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THE LITTLE GUY MYTH: THE FAIR ACT'S VICTIMIZATION OF SMALL BUSINESS

Big business dominates the media. We are inundated with news of billion-dollar mergers and corporate takeovers, but that is not the American Dream. For many years, the United States has had a love affair with small business. Americans may shop in megamalls and Super Wal-Marts, but they admire and respect the entrepreneurial spirit embodied in the many small businesses that increasingly drive our economy.¹ The passion and concern the public has for small businesses, particularly entrepreneurs, is unparalleled.²

One significant example of such passion and concern is the proposed Fair Access to Indemnity Act (FAIR Act), which seeks to award attorneys' fees to small businesses that prevail against the Occupational Safety and Health Administration (OSHA) and the National Labor Relations Board (NLRB) in litigation. Significantly, the Act is not reciprocal in that the agencies are not entitled to attorneys' fees when they prevail against the guilty small business. Although proponents claim that the rationale behind the FAIR Act is to "even the playing field" between large government agencies and small businesses, this Note illustrates that the true rationale is the clandestine desire to give small businesses advantages that are perhaps unwarranted.

If it seems equivocal that small businesses are well protected and cared for, one need only look at the legislation supporting small businesses within the last fifteen years. The first section of this Note focuses on the enactment and development of the Equal Access to Justice Act (EAJA)³ as a way to "protect" small business employers from incurring legal costs in litigation against government agencies.⁴ The second section analyzes the sentiment surrounding the EAJA's failure, and the more extreme bill that has

1. See *infra* notes 91-95 and accompanying text.

2. See *infra* notes 178-79 and accompanying text.

3. Pub. L. No. 96-481, 94 Stat. 2325 (1980) (codified at 28 U.S.C. § 2412 (2000)).

4. See *infra* notes 8-43 and accompanying text.

been proposed to increase such "protection."⁵ In particular, the FAIR Act takes a stronger stance than the EAJA because it awards attorneys' fees to prevailing small businesses, even when the government agencies may have been justified in bringing the claim. Assessing the language used in support of the bill reveals that many people in this country believe that small businesses are *not* well protected. Such a notion is completely ill founded, and, furthermore, the proponents of the FAIR Act are aware of the shaky foundation upon which their argument rests.

The third and fourth sections explain the true rationale underlying legislation such as the FAIR Act: the political ideal that small businesses are evidence of the American Dream. The third section dispels the myth that small businesses are "victims" of governmental abuse in need of further protection.⁶ Finally, the fourth section asserts that *if* the public wants further protection for small firms, an argument not without merit, it should honestly advocate such a policy without relying on the "victim" theory that corrupts bills such as the FAIR Act.⁷

THE BEGINNING OF THE TREND

The prevailing scheme regarding attorneys' fees in this country is the American rule, which states that each party is accountable for paying his own legal fees regardless of who is vindicated.⁸ Despite the longevity of the rule, many judicially created and statutory exceptions exist.⁹ These exceptions exemplify the various

5. See *infra* notes 44-85 and accompanying text.

6. See *infra* notes 86-157 and accompanying text.

7. See *infra* notes 158-98 and accompanying text.

8. This notion has long been part of our legal system. In *Arcambel v. Wiseman*, the United States Supreme Court refused to award the prevailing party attorneys' fees. 3 U.S. (3 Dall.) 306 (1796); see also *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 240 (1975) (highlighting that "[u]nder the 'American Rule' . . . attorneys' fees are not ordinarily recoverable by the prevailing litigant in federal litigation in the absence of statutory authorization").

9. For a list of some statutory exceptions, see Henry Cohen, *Awards of Attorneys' Fees Against the United States: The Sovereign is Still Somewhat Immune*, 2 W. NEW ENG. L. REV. 177, 184-91 (1979). The main judicial exceptions are: (1) the "common fund" exception which permits a party suing on behalf of others to have the beneficiaries contribute to the cost of an attorney; and (2) the "bad faith" exception which grants attorneys' fees when the losing party has not followed a court order and has acted intentionally or in bad faith. See Louise

arguments against the American rule, and suggest why it is the minority rule among industrialized democracies.¹⁰ In 1980, Congress passed the EAJA, a pivotal exception to the American rule, on behalf of small businesses.¹¹ When first enacted, the Act was experimental; it became permanent in August 1985.¹² The EAJA awards small businesses and individuals attorneys' fees when they prevail against government agencies, unless the government proves it is "substantially justified" in its position.¹³

The EAJA qualifies as an "extreme" exception when one considers the pervasive doctrine of governmental immunity: "Traditionally, the United States [government] was even less vulnerable to an award of attorneys' fees than a private litigant."¹⁴ More surprisingly, it is a one-sided provision, because the government can never recover fees.¹⁵ The only time the government's stance is evaluated is when it loses: the government must then prove that it was "substantially justified" in its position to avoid compensating the small business or individual for its legal fees.¹⁶

L. Hill, *An Analysis and Explanation of the Equal Access to Justice Act*, 19 ARIZ. ST. L.J. 229, 231 n.14 (1987); see also Brigitte Fresco, Lundin v. Mecham: *Defining the Scope of the Equal Access to Justice Act*, 62 GEO. WASH. L. REV. 795, 796 (1994) (stating that the exceptions "may . . . have swallowed the rule"). For a detailed discussion of the American rule and its common law exceptions, see Jon S. Hoak, Note, *Attorney Fees: Exceptions to the American Rule*, 25 DRAKE L. REV. 717 (1976).

10. See Fresco, *supra* note 9, at 795 (noting that most industrialized democracies adhere to the English rule, which allows the prevailing party to recover fees from the losing party); see generally Calvin A. Kuenzel, *Attorneys' Fees in a Responsible Society*, 14 STETSON L. REV. 283 (1985) (contrasting the American rule and the English rule).

11. For a discussion of how the EAJA fits into the "misconduct in litigation" exception, see Dan B. Dobbs, *Awarding Attorney Fees Against Adversaries: Introducing the Problem*, 1986 DUKE L.J. 435, 441-44.

12. See Pub. L. No. 99-80, 99 Stat. 183 (1985) (codified as amended at 5 U.S.C. § 504 (1994) and 28 U.S.C. § 2412 (1994)). Title 5 of the U.S. Code covers fee awards in administrative matters, whereas Title 28 pertains to fee awards in civil suits. See Hill, *supra* note 9, at 232.

13. See 28 U.S.C. § 2412(d)(1)(A) (2000).

14. Spencer v. NLRB, 712 F.2d 539, 543 (D.C. Cir. 1983). Even the common law exceptions could not be invoked against the government without an express statutory provision. See *id.* at 543-44.

15. See Dobbs, *supra* note 11, at 449.

16. See 28 U.S.C. § 2412(d)(1)(A). The court can find that "special circumstances make an award unjust," and therefore reject government compensation. *Id.*

The early EAJA cases reflect the difficulty courts had in defining "substantially justified."¹⁷ Courts split over whether the government had to be justified in only its litigation position¹⁸ or in both its prelitigation and litigation positions.¹⁹ Congress responded to this debate by choosing the latter in the 1985 Amendments.²⁰ The legislative history also provides that "substantially justified" requires a showing of more than reasonableness,²¹ an issue that was heavily debated prior to the Amendments.²² Of course, the assertion that "more than reasonableness" is somehow a clearer standard than "substantially justified" is superficial at best. "The legislative history gives no further guidance except to echo the previously followed premise that determinations of substantial justification must be made on a case-by-case basis."²³

The Asserted Rationale

The EAJA was designed primarily to give individuals and small businesses the resources to defend their rights and deter the government from bringing arbitrary or fruitless claims.²⁴ Even as an answer to the cries that small businesses were being "targeted" by government agencies, the introduction of the EAJA was not

17. See Nancy A. Streeff, *Gavette v. Office of Personnel Management: The Right to Attorney Fees Under the Equal Access to Justice Act*, 36 AM. U. L. REV. 1013, 1017-18 (1987).

18. See, e.g., *Essex Electro Engrs., Inc. v. United States*, 757 F.2d 247, 247 (Fed. Cir. 1985); *White v. United States*, 740 F.2d 836, 841 (11th Cir. 1984); *United States v. 2,116 Boxes of Boned Beef*, 726 F.2d 1481, 1488 (10th Cir. 1984); *Tyler Bus. Servs., Inc. v. NLRB*, 695 F.2d 73, 75-76 (4th Cir. 1982).

19. See, e.g., *Miller v. United States*, 753 F.2d 270, 274 (3d Cir. 1985); *Iowa Express Distribution, Inc. v. NLRB*, 739 F.2d 1305, 1309 (8th Cir. 1984).

20. See 28 U.S.C. § 2412(d)(2)(D).

21. See H.R. REP. NO. 99-120, at 9 (1985), *reprinted in* 1985 U.S.C.C.A.N. 132, 138.

22. Some courts required a showing of reasonableness. See, e.g., *Citizens Council v. Brinegar*, 741 F.2d 584, 593 (3d Cir. 1984); *Cornella v. Schweiker*, 741 F.2d 170, 171 (8th Cir. 1984); *Gava v. United States*, 699 F.2d 1367, 1370 (Fed. Cir. 1983). Others required more than reasonable justification, based on the fact that Congress had previously rejected replacing the words "substantially justified" with "reasonably justified." See, e.g., *Martin v. Lauer*, 740 F.2d 36, 43 (D.C. Cir. 1984); *Phillips v. Heckler*, 574 F. Supp. 870, 872 (W.D. N.C. 1983) (citation omitted). Retreating from legislative history altogether, some courts focused on the frivolous standard enumerated in Federal Rule of Civil Procedure 37. See, e.g., *Trustees for Alaska v. Watt*, 556 F. Supp. 171, 173 (D. Alaska 1983).

