperscript{582} Unions Petition OSHA for Emergency Rule to Prevent Cumulative Trauma Disorders, DAILY LAB. REP., Aug. 1, 1991, at A4.

illnesses'—such as cancer or irreversible kidney damage—are grave dangers warranting" an emergency temporary standard.584

After placing the item on its semi-annual regulatory agenda in 1991,585 the DOL in August 1992 finally published an Advance Notice of Proposed Rulemaking requesting comments and information. Spurred by United States Bureau of Labor Statistics (BLS) data showing that repetitive trauma disorders had tripled during the previous eight years, the DOL announced that it was "considering" a standard to address ergonomic hazards. Whereas in 1981 and 1984, repetitive trauma disorders accounted for 18% and 28%, respectively, of all recordable occupational illnesses reported to OSHA, by 1989 the 147,000 new cases represented 52% of the total. Studies of individual industries conducted by NIOSH suggest that the BLS data are underestimates. NIOSH found the following high incidence rates of ergonomic disorders: 50% among supermarket cashiers; 41% for meatpackers; 30% for specialty glass workers; and 20% among poultry workers.586 Especially pertinent is OSHA's recognition that "[m]ost ergonomic hazards and related disorders . . . appear to be due to changes in production processes and technologies, resulting in more specialized tasks with increased repetitions and higher assembly line speeds. In many cases these changes have not concomitantly included integration of ergonomic technologies."587 The absence of a standard means that employers are in the first instance effectively free to inflict pace-based repetitive trauma injuries on their employees. Only after the fact, then, is OSHA even theoretically in a position to cite employers for violating the general duty clause—until now, to be sure, without success.

Progress toward state intervention may be blocked for the time being by the advent of a Republican majority in the 104th Congress. Senator Nancy Kassebaum, the Chair of the Senate Labor and Human Resources Committee, unabashedly promoting a pro-business agenda, stated unequivocally that she would oppose any effort by OSHA to promulgate an ergonomics standard because the financial imposition on employers would be too great.588 Never-

theless, the DOL, noting that by 1991 the number of reported repetitive trauma disorders had risen to 224,000 cases, accounting for 60% of all new workplace illnesses, continued to include an Ergonomic Protection Standard on its semi-annual regulatory agenda, even after the Democratic party had lost its congressional majority.589 When Silverstein, the OSHA official, stated that the agency would issue a proposal after a congressionally imposed moratorium expired, the House of Representatives, eager to "force OSHA to cease its activities on the promulgation of an ergonomics standard that is paternalistic in concept,"590 voted to punish the agency by allowing more of its current fiscal year budget to be subject to rescission.591 In response, apparently, OSHA released an unofficial draft standard, not for citation or quotation,592 which was "far less demanding on employers" than a previous outline.593

Ultimately, the Clinton administration, bowing to pressure from Congress and powerful business groups like the National Federation of Independent Business and National Association of Manufacturers, decided that it "will not spend scarce political capital on the OSHA rules."594 If, in the absence of an ergonomics standard, the OSHRC and the courts uphold the ALJ's ruling in Pepperidge Farm that OSHA must prove that slower line-speeds will reduce the incidence of repetitive trauma syndrome rather than impose experiments on employers, then poultry plant workers may be left without legal protection against further overreaching by employers in collusion with the USDA.

Increasing line-speed may not be the only factor that increases the number of repetitions performed by workers, but it has a threefold crucial impact on the incidence of cumulative trauma disorder. The faster pace "almost inevitably" creates more repetitions.595 Speed can also affect muscular tension in two ways. The more rapid motions associated with higher speed can require greater

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591. Id. at H3254-55.
accelerations and decelerations, thus producing larger peaks of muscular activity. Also, increased pace can contribute to the "resting level of muscular tension" and thus to "higher overall levels of muscular activity."596 In one study, a 10% increase in speed produced a 38% increase in the worker’s pinch force; a 17% increase almost doubled it.597 The fact that ruthlessly fast disassembly lines undermine workers’ mental and physical health and safety in ways also unrelated to repetitive stress disorders explains why groups such as Poultry Workers in Action have demanded slower line-speeds as a central element of their struggle against exploitation.598