23. Hill, *supra* note 9, at 243.

24. See Fresco, *supra* note 9, at 798.

mainly a deterrent of governmental injustice, but an advocate of fairness to small businesses.²⁵ "In essence, the EAJA is Congress's attempt to level the litigation playing field."²⁶ The inequity alluded to is the disparity in resources that exists between government agencies and small firms.²⁷ The argument is that if small firms have a real chance to recover fees from the government, two positives will result: (1) small firms will be more likely to fight the government instead of succumbing to settlement as a way to avoid legal costs; and (2) the government will hesitate before bringing meritless claims.²⁸

The language used to describe the purpose of the EAJA was quite strong. Small businesses were described as "victims" and the government's behavior was characterized as "abusive."²⁹ The Act was intended to stop the government from "pick[ing] on" small firms.³⁰ Such language embodied fears that the "little guy" would be trampled by large and wealthy government agencies.³¹ This sentiment transformed the focus of the EAJA from advocacy on behalf of small business to support of "an 'anti-bully' law."³² In order to stop these bullies, Congress believed that a "little guy" who prevailed against big government should be made "whole" by

25. See *id.* ("The EAJA also gives 'incentive to Federal agencies to more carefully select their cases and not pick on small firms because they are easy targets unlikely to defend themselves.'). See generally UNITED STATES SMALL BUS. ADMIN., THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT 135 (1996) [hereinafter THE STATE OF SMALL BUSINESS (1996)] (stating that the benefits of imposing regulations, such as enjoying fair market practices and safe work environments, are distributed among society; however, the costs usually fall on specific businesses).

26. Fresco, *supra* note 9, at 798.

27. "In fact, there is evidence that small businesses are the target of agency action precisely because they do not have the resources to fully litigate the issue." H.R. REP. NO. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4988. "Small businesses are less likely to have the resources to monitor, interpret, and respond to changing government requirements. . . . A lawsuit that would slow down a large firm may destroy a small one." ROLAND J. COLE & PHILIP D. TEGELER, GOVERNMENT REQUIREMENTS OF SMALL BUSINESS 2 (1980).

28. See *Spencer v. NLRB*, 712 F.2d 539, 549-50 (D.C. Cir. 1983).

29. See *id.* at 550.

30. See 131 CONG. REC. 20,349 (1985) (statement of Sen. DeConcini).

31. See generally Kuenzel, *supra* note 10, at 287 (highlighting that the "little man had lost" as one of the poor results of the American rule).

32. *Battles Farm Co. v. Pierce*, 806 F.2d 1098, 1101 (D.C. Cir. 1986), vacated, 487 U.S. 1229 (1988).

recovering its litigation costs.³³ The notion of small businessmen as underdogs became clear simply because the government, at times the prevailing party, is *never* made whole.³⁴

The Success of the EAJA

While the language of the Act diminished its strength of purpose, successes of the EAJA are important to consider because the FAIR Act may be viewed as a response to its failures.³⁵ The FAIR Act's chief sponsor, Senator Tim Hutchinson (R-Ark.), argued that a legislative change is necessary because the eighteen-year-old EAJA "is not providing the relief it was meant to provide"—giving small business owners an incentive to defend themselves and reimburse them for their defense costs if they win.³⁶

Although some may see the EAJA as successful,³⁷ the many inconsistencies in its application suggest an imprecise purpose. A 1998 case illustrated the murkiness of the "substantially justified" standard. The court stated that it "falls somewhere between the no justiciable issue standard of [state law] and an automatic award of fees to a prevailing party."³⁸ In the fifteen years that have elapsed since the 1985 Amendments, it is astonishing that the standard remains so unclear.³⁹

33. See H.R. REP. NO. 96-1418, at 10 (1980), *reprinted in* 1980 U.S.C.C.A.N. 4984, 4988.

34. See Dobbs, *supra* note 11, at 449; see also *supra* text accompanying note 15.

35. Those who oppose the FAIR Act believe that the EAJA is effective. They render the FAIR Act futile, because the EAJA "already ensures against prosecutorial overreaching." Susan J. McGolrick & Brian Lockett, *Job Safety: Hastert Says Vote on FAIR Act Was Postponed Due to Lack of Votes*, BNA CORP. COUNS. DAILY, Feb. 18, 2000, available in LEXIS, BNA Materials, Business Materials, BNA Corp. Law Daily.

36. Susan J. McGolrick, *Labor Law: Senate Panel Hears Testimony on Proposal Requiring NLRB, OSHA to Pay Defense Costs*, BNA CORP. COUNS. DAILY, Aug. 2, 1999, available in LEXIS, BNA Materials, Business Materials, BNA Corp. Law Daily.

37. See, e.g., 131 CONG. REC. 20,350 (1985) (statement of Sen. Dole) ("What the EAJA has accomplished is what it was intended to accomplish . . ."); see also H.R. REP. NO. 106-385, at 17 (1999) (claiming via a vote that there is insufficient evidence to conclude that the EAJA is ineffective).

38. *Helmy v. Department of Bus. and Prof'l Regulation*, 707 So. 2d 366, 368 (Fla. Dist. App. 1998) (citations omitted).

39. Conversely, it could be argued that Congress's intent was to leave the standard murky to allow for an ad hoc approach. See Hill, *supra* note 9, at 243; see also *supra* text accompanying note 23.

One of the best ways to measure the impact of the EAJA is to compare the projected expense of the Act with the actual expenditures. The EAJA was originally estimated to cost \$68 million a year, but during the period between 1988 and 1992, the total awards amounted to approximately \$6 million a year.⁴⁰ In 1996, the NLRB received eight EAJA applications and awarded fees to one applicant.⁴¹ OSHA received seventy-nine applications between 1982 and 1994, and granted awards in thirty-eight cases.⁴² In the House and Senate, proponents of the FAIR Act view this disparity between projected and actual expenditures as indicative of the EAJA's failures.⁴³

CONTINUING THE TREND: A RESPONSE TO THE EAJA'S FAILURES?

Since it is clear the EAJA is underutilized at best, and at worst simply not working, the FAIR Act imposes a flat rule: If you are a small business, or a small labor organization, and you prevail against the Board or OSHA, then you will automatically get your attorneys' fees and expenses.⁴⁴

The FAIR Act⁴⁵ was introduced in the House of Representatives on May 27, 1999.⁴⁶ The Act would amend the National Labor Relations Act and Occupational Safety and Health Act, both of

40. See McGolrick, *supra* note 36.

41. See *id.*

42. See *id.*

43. See *id.* But cf. H.R. REP. NO. 99-120, Part II, at 2 (1985), reprinted in 1985 U.S.C.A.N. 132, 152 (stating that the estimated cost of the EAJA is based on the assumption that only 3-5% of eligible parties will apply for recovery of attorneys' fees). The disparity between projected and actual cost may represent the fact that the EAJA is not well known to small businessmen, rather than its ineffectiveness as a tool to equalize the playing field.

44. Hon. William F. Goodling, *Introduction of the Fair Access to Indemnity and Reimbursement (FAIR) Act*, at <http://thomas.loc.gov/cgi-bin/query/D?r106:6:/temp> (May 27, 2000) (on file with the *William and Mary Law Review*). But see H.R. REP. NO. 106-385, at 21 (1999) (citing statistics to infer that the EAJA is highly utilized).

45. H.R. 1987, 106th Cong. (1999).

46. The proponents are comprised of Representatives such as William F. Goodling, Cass Ballenger, Peter Hoekstra, Lindsey O. Graham, and Bob Schaffer. See *Bill Summary and Status for the 106th Congress, Fair Access to Indemnity and Reimbursement Act*, at <http://thomas.loc.gov/cgi-bin/query/D?c106:2:/temp/~c106hgyuJP::> (May 27, 1999).

which regulate small business practices.⁴⁷ This amendment would allow for recovery of attorneys' fees by entities with no more than 100 employees and a net worth of no more than \$7 million.⁴⁸ Employers and unions who qualify for an award of fees would receive them, *even if* the government was "substantially justified" in bringing the action.⁴⁹ Consequently, the FAIR Act is termed an "automatic award" provision. It ensures recovery to small businesses without consideration of the government's justification or lack thereof.

Fifteen years after the EAJA was amended and permanently reinstated, the disparity between the EAJA "in theory" and "in actuality" has become an impetus for change.⁵⁰ The EAJA's goal of inciting small businesses to fight back has been obscured: "In Fiscal Year 1996 . . . the NLRB received nearly 33,000 unfair labor practice charges and issued more than 2,500 complaints . . ."⁵¹ Of those complaints, 2204 settled.⁵² Of nearly 77,000 OSHA violations cited in 1998, approximately 2061 inspections that led to sanctions were contested.⁵³

As a better way to reach the enumerated goal, the FAIR Act proposes a harsher effect on the government.⁵⁴ Proponents believe that the "substantially justified" standard has been applied too leniently.⁵⁵ "The result . . . is that an agent easily is able to win an EAJA claim and the prevailing business is often left high and dry."⁵⁶ The low threshold justification requirement would be

47. See H.R. REP. NO. 106-385, at 2-4.

48. See Brian Lockett, *Labor Law: Salting, Attorneys' Fees Bills Reported Out of House Education, Workforce Committee*, BNA CORP. COUNS. DAILY, Aug. 2, 1999, available in LEXIS BNA Materials, Business Materials, BNA Corp. Law Daily.

49. *Id.*

50. See generally Goodling, *supra* note 44 (providing statistical evidence of the futility of the EAJA).

51. *Id.*

52. See *id.*

53. See *id.*

54. It is ironic that Goodling calls the FAIR Act a "loser pays" rule, yet when the small businessman loses, he is not responsible to compensate the government for legal fees. See Lockett, *supra* note 48.

55. See H.R. REP. NO. 106-385, at 7 (1999). "Despite Congress' effort in 1985 to clarify (in committee report language) that 'substantially justified' places a burden on the general counsel greater than 'reasonable basis,' current law follows the 1988 Supreme Court ruling that the burden is in fact the lower 'reasonable basis' standard." *Id.* (footnote omitted).

56. Goodling, *supra* note 44.

omitted in the FAIR Act, as the Act does not consider the reasonableness of the government's position at all.⁵⁷

Taking It One Step Further

Analyzing the differences between the EAJA and the FAIR Act for present and pending attorneys' fees illustrates the severity of the FAIR Act's provisions.⁵⁸ The FAIR Act takes the EAJA more than just one step further, as it does away with one of the EAJA's central objectives: to pick a rule that represents the middle ground between polar extremes.⁵⁹

Superficially, the differences between the two approaches are easy to recognize. The FAIR Act applies to businesses with no more than 100 employees whereas the EAJA applies to businesses with no more than 500 employees. The EAJA considers government justification while the FAIR Act does not.⁶⁰ Curiously, the FAIR Act also singles out two government agencies as the targets of this bill, yet the EAJA applies to *any* governmental agency.⁶¹ The potential underlying effects of these differences is that the FAIR Act would provide *greater* relief (because the government can never refuse to pay based on justification grounds) to *fewer* prevailing parties (because the definition of "small business" has narrowed).⁶²

57. See McGolrick, *supra* note 36 (stating that the FAIR Act would "make agency justification irrelevant").

58. Cf. H.R. REP. NO. 106-385, at 19 (describing the Act as a "radical departure from the American Rule"). But cf. H.R. REP. NO. 106-385, at 11 n.20 (noting that many "loser pays" concepts are prevalent in the law).

59. "[R]ather than prescribing mandatory fee awards against the government whenever it lost a case, the EAJA adopts the 'middle ground' approach of authorizing a fee when the government's position is found to be without substantial justification." Gregory C. Sisk, *The Essentials of the Equal Access to Justice Act: Court Awards of Attorneys' Fees for Unreasonable Government Conduct (Part One)*, 55 LA. L. REV. 217, 226 (1994); see also H.R. REP. NO. 96-1418, at 10 (1980), reprinted in 1980 U.S.C.C.A.N. 4984, 4989 (explaining that the "substantial justification" standard is a balance deliberately struck between the government's interest in instilling obedience to the law and the public's interest in empowering parties to fight back against the government).

60. See *supra* notes 54-57 and accompanying text.

61. Compare H.R. 1987, 106th Cong. (1999), with 28 U.S.C. § 2412(a)(1) (1994).

62. See McGolrick, *supra* note 36 (describing the employee and net worth limits as "a special rule created for only the smallest of businesses"). Conversely, it can be argued that even this narrow definition is too broad. See, e.g., H.R. REP. NO. 106-385, at 19 (noting that the FAIR Act would increase NLRB and OSHA spending); NATIONAL INST. FOR OCCUPATIONAL SAFETY AND HEALTH, U.S. DEPT OF HEALTH AND HUMAN SERVS., IDENTIFYING

Additionally, although harsher and more extreme, the FAIR Act's "flat rule" will come into play less often because it only applies to actions involving OSHA and/or NLRB.⁶³

Arguments for the FAIR Act are similar to the legislative history surrounding the EAJA, and, while the goals of the bill also seem to benefit small businesses, its wording sadly shares some of the same imperfections. The enumerated purpose of the FAIR Act is to:

- (1) ensure that small businesses will not be deterred from defending against actions brought by NLRB and OSHA;⁶⁴ (2) reduce the disparity in expertise and resources that exists between small businesses and NLRB and OSHA;⁶⁵ and (3) make NLRB and OSHA more accountable for their actions in deciding which claim to bring.⁶⁶

The first goal seeks to operate against the norm of settling. Small business owners often settle as a result of the high cost of litigating.⁶⁷ If litigation is an appropriate means to fight for the lawfulness of one's position, small businessmen should not be deprived of this tool. The fear of crippling financial burden should not be allowed to derail the judicial process. Senator Michael B. Enzi of Wyoming fears that government agencies have an incentive to bring claims against small employers because the "substantially justified" threshold is so low, yet small business owners barely have

HIGH-RISK SMALL BUSINESS INDUSTRIES: THE BASIS FOR PREVENTING OCCUPATIONAL INJURY, ILLNESS, AND FATALITY 15(1999) [hereinafter IDENTIFYING HIGH-RISK] ("98% of all private industry workplaces met the definition of small business establishments . . ."); McGolrick, *supra* note 36 (estimating that the 100-employee limit would be met by nearly 97% of 'small' business employers). *But cf.* MANSEL G. BLACKFORD, A HISTORY OF SMALL BUSINESS IN AMERICA xi-xiii (1991) (describing the difficulty and inconsistency in defining "small business").

63. This singling out obviously is problematic. According to Richard Griffin, general counsel of the International Union of Operating Engineers, there appears to be "no credible reason" for omitting the "substantially justified" standard, particularly only for NLRB and OSHA. McGolrick, *supra* note 36; *see also id.* (highlighting Senator Herman's concern that these two agencies are singled out).

64. H.R. 1987(b)(1), 106th Cong. (1999).

65. H.R. 1987(b)(2).

66. H.R. 1987(b)(3).

67. *See* McGolrick, *supra* note 36.

any incentive to fight because of cost.⁶⁸ Consequently, many claims against small businesses go uncontested in court because of this justified fear of economic loss.⁶⁹

Second, the FAIR Act seeks to reduce the economic disparity that exists between government agencies and small businesses. Because businesses would certainly recover all damages in a successful defense, the desire to settle before a court decision is abated. Senator Tim Hutchinson of Arkansas, for example, believes that the FAIR Act will neutralize the difference in resources between the respective parties and ensure that the lawsuit is about content, not money.⁷⁰ This measure would force the government agencies to rely on facts to win a case instead of waiting until the relatively tiny war chests of small businesses are emptied with no hope of replenishment.

Third, the increased impetus to fight back will make the government evaluate the merit of each and every claim *before* bringing a lawsuit. By taking away the discretion the court has to award fees to certain business owners, the automatic award of the FAIR Act will ensure that the government sues only on fruitful grounds.⁷¹

On the surface, these three aims seem fairly mild; lurking beneath, however, is the passionate message that the "underdogs" are fed up. "By granting attorneys' fees and expenses to small businesses who know the case against them is a loser, who know that they have done nothing wrong, the FAIR Act gives these entities an effective means to fight against *abusive* and *unwarranted* intrusions by the Board and OSHA."⁷² The small business owners are repeatedly referred to as the "little guys"⁷³ and

68. See *id.*; see also COLE & TEGELER, *supra* note 27, at 1 (citing the substantial amount of "legal and administrative costs of settling disagreements with the regulators").

69. See *supra* note 27 and accompanying text.

70. See McGolrick, *supra* note 36; see also Goodling, *supra* note 44 (describing the government agencies as "vast" bureaucracies with "vast resources" that prevent small business owners from effectively fighting back).

71. See Goodling, *supra* note 44; see also NATIONAL FED'N OF INDEP. BUS. (NFIB), *NFIB Issue Overview: Your Vote Gives Small Business A Big Voice*, Ballot No. 530 [hereinafter *NFIB Issue Overview*] (on file with the *William and Mary Law Review*) ("The threat of reimbursement to small business owners for unwarranted action would be a powerful incentive for government personnel to back off unless there is strong evidence of guilt.").

72. Goodling, *supra* note 44 (emphasis added).

73. See *id.*; H.R. REP. NO. 106-385, at 5 (1999); McGolrick, *supra* note 36.

the government is personified as a litigious entity that continually sues the little guys for the sole purpose of hurting them financially.⁷⁴ According to Senator Enzi:

The FAIR Act says that if the NLRB or OSHA brings a case against a *little guy*, it had better make sure that the case is a winner, because if it isn't—and the small business is put through the time and expense of defending itself—then the government will have to reimburse the small employer for its attorneys' fees and expenses. It's as simple as that.⁷⁵

It is fairly easy to be misled regarding the strength of the proponents' opinions, especially when cast against today's background of increased government regulation. "Government requirements have increased in number and impact. At the same time, the vulnerability of small businesses has increased" because of the success of large businesses in the labor market.⁷⁶ One is led further down this path when reading the language used to put forth the bill. It is surprisingly conclusive. For example, the government action is termed "abusive," even though it may often be merited. Through parallel assumption, the small businesses are described as lacking in negligence or wrongdoing, although there must have been some evidence of violation in order to generate a lawsuit. Entrepreneurs are a cornerstone of American commerce, but it is preposterous to presuppose their innocence as a rule.

Proponents argue that the FAIR Act will give business owners the incentive to fight "meritless" claims, however, even if merited (but unsuccessful in court), the government will still be forced to

74. See generally THE STATE OF SMALL BUSINESS (1996), *supra* note 25, at 131 (explaining that "governments do not fully understand and appreciate the cost and burden of regulations on small business"); Goodling, *supra* note 44 (stating that the government knows that under the EAJA, it can almost never lose, therefore it has reason to litigate meritless claims); *NFIB Working to Lessen Lawsuits*, CAPITOL COVERAGE, June 1999 (explaining that without any reform, lawsuits against small businesses will continue to increase); cf. COLE & TEGELER, *supra* note 27, at 1-2 (stating that although many small businessmen believe government regulations impose a disproportionate burden upon them, there are methods to reduce such burden through enhanced research and reform).

75. McGolrick, *supra* note 36.

76. COLE & TEGELER, *supra* note 27, at 5.

pay.⁷⁷ Furthermore, supporters infer that the government does not, at the present time, think twice before bringing a lawsuit, evidenced by the increasing number of lawsuits currently pending. Yet, the underlying problem may not be the government's tendency to act without thinking, but rather, the amount of regulation passed,⁷⁸ and/or the amount of violations that truly do occur.⁷⁹ It is surprising to see the use of such conclusive language, because the situation at hand seems anything but final.