Although the complexities of the interaction of the various factors that bring about the onset of repetitive trauma syndrome in an individual worker may render it impossible to quantify precisely the threshold of repetitions below which no worker will be injured, ergonomists can state emphatically that fewer rather than more repetitions, less rather than more forceful motions, and less rather than more uncomfortable postures will reduce the incidence of cumulative trauma disorders. The ALJ’s decision in Pepperidge Farm, penalizing the DOL and affected workers for the agency’s failure to issue a standard, neglected the fact that Congress intended the general duty clause to enable the DOL to protect employees who are working under circumstances for which the DOL has not yet promulgated a standard. Since employers are not subject to any penalties for violating the general duty clause until OSHA has investigated and cited them, and they have refused to correct the violation,599 firms cannot complain of unfair surprise. Moreover, formulation of usefully precise standards for line-speeds in industries in which heterogeneous commodities are produced in widely varying processes and configurations may be very difficult.600 Other industries may lend themselves more readily to such standardization, but the diminishing resources at OSHA’s disposal ren-

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598. POULTRY WORKERS IN ACTION, NC ERGONOMICS CENTER PREDICTED A FLOP 1 (n.d.) (on file with author).
600. Telephone Interview with Barbara Silverstein, Special Assistant for Ergonomic Programs, OSHA (Jan. 25, 1995).
ders it infeasible for the agency to promulgate hundreds of such standards\textsuperscript{601}—especially when firms and industries further exhaust those resources by challenging the validity of the standards.

The chicken processing industry may, to be sure, be an exception because the USDA has already set the line-speed at a rate that clearly contributes to the repetitive traumatization of the workforce. After all, reflecting the received ergonomic wisdom, OSHA’s unofficial Draft Ergonomic Protection Standard singles out as a signal risk factor the "[p]erformance of the same motions or motion pattern every few seconds for more than two hours at a time.”\textsuperscript{602} Guidelines based on the most recent overview of the international ergonomic literature go even further in characterizing work cycles of less than thirty seconds repeated for more than an hour as "strongly related to disorders of the forearm and wrist."\textsuperscript{603} The combination of uniform line-speed, extreme division of labor that reduces workers to the performance of one motion in less than a second, and the absence of breaks, stamps chicken processing as an industry deserving of special and prompt attention. This conclusion is hardened by the fact that NIOSH has carried out Health Hazard Evaluations in several chicken plants that have underscored how rife repetitive trauma disorders are.\textsuperscript{604} Unsurprisingly, legal counsel for Perdue and other affected firms characterizes NIOSH as "a bunch of nuts."\textsuperscript{605}

The chicken oligopolies’ probable objection to the use of the general duty clause (and of a standard) to regulate line-speed on the ground that it is economically infeasible would not conform to judicial interpretation of the Occupational Safety and Health Act. To be sure, the D.C. Circuit stated in a footnote that although expense alone did not render a safety measure infeasible, "if adoption of the precaution would clearly threaten the economic viability of the employer, the Secretary should propose the precaution by way of promul[g]ated regulations, subject to advance industry comment, rather than through adventurous enforcement of the general

\textsuperscript{601} Telephone Interview with Ann Glenn, Attorney, U.S. Dep’t of Lab., Solicitor’s Office (Jan. 23, 1995).
\textsuperscript{602} Memorandum from the Occupational Safety and Health Administration Ergonomics Team, Summary of Key Provisions Draft Ergonomic Protection Standard (Sept. 22, 1994) (on file with author).
\textsuperscript{603} Kilbom, supra note 20, at 52.
\textsuperscript{604} See, e.g., NIOSH: PERDUE, supra note 16; NIOSH: CARGILL, supra note 313.
\textsuperscript{605} Telephone Interview with David Wylie, Attorney for Perdue Farms, Inc. (Jan. 26, 1995).
duty clause. Yet the next year the court offered a much more precise and expansive conceptualization of the economic burdens that Congress contemplated imposing on employers:

There can be no question that OSHA represents a decision to require safeguards for the health of employees even if such measures substantially increase production costs.