The FAIR Act's absolutist approach is even more surprising given that the idea is not novel. As far back as the late 1970s, the idea of an automatic award provision was discussed and rejected.⁸⁰ Twenty

77.

[E]ven in cases where the outcome depended on the credibility of witnesses that could be established only by a trial, or in cases where the law changed in unanticipated ways between the complaint and the decision, OSHA and the NLRB would be liable in the event of an adverse ruling.

McGolrick, *supra* note 36 (quoting Alexis Herman, Labor Secretary).

78. See generally SELECT COMM. ON SMALL BUS., U.S. SENATE, HANDBOOK FOR SMALL BUSINESS: A SURVEY OF SMALL BUSINESS PROGRAMS OF THE FEDERAL GOVERNMENT 178 (1979) [hereinafter HANDBOOK FOR SMALL BUSINESS] (explaining that OSHA standards "are continually examined in order to bring them into conformity with current needs and research findings"). Perhaps today's situation *necessitates* so many regulations. As far back as 1980, the government was making changes to reduce the potential negative impact government agencies had on small businesses. For example, the Regulatory Flexibility Act (RFA) was passed in 1980, encouraging federal agencies "to impose lighter regulatory burdens" on small firms. BLACKFORD, *supra* note 62, at 109. Additionally, OSHA exempted businesses with fewer than 20 employees from its regulations. See *id.*

79. It is doubtful that government agencies, like OSHA, have no safeguards to ensure that they do not habitually bring fruitless claims. See H.R. REP. NO. 106-385, at 19 (1999) (citing statistics to support the agencies' "careful selection of meritorious charges in which to proceed with issuance of a complaint, and the skill with which it prosecutes them"). "The consequences of occupational injuries and illnesses are significant." IDENTIFYING HIGH-RISK, *supra* note 62, at 6. "A total of 6.6 million work-related injuries and illnesses were reported during 1995." *Id.* In actuality, "occupational illnesses tend to be underreported." *Id.* Out of 360 small businesses surveyed by the Office of Advocacy, roughly 40% "did not fully comply with most regulations." U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, THE CHANGING BURDEN OF REGULATION, PAPERWORK, AND TAX COMPLIANCE ON SMALL BUSINESS: A REPORT TO CONGRESS 16 (1995) [hereinafter CHANGING BURDEN]. Additionally, a 1990 survey indicated that the category of smallest business establishments (1-19 employees) had the fewest establishments with a medical surveillance program, followed by establishments with 20-99 employees. See *id.* at 7-8. See generally *id.* (explaining the process by which OSHA violations are adjudicated).

80. See *Spencer v. NLRB*, 712 F.2d 539, 550-51 & n.43 (D.C. Cir. 1983). Congress deliberately chose a "middle ground" approach, rejecting the position of the FAIR Act. See *supra* note 59 and accompanying text. Congress wanted to adopt a provision "falling somewhere between the English Rule and the current American Rule." *Spencer*, 712 F.2d at

years of contemplation on this subject have yielded few new ideas. When Congress created the EAJA, it considered the idea of making it an automatic award provision, much like the FAIR Act:

Single-minded pursuit of the foregoing goals would have induced Congress to enact a law providing for the automatic award of attorneys' fees to private parties who prevailed in suits against the government. Congress did not go that far, however, because of its sensitivity to two other considerations. First, it did not wish to inhibit legitimate efforts by the executive to enforce the law. Second, it feared the potentially huge cost to the government of an automatic fee-shifting provision.⁸¹

Congress declined to extend the EAJA to a more FAIR-like position because of its fear that government agencies would stop bringing legitimate claims.⁸² Such fear correctly recognizes, as the FAIR Act wrongly ignores, that enforcement of regulations is a *positive* thing for society. "This standard balances the constitutional obligation of the executive branch to see that the laws are faithfully executed against the public interest in encouraging parties to vindicate their rights."⁸³ If the regulations are enacted, their enforcement is essential.

So, what explains the change in rationale from fourteen years ago when Congress explicitly declined to adopt the FAIR Act's position? Could it merely be the failure of the EAJA and/or the increase in government regulations? If so, neither of those occurrences fully explains why the *rationale* would change. If Congress once believed that an automatic award provision would inhibit legitimate claims, that fear is still legitimate today. Yet proponents of the FAIR Act ignore that danger and claim their rationale is the same as it was for the EAJA.

552.

81. *Id.* at 550-51 (footnote omitted).

82. *See id.* at 550; S. REP. NO. 96-253, at 6 (1979) (noting the inappropriateness of a standard developed in 1968 because "it might have a chilling effect on reasonable Government enforcement"); *see also NFIB Issue Overview*, *supra* note 71 ("The threat of liability against the government would hamper government personnel in performing their jobs.").

83. *Spencer*, 712 F.2d at 551 (citations omitted).

Something else is at play; the validity of the process is questionable when the same obstacles from twenty years ago are still a problem today. The sentiment that created the EAJA is the sentiment driving the FAIR Act. Considered in a vacuum, the FAIR Act itself is not very important. It is just another attempt to ease the way for small business. Attempts have been made in the past and more attempts will be made in the future.⁸⁴ The strength of the rhetoric driving the FAIR Act indicates that the sentiment is not going away. If an agency "drags an innocent small employer through the burden, expense, heartache, and intrusion of an action that the employer ultimately wins, reimbursing the employer for its attorneys' fees and expenses is the very least that should be done."⁸⁵

Such strong language reflects the extremist position taken by proponents of the FAIR Act and suggests that something beyond the mere desire to be "fair" to small businesses is the driving force behind this bill. That force is the proponent's recognition that the government regulations are not wholly unfit, but that most small businesses cannot hope to follow such laws. Small businesses have a difficult time complying with legitimate government regulations; as a result, the bill is seeking to make amends. Instead of focusing on the effect regulations are having upon small commerce, the proponents are hiding behind the idea that the playing field is not level.

DISPELLING THE "LITTLE GUY" MYTH

In order to prove that something else is lurking behind the proposed rationale for laws such as the EAJA and the FAIR Act, the idea of small businesses as little guys must be dispelled. Victims are defined as people "subjected to oppression, deprivation, or suffering . . . someone tricked, duped, or subjected to hardship: someone badly used or taken advantage of."⁸⁶ Despite their

84. In fact, proponents of the FAIR Act make it clear that these types of proposals are not going away. Even if their FAIR Act is not passed, they are committed to bringing it back to the table. "[W]e will be back with the FAIR Act and we will win . . ." McGolrick & Lockett, *supra* note 35.

85. Goodling, *supra* note 44.

86. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 2550 (1986).

perceived vulnerability, an evaluation of the size,⁸⁷ support,⁸⁸ and benefits⁸⁹ of small businesses proves that the label of "victim" simply does not apply. Additionally, the strong history of small businesses further illustrates the visible and respected position they occupy in our world today.⁹⁰

For the sake of argument, let us look at small businesses as they are portrayed: as victims. They have limited resources with which to compete against larger, wealthier, and more powerful corporations. They have fewer employees, probably smaller office space, and a more limited consumer market. They have less capital to advance their own interests through marketing and promotions, and consequently, maintain a smaller profile. As a result, small businesses are easier to step on. These little guys certainly do not have the cushion of an internal legal department or money to pay for Washington lobbyists. Additionally, they have to comply with the same rules and regulations that even the largest corporations find challenging. Government regulations have a disparate impact on small firms, forcing them to try to comply with regulations designed for their larger counterparts. The victimization is easy to imagine and attractive to argue because it places blame in a situation that is truly blameless. The appeal of this argument is reduced by the fact that the entrepreneur still flourishes.

First and foremost, it must be recognized that small businesses comprise a sizable portion of our economy. "A large segment of the economy consists of relatively small, closely held businesses. These businesses provide owners with a good job and the possibility of additional earnings."⁹¹ Small businesses employ a majority of the nation's workforce and generate over half of the gross domestic

87. See *infra* notes 91-99 and accompanying text.

88. For a discussion of legislation aiding small businesses, see *infra* notes 124-44 and accompanying text. Also, many programs have been designed to help small firms grow and prosper: the Small Business Development Programs, the Small Business Innovation Research, the Small Business Technology Transfer program, and Focus on Women Business Enterprise, to name a few. See H.R. REP. NO. 105-849, at IX, 10-11, 115-16, 121-23 (1999).

89. See *infra* notes 145-57 and accompanying text.

90. See *infra* notes 165-79 and accompanying text.

91. Leonard J. Sliwoski & Mary Bader, *A Brief for S and C Corporations*, 7 BUS. LAW TODAY, Mar.-Apr. 1998, at 49.

product.⁹² The growth of small businesses within the last decade⁹³ has fueled new job growth in the U.S. economy.⁹⁴ In fact, small businesses are the "principal source" of new jobs.⁹⁵ Despite the majority status small business enjoys under a variety of measures, this majority is considered the underdog.

Studies indicate "that small businesses are the leading source of innovations . . . produc[ing] twice as many innovations per employee as . . . large firms. In fact, small businesses have been responsible for most of the significant innovations in the 20th century."⁹⁶ In the President's annual report on small businesses, President Clinton highlighted the new services and products small businesses generate for the U.S. economy.⁹⁷ Despite their vulnerability as compared to large businesses because of the burden of government regulations, these "little guys" remain a strong economic and innovative force.⁹⁸ Small businesses are epicenters for

92. See *Small Business Innovation Research Program (SBIR): Hearing Before the Subcomm. on Gov't Programs and Oversight of the House Comm. on Small Business*, 105th Cong. 47 (1998) [hereinafter *SBIR*] (statement of Congressman Jesse L. Jackson, Jr.); see also U.S. SMALL BUS. ADMIN., *THE FACTS ABOUT SCORE: COUNSELORS TO AMERICA'S SMALL BUSINESS* (May 2000) [hereinafter *SCORE*].

93. In 1996, 842,000 new small employers opened up their businesses. See U.S. SMALL BUS. ADMIN., *THE STATE OF SMALL BUSINESS: A REPORT OF THE PRESIDENT* 21 (1997) [hereinafter *THE STATE OF SMALL BUSINESS* (1997)]. The number of nonfarm sole proprietorships increased from 14,783 to 16,664 between 1990 and 1996, reflecting an annual increase of 3.1%. See U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, *THE NEW AMERICAN EVOLUTION: THE ROLE AND IMPACT OF SMALL FIRMS* 3 (1998) [hereinafter *AMERICAN EVOLUTION*]. For a comprehensive analysis of the growth of small firms, see WILLIAM A. BROCK & DAVID S. EVANS, *THE ECONOMICS OF SMALL BUSINESS* (1986).

94. Cf. *AMERICAN EVOLUTION*, *supra* note 93, at 8 ("[W]hatever else they are doing, large firms are no longer the major providers of new jobs for Americans." (quoting David Birch)).

95. See *SCORE*, *supra* note 92; see also *THE STATE OF SMALL BUSINESS* (1997), *supra* note 93, at 3 (explaining that small businesses are "the foundation of the Nation's economic growth."). Sixty-four percent of the 2.4 million new jobs created in 1996 were created by small firm industries. See *id.* at 13. The largest percentage increase in employment between 1990 and 1995 occurred in the smallest of firms—those with one to four employees. See *AMERICAN EVOLUTION*, *supra* note 93, at 16-18.

96. *SBIR*, *supra* note 92, at 35-36 (statement of Daniel O. Hill, Assistant Administrator, Office of Technology, Small Business Administration) [hereinafter *Statement of Hill*].

97. See *THE STATE OF SMALL BUSINESS* (1996), *supra* note 25, at 85.

98. Even the "littles" guy, the sole proprietor, is a contributing member of the economy. In 1993, nonfarm sole proprietors held receipts of approximately \$757 billion. See *id.* In fact, the fastest-growing group of businessmen is the incorporated self-worker. See *id.* at 91.

independence and innovation "in the face of pressures inherent in large organizations against such independence and innovation."⁹⁹

As traditional victims, one would assume that the pervasive and innovative force of small firms would have gone unnoticed and/or unaided. Conversely, the government has noticed and responded to the needs of small business. The Committee on Small Business was formed as recognition that "the nation's small business people represent a major segment of our business population and our nation's economic strength."¹⁰⁰ This committee bestows an aura of respect and pride on entrepreneurs and acts as "the advocate and voice for small business."¹⁰¹

Additionally, the government has recognized "the capabilities of small high-tech companies that, as a group have shown an ability unequalled by large businesses to produce new products, processes and technologies."¹⁰² As a result, programs such as the Small Business Innovative Research program were created.¹⁰³ This program provides capital to small businesses to enable them to conduct research and development.

If there is any doubt that small businesses have a voice, one need only glance at the many lobbying firms and organizations dedicated to the practice of small business.¹⁰⁴ One of the strongest voices for small firms is the National Federation of Independent Business (NFIB). A nonprofit, nonpartisan organization founded in 1943,¹⁰⁵

99. COLE & TEGELER, *supra* note 27, at 5; see also AMERICAN EVOLUTION, *supra* note 93, at 20-21 (explaining that small businesses use their community ties to further innovation); THE STATE OF SMALL BUSINESS (1997), *supra* note 93, at 3 (stating that small businesses provide a disproportionately higher amount of innovations than do large firms).

100. H.R. REP. NO. 105-849, at 2 (1999).

101. *Id.*

102. SBIR, *supra* note 92, at 1 (statement of Congressman Roscoe Bartlett, Chairman, Subcommittee on Government Programs and Oversight).

103. This program was created by the Small Business Administration in 1982. See *id.* at 1. The program is designed to make "the best and brightest entrepreneurial researchers" become part of the federal research and development efforts. Statement of Hill, *supra* note 96, at 36.

104. For a sampling—look at the NFIB, National Small Business Association, Small Business United, Special Counsel for Small Business Matters, Small Business Legal Defense Committee, Small Business Advisory Committee, and the Small Business Administration.

105. See NFIB Online: *The Voice of Small Business, NFIB to Congress: Help Make Sure Agencies Play Fair When Dealing with Small Firms*, at <http://www.nfib.com/media> (Oct. 25, 1999) (on file with the William and Mary Law Review). The NFIB was created to "give small and independent business a voice in governmental decision making." *About NFIB: Ensuring*

NFIB is devoted to exploring problems faced by small firms. Comprised of over 600,000 business owners, NFIB "is the largest advocacy group representing small and independent businesses."¹⁰⁶ The increasing strength of the organization was illustrated when *Fortune Magazine* ranked NFIB "the most influential business organization . . . in 'Washington's Power 25' survey."¹⁰⁷ Using its power and visibility,¹⁰⁸ the NFIB distributed ballots to small firms all across the country asking them to vote on the FAIR Act initiative.¹⁰⁹

Voting your NFIB Federal Member Ballot has never been more important . . . or easier. The ability of NFIB to have a big voice for small business hinges on your involvement in the process of setting our advocacy agenda. One of the first questions law-makers ask when we see their support is, "Where do the NFIB members I represent stand on this issue?" By showing them your ballot responses, we can let them know the view of small business owners "back home."¹¹⁰

On the night before the House of Representatives was scheduled to vote on the FAIR Act, the NFIB said they were "counting on Congress to place private small businesses and the government on more equal footing by passing this important legislation."¹¹¹ Furthermore, NFIB will consider how congressional members vote on this bill when determining who is to receive its "coveted 'Guardian of Small Business' award."¹¹²

Another extremely strong organization devoted to small firms is the Small Business Administration (SBA). "[I]t's our job in the U.S.

Small Business Needs Are Met, at <http://www.nfib.com/about/content.htm> (last visited Oct. 23, 2000) [hereinafter *About NFIB*].

106. See *About NFIB*, *supra* note 105.

107. *Id.*

108. The NFIB has federal legislative offices in Washington D.C., and state legislative offices in all 50 capitals. See *id.*

109. See *NFIB Issue Overview*, *supra* note 71. Other initiatives voted on included expanding the type of investments small businesses are allowed to deduct from income, repealing the Social Security earnings limit, reforming the health insurance tax credit, and expanding the family medical leave. See *id.*

110. *Id.*

111. *Id.* at 1-2.

112. *Id.* at 1.

Small Business Administration's Office of Advocacy to measure the contributions of small firms and to ensure that small business concerns get a fair hearing in government legislative and regulatory processes."¹¹³ Additionally, "since the end of Fiscal Year 1992, the SBA has backed more than \$48 billion in loans to small businesses."¹¹⁴ In 1997, it approved 45,288 loan guaranties to small businesses.¹¹⁵ During Fiscal Year 1999, it kept a "guaranteed loan portfolio of more than \$40.5 billion in loans to 486,000 small businesses."¹¹⁶ In the same year, it "made 3,100 investments worth \$4.2 billion through its venture capital program," which helped *initiate* small businesses.¹¹⁷ Additionally, in Fiscal Year 1999, the SBA "extended management and technical assistance to more than 900,000 small business persons through its . . . [SCORE] volunteers and 1,000 small business development center locations."¹¹⁸ In short, these so-called "little guys" have very big friends.

The SBA's SCORE program is an interesting example of the strength of support, and not just monetarily, small businesses enjoy. The program consists of 11,500 volunteers who provide expert advice to potential and present small business owners.¹¹⁹ These volunteers are retired business executives, illustrating the sustained interest people have in helping small businesses get started.¹²⁰ Since its inception in 1964, SCORE has helped more than four million Americans with small business counseling.¹²¹ Each year the program aids approximately 300,000 entrepreneurs and currently is represented by 389 chapters around the country.¹²² The 30,000 hits per month its website receives and the 8000 e-mail

113. AMERICAN EVOLUTION, *supra* note 93, at 2.

114. THE STATE OF SMALL BUSINESS (1996), *supra* note 25, at 4.

115. *See id.*

116. SCORE, *supra* note 92.

117. *Id.*

118. *Id.* The "little guys" are also not left without resources to voice specific problems. The Small Business Advisory Committee, for instance, provides a forum where entrepreneurs can discuss their problems with government officials in the tax field. *See HANDBOOK FOR SMALL BUSINESS*, *supra* note 78, at 61.

119. *See* SCORE, *supra* note 92.

120. *See id.*

121. *See id.*

122. *See id.* (noting that chapters are located in Guam, Puerto Rico, the U.S. Virgin Islands, and the United States).

counseling sessions per month it provides¹²³ indicate that interest in small business is ripe.

Congress's Approval

These small business organizations do not provide support in a vacuum. Aside from the loans mentioned above, many efforts of these organizations' goals often come to fruition through legislative initiatives.¹²⁴ For example, in 1995, President Clinton signed eleven new laws that addressed many of the small business community's concerns.¹²⁵ "In fact, meaningful action has been taken on fully 86% of the 1995 White House Conference on Small Business recommendations."¹²⁶ Specifically, the Small Business Lending Enhancement Act of 1995¹²⁷ increased the amount of funds available through the SBA's lending programs. Additionally, the Office of Advocacy launched the Angel Capital Electronic Network, a nationwide Internet service that provides information on small firms in order to attract investors.¹²⁸

123. *See id.*

124. A brief sampling of some recent legislation illustrates the strength of these organizations' efforts. *See, e.g.*, Small Business Job Protection Act of 1996, Pub. L. No. 104-188, 110 Stat. 1755 (codified as amended in scattered sections of 26 U.S.C.), (liberalizing tax treatment of S corporations); Veterans Entrepreneurship Promotion Act of 1997, H.R. 168, 105th Cong. (1997) (providing preferential treatment to veteran-owned businesses); Small Business Regulatory Assistance Act of 1997, H.R. 96, 105th Cong. (1997) (requiring agency participation in forming a regulatory compliance assistance plan). Another law, the Taxpayer Relief Act of 1997, directed billions of dollars in tax relief to small firms over the following 10 years. *See THE STATE OF SMALL BUSINESS* (1997), *supra* note 93, at 4. There is also the Small Business Regulatory Enforcement Fairness Act of 1996 which requires federal agencies to help small businesses comply with government regulations and to develop policies that reduce or eliminate fines for small businesses. *See* Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C.).