... Congress does not appear to have intended to protect employees by putting their employers out of business—either by requiring protective devices unavailable under existing technology or by making financial viability generally impossible.

This qualification is not intended to provide a route by which recalcitrant employers or industries may avoid the reforms contemplated by the Act. Standards may be economically feasible even though, from the standpoint of employers, they are financially burdensome and affect profit margins adversely. Nor does the concept of economic feasibility necessarily guarantee the continued existence of individual employers. It would appear to be consistent with the purposes of the Act to envisage the economic demise of an employer who has lagged behind the rest of the industry in protecting the health and safety of employees and is consequently financially unable to comply with new standards as quickly as other employers. As the effect becomes more widespread within an industry, the problem of economic feasibility becomes more pressing. ... [I]f the competitive structure or posture of the industry would be otherwise adversely affected—perhaps rendered unable to compete with imports or with substitute products—the Secretary could properly consider that factor.

In determining whether the cost of compliance with the general duty clause would jeopardize a firm’s long-term profitability and competitiveness, the OSHRC has adduced as a relevant consideration “whether the employer can pass the costs on to the customer.” Because chicken imports are negligible and the gap be-

608. Secretary of Lab. v. Waldon Healthcare Center, 16 O.S.H. Cas. (BNA) 1052, 1067
tween the price of chicken and its principal substitute, red meat, is so large, the costs of doing business associated with preventing injuries can be passed on to consumers by profitable firms in a “recalcitrant” industry that has thus far avoided the reforms Congress intended to impose on employers. The only logically consistent refutation of this position would argue that the federal government’s longstanding “cheap food policy” is designed to vindicate Engel’s law—that food as a proportion of a family’s budget (or macroeconomically: of a society’s income) declines as income rises—in large part by having racial and ethnic minority workers such as migrant farm workers and, more recently, female chicken processors\(^609\) subsidize the food expenditures of consumers at large in the form of low wages and uncompensated injuries. As one of the members of the Commission on Agricultural Workers explained,

[A] vital point that has been inherent in the agricultural industry in this country for the last 50 years . . . is a clear congressional intent in the subsidy programs and other means that food prices in this country will be kept as low as they can so that food is affordable. When you compare the food costs in this country to other countries throughout the world, it is clear that our food costs are substantially lower.\(^610\)

Rather than hiding behind what they laud as the advances in productivity achieved by the poultry industry and redounding to the benefit of the country as a whole, the USDA, OSHA, the judiciary, Congress, and the President would at least create clear lines for struggle if they admitted that a group of workers has been singled out to bear these costs.

However, if employers’ “‘relentless opposition’” results in the suppression of an ergonomics standard,\(^611\) and OSHA’s efforts to

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abate ergonomic hazards through the general duty clause are stymied by administrative tribunals and the circuit courts, the lack of pressure from a strong labor movement for significant improvements in occupational safety and health will relegate workers to the vagaries of market forces. The United States International Trade Commission's poultry expert also believes that workers' compensation costs may eventually come to haunt an industry that would have automated even faster had it felt the spur of high wages.612 Although Perdue's Safety and Health Director does not share the hope of some technocrats that further automation will eliminate the source of repetitive trauma syndrome613 and thus abate the need for ergonomics programs, he admits that, absent vigorous enforcement by OSHA, other firms will continue to perceive little financial incentive to adopt such programs.614

XI. POWER AND THE DIVISION OF LABOR: I GAVE MY LOVE A CHERRY THAT HAD NO STONE, I GAVE MY LOVE A CHICKEN THAT HAD NO BONE

[D]istribute the earth as you will, the principal question remains inexorable—Who is to dig it? Which of us . . . is to do the hard and dirty work for the rest, and for what pay? Who is to do the pleasant and clean work, and for what pay? Who is to do no work, and for what pay? . . . How far is it lawful to suck a portion of the soul out of a great many persons, in order to put the abstracted psychical quantities together and make one very beautiful or ideal soul?615

An important albeit positivistic truth inheres in the claim that "[t]he prevalence of repetitive tasks in the modern workplace is the natural consequence of advanced industrial technology. Increasing specialization in the production process requires that each worker perform an ever-decreasing range of tasks more and more often."616 But this claim also obscures the possibility that produc-

613. DALEY ET AL., supra note 483, at 50.
614. Telephone Interview with Jim McCauley, Health and Safety Director, Perdue Farms, Maryland (Jan. 27, 1995).
616. David J. Kolesar, Cumulative Trauma Disorders: OSHA's General Duty Clause and
tion and consumption can be organized and coordinated differently to make work life less hazardous and tedious. Even apart from claims that cast doubt on the superiority of "[m]ass [p]roduction as [d]estiny" and propose a resurgence of craft-based flexible specialization,617 plant managers and pro-capitalist sociologists of work have reported for decades that "a law of diminishing returns applies to the subdivision of jobs and that a recombination of certain fractured parts has increased efficiency."618

Chicken processing plants display the chief characteristics of mass production: mechanical pacing of work, repetitiveness, minimum skill requirement, predetermined use of tools and techniques, minute subdivision of labor, and surface mental attention. Indeed, the tiny shards and slivers of autonomy that the classical mass production workers, such as those in automobile manufacturing, can carve out by building "banks" of product and thus varying work place within limits,619 are largely precluded for chicken processors. The owner of one of the large integrated broiler firms has defended these extreme conditions by reference to an even worse fate. Responding to a description of one of his processing plants that had appeared in The Wall Street Journal, the President and CEO of B.C. Rogers Poultry argued that,

processing chickens is an inherently unpleasant task. . . .

Chicken is not grown pre-cut in the plastic bags found at the local grocer. Short of total plant automation, the technology for which does not presently exist, and implementation of which would result in displacement of thousands of employees, we know of no alternate method of providing the world with a steady supply of clean, healthy, low fat chicken.620

Even assuming that chicken has been a low-fat, protein-rich, positive contribution to nutritional standards of broad strata of the population,621 this industry apologia leaves two questions unex-

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619. Id. at 12, 146.
621. Roy Gyles, Technological Options for Improving the Nutritional Value of Poultry
explored. First, would consumers have conferred so much effective demand on this seemingly cheap commodity had its price reflected the lifetime impairment of the value of the producers' labor power in the form of the physical and mental pain and suffering that the largely atomized worker-producers have been unable to project into their wages? And second, could society have achieved the same nutritional outcome by production methods less destructive of the physical and emotional health of the direct producers? Apart from the issue of whether alternative sources of amino acids such as legumes would have been and remain a superior nutritional component and would reduce the loss of usable energy by rendering unnecessary the addition of an animal trophic level to the food chain, the answer might be that it would indeed have been impossible to achieve the same high level of output at the same low prices by any more humane production methods. "Ironically," as The Wall Street Journal recently noted, it is precisely

the public's growing concern for its own health and safety that has helped fuel growth of some of the nation's harshest jobs. Poultry workers, for instance . . . feed Americans' burgeoning appetite for lean and easy-to-cook meat by trimming away fat, bone and skin—and succumbing to rates of injury and illness that afflict almost one out of four workers annually. The chief cause of the extremely debilitating work in the poultry industry is the speed to which workers are driven to perform highly repetitive motions in order to keep pace with a partially automated production process. If a fully automated process is viewed as the end goal, in which physical stresses will be replaced by boredom—"[e]ven the lightening of labor becomes a means of torture inasmuch as the machine does not free the worker from work, but rather his work from content"—it is not clear how this state of affairs could have been achieved in ways radically