125. *See THE STATE OF SMALL BUSINESS* (1997), *supra* note 93, at 4.

126. *Id.*

127. Pub. L. 104-36, 109 Stat. 295 (1995) (codified as amended in scattered sections of 15 U.S.C.).

128. *See THE STATE OF SMALL BUSINESS* (1997), *supra* note 93, at 5. This initiative is noteworthy because it does not just serve to aid already existing small businesses; rather its efforts are directed toward creating a strong investment market for small firms, which will inevitably increase the amount of small businesses. The federal government used to focus solely on small firms already established. Now the focus is on research, development, and demonstration funds for *new* business development. *See HANDBOOK FOR SMALL BUSINESS*, *supra* note 78, at 1. Some of the organizations devoted to the *development* of small businesses are: Economic Development Administration, Office of Minority Business Enterprise at the

In 1996 and 1997, Congress passed two more important pieces of legislation, the Taxpayer Relief Act of 1997 (TRA),¹²⁹ and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).¹³⁰ TRA served to reduce the tax burden imposed on small businesses. This "landmark tax reform legislation" provided roughly \$20 billion in tax relief to small firms over the subsequent ten years.¹³¹ The exclusion of employer expenditures on employee education from the business's taxable income was also extended for three years.¹³² In addition, the amount of money excluded from taxation regarding a transfer of small family-owned businesses was increased.¹³³ Furthermore, the Act reduced capital gains taxes from 28% to 20%, thus helping small businesses by encouraging investment in those small firms that reinvest for growth purposes, as opposed to large companies that merely pay hefty dividends.¹³⁴

SBREFA is intriguing because it involves a coming-together of regulatory agencies and small firms.¹³⁵ It "gives small businesses a stronger voice where it's needed—early in the Federal regulatory development process."¹³⁶ Agencies must provide assistance to small firms to achieve awareness and knowledge¹³⁷ and small firms are given much more of a say in the rulemaking process of agencies.¹³⁸ Of special import is OSHA, an agency that continually exhibits its willingness to help small firms, as demonstrated by the four

Commerce Department, Office of Inventions at the Department of Energy, Office of Small Business Policy within the division of corporate finance at the Securities Exchange Commission. *See id.* This attention is well placed, considering that "[n]ew firm start-ups . . . that did not exist before 1990 created 21.9% of all net new jobs between 1990 and 1995." AMERICAN EVOLUTION, *supra* note 93, at 17.

129. Pub. L. No. 105-34, 111 Stat. 788 (codified as amended in scattered sections of 26 U.S.C.).

130. Pub. L. No. 104-121, 110 Stat. 857 (codified as amended in scattered sections of 5 U.S.C.). It amended the Regulatory Flexibility Act originally passed in 1980. *See* 5 U.S.C. §§601-612 (1982); *see also* THE STATE OF SMALL BUSINESS (1996), *supra* note 25, at 131.

131. THE STATE OF SMALL BUSINESS (1997), *supra* note 93, at 4.

132. *See id.*

133. *See id.*

134. *See id.*

135. "Compliance will be achieved when both agencies and small businesses seek to work cooperatively." THE STATE OF SMALL BUSINESS (1996), *supra* note 25, at 138. For a thorough discussion of SBREFA, *see id.* at 135-40.

136. THE STATE OF SMALL BUSINESS (1997), *supra* note 93, at 5.

137. *See id.*

138. *See id.*

regional meetings it held with small firms in 1997 to discuss a new program.¹³⁹

Although OSHA has been one of the more successful agencies in terms of dispensing information to small business, it is also one of two agencies attacked by the FAIR Act.¹⁴⁰ The Department of Labor reported that "88% of small businesses fined by OSHA between March and December [of] 1997 had fines reduced by a total of \$110 million."¹⁴¹ OSHA's Targeted Training Program does exactly what FAIR Act proponents have been accusing it of doing: targeting small businesses. Ironically, this program "targets" small firms in a positive way, providing grants for safety and health training programs in small businesses.¹⁴²

It is further noteworthy to consider that contrary to the accusations of FAIR Act proponents, OSHA's initiatives are not all recent. For example, in 1978, OSHA established a "New Directions" grant program to assist educational organizations and trade associations in developing themselves as centers of education in safety and health.¹⁴³ A primary element in evaluating applications for such grants was the ability to serve small business.¹⁴⁴ Thus, even though OSHA provided indirect support to small firms years ago and within the last decade has increased its direct support, the agency is still singled out by the FAIR Act as one of the more aggressive bullies.

Once again, it appears that something other than "victimization" of small business is driving legislation designed in a zero-sum

139. See *THE STATE OF SMALL BUSINESS* (1997), *supra* note 93, at 5.

140. Again there is a hint of something else at work—why would the "victims" attack one of its friendlier "bullies"?

141. *IDENTIFYING HIGH-RISK*, *supra* note 62, at 9 (citations omitted).

142. See *id.* at 8-9. In addition, OSHA has videos and publications to help businessmen understand its regulations. Also, over two million OSHA Small Business Handbooks have been distributed. See *HANDBOOK FOR SMALL BUSINESS*, *supra* note 78, at 178. To further empower themselves with knowledge, small businesses can look at OSHA data and compare their injury and illness rates against others in their industry. See *id.* at 179. Such information not only arms small firms with knowledge, it serves as a check on OSHA's actions. OSHA is not the only agency trying to inform small firms about their duties. The IRS, for example, created "Your Business Tax Kit" to help inform small businesspersons. See *id.* at 62. Such businessmen have access to Tax Guide for Small Business, which explains tax problems. See *id.* In addition, the IRS conducts Small Business Tax Workshops to provide information. See *id.*

143. See *HANDBOOK FOR SMALL BUSINESS*, *supra* note 78, at 178.

144. See *id.*

fashion where government agencies must be blasted for small businesses to benefit. Government agencies that simply do their job are branded as bullies by the very same legislators who created them when new laws are "needed" to protect small business.

The Victims as Beneficiaries

Victims are usually at a disadvantage because of their weakness or lack of resources. Surely, small businesses have their disadvantages. Sole proprietors, for example, who choose not to incorporate may incur personal liability. Even incorporated small firms may face liability difficulty.¹⁴⁵ Because the shareholders and owners are usually one and the same, lenders will usually not extend credit unless the principal shareholders give their personal guarantee of payment.¹⁴⁶ Creditors may be tougher on small firms because they realize that capital is limited, and that shareholders do not have widely diversified portfolios. In turn, small businessmen, especially sole proprietors, may feel extra pressure to succeed and maintain a strong business. "[W]hen a small business finds itself in financial difficulty, the equity owners very often will feel compelled to add additional funds to keep it going."¹⁴⁷

Consequently, victims are in need of aid, as are small businesses. That is where the analogy ends, however, because the alleged bullies who are "victimizing" the small firms are also the helping hands. Two special benefits serve to reduce the disadvantages noted above: special tax treatment¹⁴⁸ and limited liability (for small firms that *choose* to incorporate).¹⁴⁹

145. They face the threat of personal liability if the corporate veil is "pierced." See FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 54-56 (1991).

146. See WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 139 (6th ed. 1996).

147. *Id.* at 140.

148. Small firms are able to elect subchapter S tax treatment. See 26 U.S.C. § 1362 (1994 & Supp. IV 1998). For a thorough discussion of the tax impact associated with a small firm's choice of legal entity, see Sliwoski & Bader, *supra* note 91.

149. Limited liability also operates to protect the owners of a business from being personally liable. For example, if a tort claim ensues, and the corporation is forced to pay, the judgment cannot be attained from the pockets of the owners unless the corporate veil is pierced. See generally EASTERBROOK & FISCHER, *supra* note 145, at 40-62 (discussing limited liability).

Limited liability is extended to larger firms, because they are the true "victims" in need of aid. Without limited liability, tort judgments against deep-pocketed firms could cause directors of large firms to be held personally liable. The limited liability concept fosters separation of ownership from control, allowing directors to manage the firm without "owning" any part of it.¹⁵⁰ Similarly, the owners (shareholders) are relieved of any managerial duties. Shareholders do not make the decisions regarding investment, allowing the managers to be better risk-bearers because their own money is not at issue.¹⁵¹ This limited liability policy is obviated when applied to small businesses because there is virtually no separation of ownership from control in closely held firms.¹⁵² Despite the lack of supporting rationale, small businesses are still afforded this benefit. A layman's definition of victim surely does not include requiring extra special treatment without reason.¹⁵³

Additionally, sole proprietors and entrepreneurs *choose* to start small firms. Their potential exposure to liability appears only if they *choose* not to incorporate. The problems small firms face are not only a function of choice, but also a function of size. Choosing to remain small is an acknowledgment that one's resources, staff, and capital may remain smaller than that of larger firms. If lenders insist on personal guarantees from small firm owners, but not from large firm directors, it is merely a function of size.¹⁵⁴ If small firms are unable to comply with federal regulations, and therefore wind up in court, it is a function of the difference in resources, which is directly linked to size.¹⁵⁵

If the distinguishing mark of small businesses is that they are small, and therefore appear to be "underdogs," the response should

150. See EASTERBROOK & FISCHER, *supra* note 145, at 40-47.

151. See *id.* at 47.

152. "Because those who supply capital in close corporations typically are also involved in decision making, limited liability does not reduce monitoring costs. . . . Moreover, managers' incentive to undertake overly risky projects is greater in close corporations." *Id.* at 55-56.