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624. Saporito, supra note 485, at 74 ("Poultry processing is a mixed bag of machine and hand operations.").
625. 1 Marx, Das Kapital, supra note 25, at 445-46.
different from those actually used. Even strong labor unions would have found it difficult to pressure (nonexistent) firms to delay the start-up of a broiler industry until automation technology was available. Even if this implausible scenario had been imaginable, how could any profit-seeking entity have justified such long-term investments designed to result in a one-time enormous explosion of output without having gradually built up a guaranteed demand for the product?

It is, in other words, possible that only the ruthlessly minute division of labor—B.C. Rogers Poultry, for example, boasts of “designated knife sharpeners whose sole task is to sharpen knives”626—and relentless driving of workers at ever faster speeds can deliver the enormous volume of throughput within such a relatively short period of time. If indeed the slaughtering and eviscerating processes could be automated, perhaps the industry should confine itself to mass producing the whole chickens that are the end-products of those operations. The further processing lines, which now constitute the central source of repetitive trauma disorders, produce the most profitable commodities at the greatest cost to deboners and other workers. Consumers buy deboned chicken because it is cheap—just as some hire others to do other kinds of dirty work such as “picking up dog shit” when they “d[o]n’t have the time do it”627 because that labor comes cheap. If house cleaners were expensive, few people could afford to slough off this work on to them. So, too, perhaps products such as boneless chicken breasts should be converted into luxuries by paying deboners as much as plumbers or lawyers, or by slowing down the line to a leisurely pace that enables workers to chat and take frequent breaks.

The mass production of deboned chicken breasts presents an interesting variation on Joseph Schumpeter’s view of “the capitalist engine [as] production for the masses, whereas climbing upward in the scale of individual incomes, we find that an increasing proportion is being spent on personal services.”628 To verify this claim, Schumpeter adduced the example of Louis XIV:

627. Susan Cheever, The Nanny Track, NEW YORKER, Mar. 6, 1995, at 84, 94.
628. JOSEPH SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 67 (2d ed. 1966).
[A] budget on that level had little that really mattered to gain from capitalist achievement. . . . Electric lighting is no great boon to anyone who has money enough to buy a sufficient number of candles and to pay servants to attend to them. It is the cheap cloth, the cheap cotton and rayon fabric, boots, motorcars and so on that are the typical achievements of capitalist production. . . . The capitalist achievement does not typically consist in providing more silk stockings for queens but in bringing them within the reach of factory girls in return for steadily decreasing amounts of effort.629

Boneless chicken breasts, however, represent neither a new product nor one—such as an automobile—that no normal consumer could produce and that even the mechanically-inclined could not create without heroic efforts. The ability to buy cheap boneless chicken breasts is merely tantamount to converting consumers into little Louis XIVs with enough money to pay remote servants to perform tasks that suddenly become beneath their dignity. Or, in the ideological reformulation favored by The Wall Street Journal in the mid-1950s, “[t]he men who process poultry” are engaged in an act of “chivalry” by “doing more and more of the housewife’s work for her.”630 The prevalence of such low-paid jobs in the United States, whether taking place in the home or externalized to factories, underscores how underdeveloped the welfare state is. For one major impact of advanced welfare states such as Sweden “is that people will increasingly have to provide common labor services for themselves: wages will have risen too high, because the level of minimum state provision is high, to permit a large servant class.”631 The point is not to abolish the division of labor or to forgo its benefits, but to encourage all people to perform as much of the unpleasant but unskilled work that virtually all non-handicapped people are capable of doing, rather than using their financial power to induce those whose meager assets force them to accept low reservation wages to devote their whole lives to harmful and unchallenging tasks.

629. Id.
An example that illustrates the possibilities of organized worker-consumer cooperation involves the same union that organizes chicken processors. After UFCW members who work as checkers in St. Louis supermarkets complained about repetitive strain injuries, a NIOSH study found that reaching and unloading heavy items from carts caused extra strain. The local union then used those results to negotiate a change in working conditions so that customers now unload for themselves, as is the case in most supermarkets.\textsuperscript{632} As a NIOSH official observed, “It’s important for the public to realize that they’re doing a real service to the cashiers. . . . Customer unloading takes a lot of stress off checkers.”\textsuperscript{633}

More than two centuries ago, Adam Smith, who considered the industrial division of labor one of the underpinnings of civilization,\textsuperscript{634} recognized some of the grave dangers to which a worker was exposed when his entire life was confined to the performance of one or two “very simple operations”; having

no occasion to exert his understanding, or to exercise his invention in finding out expedients for removing difficulties which never occur[, h]e naturally loses . . . the habit of such exertion, and generally becomes as stupid and ignorant as it is possible for a human creature to become. The torpor of his mind renders him . . . incapable of relishing or bearing a part in any rational conversation. . . . Of the great and extensive interests of his country he is altogether incapable of judging. . . . It even corrupts the activity of his body, and renders him incapable of exerting his strength with vigour and perseverance, in any other employment. . . . His dexterity at his own particular trade seems . . . to be acquired at the expense of his intellectual [and] social . . . values.\textsuperscript{635}

Although socialists later agreed with Smith that the extreme division of labor characteristic of subordination to machines was “pure boredom” and an unsurpassed “method of stupidifica-

\textsuperscript{632}. Redesigned Checkstands Will Help Reduce Cashier Injuries, UNITED FOOD & COM. WORKERS ACTION, Jan.-Feb. 1995, at 23.

\textsuperscript{633}. Id.

\textsuperscript{634}. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 3-21 (Edwin Cannan ed., 1937) (1776).

\textsuperscript{635}. Id. at 734-35.
tion,"\textsuperscript{636} they also believed that such a crippling system suppressed a "world of productive instincts and capacities, as one in the states of La Plata butchers a whole animal in order to seize its hide or tallow."\textsuperscript{637} In turn, Smith agreed with his later critics that the workers' potential was being destroyed: "By nature a philosopher is not in genius and disposition half so different from a street porter, as a mastiff is from a greyhound, or a greyhound from a spaniel, or this last from a shepherd's dog."\textsuperscript{638}

The absence of a working class movement in the United States has made workers more blind than elsewhere to the consequences of their consumption choices for other workers at their places of production and employment. This blindness is promoted by the anarchy of capitalist relations of production, the ideology of consumer sovereignty as a sacrosanct value of American civilization, and the strict but superficial separation of economics from politics. Where even the progressive consumer movement is detached from the labor movement, workers have access to little or no systematic flow of information or education and are therefore not accustomed to think about the physical and mental costs that other workers bear in producing the commodities that they want to consume—despite the fact that millions of consumers are individually conscious of the process as put-upon producers of other workers' commodities of choice. To the extent that workers remain atomized, they lend support to the extreme individualism that underlies the prevailing image of consumers as making decisions without regard to larger societal considerations.

Only in such a rigidly fissured capitalist society as the United States could the following dichotomous analysis, offered by Daniel Bell in the mid-1950s, have found such resonance:

[H]ere is a "value" problem for the human-relations engineers. Which "variable" should one seek to maximize, the satisfactions of the immediate work group or the productiv-


\textsuperscript{637} MARX, DAS KAPITAL, supra note 25, at 381. For insightful and evasive comparison respectively of Smith and Marx, see Nathan Rosenberg, Adam Smith on the Division of Labor: Two Views or One? ECONOMICA, May 1965, at 127, and E.G. West, The Political Economy of Alienation: Karl Marx and Adam Smith, OXFORD ECON. PAPERS, Mar. 1969, at 1.