153. I certainly am not arguing that small firms do not *deserve* limited liability. In fact, in terms of equitable principles, it is fair to extend the offer to large and small firms. I am, however, asserting that the rationale that serves the benefit for large firms does not serve it for small firms, making it curious that small firms still retain such benefit.

154. With small firms, it is not as easy to spread loss.

155. See generally CHANGING BURDEN, *supra* note 79, at 12-14 (explaining that the information-gathering costs associated with regulation compliance affects small businesses more because of their lack of ability to spread such costs as compared to large firms).

not be differing legal treatment.¹⁵⁶ In fact, no response may be necessary, since it must be realized that many people *choose* to stay small.¹⁵⁷

BIGGER IS NOT ALWAYS BETTER

Small businessmen are not "small" because they fail to attain "largeness." They are small because of the benefits of having ownership and control, meaningful impact on the day-to-day business transactions, and the responsibility and prestige of being self-employed.¹⁵⁸ History supports the notion that the United States, as a country, likes small business. Americans like the idea of the "little guy" succeeding in a world that is rapidly increasing in size. This simple policy rationale is what truly underlies the legislation and rulings of the last twenty years, including the EAJA, the FAIR Act, and the future proposals that are sure to come and

156. The FAIR Act certainly prescribes differing legal treatment—it awards attorneys' fees to small businesses, but not to large corporations. If legal change is necessary, perhaps it should take effect through a reduction in the regulatory burden. Cf. COLE & TEGELER, *supra* note 27, at 99-101 (detailing a broad-based reform program). "Tiering" of regulations, for example, provides for a less stringent regulation standard to be placed on small firms, depending on their size. See CHANGING BURDEN, *supra* note 79, at 15. This mechanism may be treating small firms legally different, yet it does not punish larger firms, as does the FAIR Act. This approach does not create legal inequality: it simply recognizes that size dictates legal burdens.

157. People are not forced into self-employment. "At any given time about one in twenty-five adults . . . are nascent entrepreneurs, involved in a business start-up." PAUL D. REYNOLDS & SAMMIS B. WHITE, *THE ENTREPRENEURIAL PROCESS: ECONOMIC GROWTH, MEN, WOMEN, AND MINORITIES* 64 (1997). Most of those adults are fairly well educated, have incomes over \$30,000 per year, and have a large social network. See *id.* Evidently, these are adults with options and they choose to stay "small." Also, it is worth noting the consistent increase in the number of small businesses. See *supra* note 93 and accompanying text. It is also significant that many large firms have chosen to downsize recently, recognizing the advantages of staying small. See AMERICAN EVOLUTION, *supra* note 93, at 3. "In a word, they [large businesses who have downsized] have become more entrepreneurial." *Id.* In addition, many job seekers look for a small enterprise. "Between 1974 and 1984, employment in the Fortune 500 companies declined by 1.5 million. As this situation unfolded, many Americans looked to small firms for economic rejuvenation." BLACKFORD, *supra* note 62, at 107.

158. We live in a "social system that places a high value on innovation, risk-taking, and independence": the attributes of a small businessman. Albert Shapero & Lisa Sokol, *The Social Dimensions of Entrepreneurship*, in *ENCYCLOPEDIA OF ENTREPRENEURSHIP* 83 (Calvin A. Kent et al. eds., 1982). Starting one's own business "offers promise and a challenge." BENJAMIN W. MOKRY, *ENTREPRENEURSHIP AND PUBLIC POLICY: CAN GOVERNMENT STIMULATE BUSINESS STARTUPS?* 10 (1988).

take an even more extreme view of "equalizing the playing field" in the name of encouraging small business.¹⁵⁹

The history of entrepreneurship in this country provides the basis for the American affinity for small businesses.¹⁶⁰ Denoting small firms as the realization of the "American Dream" illustrates the depth of this positive feeling.¹⁶¹ Finally, discovering that the FAIR Act and similar legislation do not "equalize" the field, but rather put small businesses on *better* footing shows a commitment to ensuring that small businesses continue to prosper.¹⁶² Such a commitment would not be made without a strong affection for small business.¹⁶³

The History of the Strong Underdog

If FAIR Act proponents believe that small firms are underdogs, it is logical that they must think that the sole proprietor is the most victimized of that group. After all, the sole proprietor represents the greatest lack of resources, making himself the easiest "target" of agency regulation. It is therefore noteworthy to see that sole proprietorship is one of the most respected forms of business in this

159. See, e.g., *EEOC: Recommendations From Small Business Will Be 'Seriously Considered,' Castro Says*, BNA CORP. COUNS. DAILY, Dec. 14, 1998, available in LEXIS, BNA Materials, Business Materials, Corp. Law Daily (referring to recommendations concerning small business interaction with the Equal Employment Opportunity Commission (EEOC)). One such future proposed recommendation is to allow small businesses to recoup attorneys' fees from EEOC. See *id.* If there is any further doubt that the FAIR Act is not the last of its kind, consider that in 1998, one year prior to the proposal of the FAIR Act, the House of Representatives passed the Fairness for Small Business and Employees Act of 1998. See H.R. 3246, 105th Cong. (1998). Title IV of such Act requires the NLRB to "pay attorney fees and expenses of any small business that prevails in . . . judicial proceedings, regardless of whether the [agency's] position was substantially justified" 144 CONG. REC. E510 (daily ed. Mar. 30, 1998) (statement of Rep. Stokes). The trend toward toughening the EAJA is definitively illustrated, and there is no reason to believe this trend will decline.

160. See *infra* notes 165-79 and accompanying text.

161. See *infra* notes 180-89 and accompanying text.

162. See *infra* notes 190-98 and accompanying text.

163. This is a seemingly simplistic notion. Helping small businesses is not an easy and effortless task. If small business was not seen as a vital component to our economy and social structure, we would let it fall by the wayside, especially in this time of increased regulation. Some, however, believe that the federal government is not doing *enough* to help small firms. See generally MOKRY, *supra* note 158, at 9 (criticizing the efforts of the federal government as weaker than those of local government). This concern though would certainly not be of importance if the desire to see small firms prosper was not exceptionally ingrained in our society.

country. In terms of public support, this underdog has some serious strength.¹⁶⁴

The entrepreneur derives strength from history. "The individual or sole proprietorship is the oldest, simplest, and most prevalent form of business enterprise."¹⁶⁵ As far back as 1913, most "Americans lived in small towns or on farms and worked for themselves or for sole proprietorships or partnerships."¹⁶⁶ "The United States has a long, proud tradition of entrepreneurship."¹⁶⁷

Perhaps the resilience small firms exhibit is one of the reasons for which they are cherished.¹⁶⁸ Prior to the 1880s, small firms were the norm.¹⁶⁹ In the middle of the nineteenth century, however, an enormous influx of large firms occurred.¹⁷⁰ Significantly, small firms and entrepreneurs did not fall by the wayside.¹⁷¹ "By developing market niches ignored by large manufacturers or by becoming the suppliers of intermediate goods to larger industrial firms, small businesses persisted in the industrial segment of America's business system."¹⁷² Small firms suffered another decline in the 1950s and 1960s, but the following two decades produced a resurgence of small business.¹⁷³ In the late 1980s the idea of small business as a desired entity was firmly rooted.¹⁷⁴ "[T]o a far greater extent than

164. See generally BLACKFORD, *supra* note 62, at xiv (explaining the public's adherence to small businesses).

165. HARRY G. HENN & JOHN R. ALEXANDER, *LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 57 (3d ed. 1983). In Klein & Coffee's book, they begin by focusing solely on the sole proprietorship as a way to easily explain the nature and function of business organizations. See KLEIN & COFFEE, *supra* note 146, at 5. Perhaps this simplicity makes the small businessman so appealing because it feels attainable and comprehensible to laymen.

166. ROBERT SOBEL, *THE AGE OF GIANT CORPORATIONS: A MICROECONOMIC HISTORY OF AMERICAN BUSINESS, 1914-1992*, at ix (3d ed. 1993).

167. IDENTIFYING HIGH-RISK, *supra* note 62, at iii.

168. See generally JOHN H. BUNZEL, *THE AMERICAN SMALL BUSINESSMAN* 13 (1962) ("[T]he small businessman has managed to be a symbol of success even in times when he has not, in point of fact, been financially successful.").

169. See BLACKFORD, *supra* note 62, at 1.

170. See *id.* at xiii.

171. See *id.*

172. *Id.*

173. Between 1976 and 1986, small business increased its share of the country's manufacturing output from 33% to 37%. See *id.* at xiv; see also U.S. SMALL BUS. ADMIN., OFFICE OF ADVOCACY, *SMALL BUSINESS IN THE AMERICAN ECONOMY* 2 (1988) ("Small business has done exceptionally well in the decade of the 1980s.").

174. In Ohio, a popular bumper sticker on automobiles stated, "There's no business like a small business AND There's no business like your own business." BLACKFORD, *supra* note

most Americans realize, the economy's vitality depends on the fortunes of tiny shops and restaurants, neighborhood services and factories."¹⁷⁵

Presently, Americans have realized that much of the economy depends upon small firms, both for inventions and employment,¹⁷⁶ however, the best reason to justify giving small firms extra special treatment lies elsewhere.¹⁷⁷ Small businesses have invaded our psyche and become "even more important as a component of American culture."¹⁷⁸ The longevity and resilience of small firms makes them symbols "epitomizing all that is best about the American way of life."¹⁷⁹

Attaining the American Dream

Having the autonomy, independence, and responsibility of starting or involving oneself in a small business is quite attractive. An entrepreneur has no time card and no authority figure other than oneself.¹⁸⁰ Small firms allow employers to become better acquainted with all aspects of the firm and to feel as though they have more of a stake in the company.¹⁸¹ In addition, anyone can start his or her own company. The option of self-employment is not limited to a specific economic,¹⁸² gender, or racial

62, at 106 (quoting observation by author).

175. *The 1990 Guide to Small Business*, U.S. NEWS & WORLD REP., Oct. 23, 1989, at 62, 72.

176. "For years the small-firm sector remained ignored and poorly understood, even though many people worked for small firms. However, all that has begun to change as powerful computers and large data sets have enabled researchers to assemble a far better understanding of the economic role of small firms." AMERICAN EVOLUTION, *supra* note 93, at 5.

177. Cf. BLACKFORD, *supra* note 62, at xv ("Small businesses have often received special treatment in state and national legislation.").

178. *Id.* at xiv.

179. *Id.*

180. See generally MOKRY, *supra* note 158, at 1 (calling the entrepreneur a "symbol of individualism").

181. Studies have shown that people who opt for careers in small business tend to be attracted to the "internal locus of control" aspect of entrepreneurship. See *id.* at 16. This factor is a belief that one can influence his/her destiny; a task more easily attained by participating in an enterprise in which you are a key player. See *id.*

182. "We have been working for the past 5 years to bring the spark of enterprise to inner city and poor rural areas through community development banks, commercial loans in poor neighborhoods, and the cleanup of polluted sites for development." THE STATE OF SMALL

group.¹⁸³ These intangibles of independence and accessibility are what many call the American Dream.¹⁸⁴ The FAIR Act seeks to further this Dream.

Small business is the vehicle by which millions access the American Dream by creating opportunities for women, minorities and immigrants. In this evolutionary process, community plays the crucial and indispensable role of providing the "social glue" and networking that binds small firms together in both high tech and "Main Street" activities. The crucial barometer for economic and social well-being is the continued high level of creation of new and small firms in all sectors of the economy by all segments of society. *It should be the role of governmental policy to facilitate that process* by eliminating barriers to entry, lowering transaction costs, and minimizing monopoly profits by large firms.¹⁸⁵

Understandably, the proponents of the FAIR Act want to extend the American Dream.¹⁸⁶ They, as does a majority of the public,

BUSINESS (1997), *supra* note 93, at 7.

183. In fact, thousands of small firms have women, minorities, and immigrants as their founders. See AMERICAN EVOLUTION, *supra* note 93, at 4. Between 1987 and 1992, the percentage of firms owned by minorities increased from 8.8% to 12.5%. See *id.* at 20. In 1994, more than 6 million women-owned proprietorships were intact, illustrating a 139% increase over the 2.5 million in existence in 1980. See THE STATE OF SMALL BUSINESS (1997), *supra* note 93, at 6.

184.

To work for yourself, to be your own boss, to run your own business—for many workers these phrases describe an American dream. In recent decades thousands of individuals have set off to pursue that dream. . . . The spirit of the independent small-business person is praised as a force that makes America great.

HUMANITIES AND SOC. SCIENCES DIV., LIBRARY OF CONG., THE ENTREPRENEUR'S REFERENCE GUIDE TO SMALL BUSINESS INFORMATION, Introduction (1994) [hereinafter ENTREPRENEUR'S REFERENCE GUIDE]; see also BUNZEL, *supra* note 168, at 13 ("[H]e [the small business person] appears to have few enemies and is, in fact, something of a national hero. In his own way he represents the independence, freedom, and perseverance that have long been identified with the American way of doing things."); THE STATE OF SMALL BUSINESS (1996), *supra* note 25, at 112 (highlighting the fact that 16.6% of all business owners earn less than the minimum wage, suggesting that many self-employed workers value the benefits of independence and flexibility that come with being part of a small firm).

185. AMERICAN EVOLUTION, *supra* note 93, at V (emphasis added).

186. See, e.g., H.R. REP. NO. 106-385, at 4 (1999) (identifying Congress's concern over the detrimental impact current law has on small business and hardworking men and women).

believe in the Dream and want to see it prosper.¹⁸⁷ "A small business starts with one person's dream. Through devotion and hard work, dreams become reality. Our efforts for the small business community ensure that these modern American Dreams still have a chance to grow and flourish."¹⁸⁸ Unfortunately, the proponents avoided an opportunity to voice their support of small firms, instead choosing to attack the government.¹⁸⁹

Better than Equal Footing

The FAIR Act does not put small businesses on *equal* footing, because they are already there; it puts them on *better* footing. President Clinton said that "[m]y Administration is committed to reforming the system of government regulations to make it more equitable for small companies."¹⁹⁰ Conversely, the law *is* equitable—the system imposes regulations on both large and small firms, as it should, because the goal of the regulations is to benefit the public's health, safety, and equality concerns.¹⁹¹

The major differences between large and small firms are a function of size.¹⁹² Legally, they are on equal footing. Occupational illness and injury plague small businesses more so than large ones because of the difference in resources.¹⁹³ Admittedly, small businesses have fewer safety and health resources: they cannot hire staff devoted to safety and health activities, and they lack the ability to identify occupational hazards and conduct surveillance.¹⁹⁴

187. "The entrepreneur has become something of a talisman and symbol of hope for the American economy." MOKRY, *supra* note 158, at 1. "The entrepreneurial spirit continues to burn brightly as the creativity and sheer productivity of America's small businesses make our Nation's business community the envy of the world." THE STATE OF SMALL BUSINESS (1996), *supra* note 25, at 3.

188. THE STATE OF SMALL BUSINESS (1996), *supra* note 25, at 7.

189. "American government can turn the American Dream into a nightmare." NFIB Online: *The Voice of Small Business, Small Business Agenda: Making Our Priorities A Capitol Concern*, at http://www.nfib.com/about/smbiz_agenda/index.asp (last visited Oct. 26, 2000).

190. THE STATE OF SMALL BUSINESS (1996), *supra* note 25, at 5.

191. See generally *id.* at 135 (explaining that all Americans, including small businesses, enjoy the benefits created by regulations).

192. See *supra* notes 155-56 and accompanying text.

193. See IDENTIFYING HIGH-RISK, *supra* note 62, at 3-4, 6.

194. See *id.*

These differences, however, do not evidence unequal legal treatment.

Hence, how can we base treating small businesses differently in legal terms on this "unequal" footing and "little guy" notion? "[P]rograms aimed at specific agencies or requirements may not be nearly as important as efforts to reform the business/government relationship, especially through aspects of the communications/information process."¹⁹⁵ It is impossible to justify the FAIR Act's purported rationale and, therefore, we need to realize that policy is the driving force behind the FAIR Act, even if not stated.

In a summary of the FAIR Act, proponents recognize that "Congress should be doing everything in its power to create an environment where small employers can be successful in what they do best-creating jobs and being the engine that drives America's economic growth."¹⁹⁶ Yet, when putting forth the reasoning behind the bill, the same summary asserts that:

The rationale for the FAIR Act is that government agencies the size of the NLRB and the OSHA . . . should more carefully evaluate the merits of a case before bringing it against a small business . . . Furthermore, small businesses have been victimized by relatively frivolous lawsuits by these agencies, but have been unable to fight . . .¹⁹⁷

The juxtaposition of these statements is quite revealing: the asserted rationale contains the hostile language, almost as a way to justify its real rationale, contained in the "summary" of the bill. The proponents seem to have been afraid to describe the sentiment that clearly exists today: we like small business and are willing to take steps to ensure its existence.¹⁹⁸

195. COLE & TEGELER, *supra* note 27, at 100.

196. H.R. REP. NO. 106-385, at 4-5 (1999).

197. *Id.* at 5.

198. This view is neither novel nor extreme. In fact, there is a plethora of literature devoted to saving small businesses. See, e.g., ENTREPRENEUR'S REFERENCE GUIDE, *supra* note 184 (listing an enormous amount of literature on how to start and maintain a successful small business); MOKRY, *supra* note 158, at 8 ("[S]tate and local governments must themselves become entrepreneurial by adopting risk-oriented, innovative, and flexible ways of helping new firms start and grow." (footnote omitted)); cf. E.F. SCHUMACHER, SMALL IS BEAUTIFUL 11 (1973) (arguing that faith in large industry puts the world on a destructive course).

CONCLUSION

In the last twenty years, Congress has developed a framework for bills similar to the FAIR Act—morph support of small business into adversity against the superiority of big business and the overly litigious agencies of the federal government. A blueprint for these bills has been created: when trying to pave the way for small commerce, make the arguments extreme and accusatory. This well-charted course has sanctioned placement of blame upon anyone larger.

The actual reason behind the FAIR Act is a blanket desire to see small firms succeed. The proponents have realized that the increase in government regulations have led to many financial burdens on small business, and are thus seeking to lift the burden in order to allow for more small business success. This rationale is justified in and of itself; there is no reason to couch it in terms of equalizing the playing field.¹⁹⁹ There is no reason to refer to the government and its agencies as bullies, and the small firms as victims. There *is* reason to assert the truth of what the proponents are impliedly asserting: we like small firms and want to see them grow. We realize that the differences in resources between large and small firms make the latter more *susceptible* to government regulation, and therefore want to implement the FAIR Act as a policy measure.

"If the myth [of the small business person] is sometimes stronger than the reality, it is only because it reinforces the tradition of individualism upon which so much in American life has been dependent."²⁰⁰ The proponents are justified in relying on this myth, though they felt unjustified in saying so.

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199. Rationale is an issue because it is the motivation to exhibit a certain form of behavior. As in many areas, the law is obsessed with rationale. Consider criminal law: We punish premeditated murder more severely than a killing motivated by passion. We care about *mens rea*—the reason why the criminal committed the crime. See JOSEPH G. COOK & PAUL MARCUS, CRIMINAL LAW 162-63 (4th ed. 1999).

200. BUNZEL, *supra* note 168, at 13.