\textsuperscript{638} SMITH, supra note 634, at 16.
ity of the company? . . . Should work be organized so as to increase output and decrease costs . . . so that there is a larger product for society? Or should work be organized so as to benefit the individuals on the job? . . . [W]ho shall bear the costs, the consumer or the worker?

Historically, the answer of the market society has been that the consumer should benefit. This underlies our concept of efficiency. In a competitive economy, how can any single company take on the burden of increased costs unless all competitors do likewise? . . . Short of pressure from the workers themselves, there is no action which would force modern enterprise to reorder the flow of work.639

An instructive counterpoint to this throughput über alles framework stems, unsurprisingly, from two self-consciously unorthodox capitalists. Because the novelties produced by Ben & Jerry's Homemade, Inc., such as super-fatted, high calorie ice cream—which, as one of ten foods that the Center for Science in the Public Interest suggests "you should never eat,"640 may, to be sure, be less healthful than mass-produced chicken—involves many hand operations, its workers incurred repetitive strain wrist injuries. After redesigning machinery and processes and partial automation failed to eliminate the problem,641 the firm "closed down the Brownie Bar line . . . due in part to concerns about ergonomic stresses inherent in the manufacturing process."642 Although customers protested "about the disappearance of the 'brownie ice cream sandwich,' . . . according to Mr. Cohen, until there is a machine to replace the repetitive motion that threatens to injure operators' arms, continuing production is 'not an option.'"643

642. BEN & JERRY'S HOMEMADE, INC., supra note 640, at 20.
Lest it be thought that Ben Cohen and Jerry Greenfield are socialists in disguise, it is noteworthy that their version of "Caring Capitalism" has been joined with threats to summon the police when the left-wing United Electrical Workers tried to leaflet one of their plants.644 Moreover, not only did Cohen, according to one insider's account, demand "that the ice cream be packed in a way that was brutally tiring and repetitive for his early employees, while accusing Big Business of exploiting workers,"645 but his employees continue to be exposed to a high injury rate in general646—in part because "the Company's need to manufacture more product through existing lines has pushed aside a long-term commitment to a risk management program."647 By the same token, however, the very fact that even an extraordinary exemplar of capital with a semi-human face had to enforce its decision in the teeth of consumer resistance suggests how unlikely voluntary emulation by a self-professed "customer-driven business" such as Perdue648 would be.

If those responsible for requesting and designing conveyor-belt machinery were also required to work under its command for longer periods of time, working conditions would presumably improve significantly.649 A more direct approach, based on self-direction rather than Schadenfreude, would enable the workers themselves to initiate the request for the design and implementation of production engineering and process decisions. A reduction in the length of the working day of poultry processors is even more urgently needed than for the working class as a whole. Nevertheless, a redistribution of labor, which would modify if not abolish the caste-like relegation of millions of workers to a lifelong attachment to a single operation, devoid of possibilities for individual self-development,650 though even further removed from public debate in the

647. BEN & JERRY'S HOMEMADE, INC., supra note 640, at 20.
648. PERDUE & CHICKEN, supra note 62, at 27.
650. I MARX, DAS KAPITAL, supra note 25, at 359-60.
United States, is as necessary as a redistribution of income, wealth, and power. Although partial and symbolic sharing of dirty work may suffice to break the link between it and the disrespect associated with it, a thoroughgoing transformation of social relations would require more.

It is a telling commentary on the power of capitalism to colonize the mind and efface the imagination of a different world that the mainstream public policy universe is exhausted by the dual notions that ever greater throughput in the service of lower prices is the supreme goal of economic life and that the best fate for a poultry worker is the destruction of her job and livelihood by automation and her consignment to some similarly debilitating and mentally unchallenging labor. Only by demanding an end to a mode of production that ruthlessly subordinates all human development to the sole criterion of profitability can workers begin creating an alternative future in which the division of labor will cease to enslave the many and enrich the few.

652. See Wireback, supra note 473 (discussing the problems inherent in the automation of the chicken industry).