

A LEGAL, ECONOMIC, AND NORMATIVE ANALYSIS OF NATIONAL PLANT CLOSING LEGISLATION

INTRODUCTION

Plant closings and private disinvestment cost 38 million American workers their jobs during the 1970's.¹ While plant closings are not new to the American economy,² their pace is accelerating.³ Northern states have been especially affected, but sunbelt residents have also experienced unemployment due to plant closings.⁴ Thus, plant closings dramatically affect the American labor market.

The National Employment Priorities Act,⁵ a bill sponsored by Congressman William Ford (D-Mich.), attempts to mitigate the effects of plant closings. In particular, the bill would require businesses to give workers and their communities advance notice of plant closings and severance payments.⁶ It also provides federal assistance to displaced workers and their communities.⁷ Sponsors of the bill hope to deter plant closings, or at least to help the workers and their communities adjust to the closings.⁸

This note focuses on aspects of the National Employment Priorities Act, House bill 2847, pertaining to communities and local governments. It describes H.R. 2847, assesses the arguments for and against the legislation, particularly the provisions related to communities and local governments, and evaluates the alternatives to the proposal.

Advocates of H.R. 2847 believe appropriate federal legislation could prevent many plant closings. They argue that legislation is needed to internalize the social and economic costs of plant closings, and to provide assistance to the workers and the communities adversely affected by plant shutdowns. These advocates of H.R. 2847 believe the only sound policy toward plant closings is to impose the social and economic costs of closings on the corporations choosing to cease or transfer their operations.⁹

1. B. BLUESTONE & B. HARRISON, *THE DEINDUSTRIALIZATION OF AMERICA* 35 (1982) [hereinafter cited as BLUESTONE].

2. *See* G. SHULTZ & A. WEBER, *STRATEGIES FOR THE DISPLACED WORKER* (1966).

3. *See* R. GOODMAN, *THE LAST ENTREPRENEURS* (1979).

4. BLUESTONE, *supra* note 1, at 27-34.

5. H.R. 2847, 98th Cong., 1st Sess., 129 CONG. REC. H2528 (daily ed. May 2, 1983).

6. *Id.* § 301.

7. *Id.* §§ 201-202, 206-209.

8. *See, e.g.*, 129 CONG. REC. H2526-27 (daily ed. May 2, 1983) (statement of Rep. William Ford, D-Mich.). *See also* Ford Plant Closing Legislation, DET. C.L. REV. 1219 (1983).

9. *See, e.g.*, *Plant Closings and Relocations: Hearings Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 2 (1979) (statement of Sen. Harrison Williams, D-N.J.). Senator Williams stated:

Economists recognize that there are many costs which are not adequately accounted

Opponents of the legislation argue that capital mobility, as exercised in such closings, provides a net benefit for American society. Opponents of H.R. 2847 see plant closings as a necessary feature of economic efficiency. They argue that the pursuit of economic efficiency increases the total value of goods and services available to the American consumer, and greatly outweighs any negative effects of plant closings.¹⁰ Furthermore, these opponents regard plant closing legislation as an infringement on economic freedom.¹¹

THE EUROPEAN APPROACH TO PLANT CLOSINGS

Proponents of plant closing legislation are quick to point out that the United States lags far behind other industrialized countries in affording workers and communities protection from plant closings.¹² The United States is one of the few industrialized nations without a national plant closing law. Great Britain, West Germany, Belgium, France, Italy, Australia and Sweden all regulate plant closings.¹³

The content of these plant closing laws varies from country to country. Commonly, such laws require advance notice to employees and the government, severance payments, pension protection, and acknowl-

for by the cold calculus of the marketplace. The cost of pollution is an obvious example. We can all agree that pollution is a social cost for which the polluter must take some responsibility. It is now time to recognize the decision to move a plant, even though economically sound, imposes costs on employees for which management must also be in some part responsible.

See also Sclar, *Social Cost Minimization: A National Policy Approach to the Problems of Distressed Economic Regions*, 10 POL. STUD. J. 235, at 235 (1981); *January 1980 Hearings*, *infra* note 12, at 130 (statement of Ralph Whipple, Region 6 Director, U.A.W.). Mr. Whipple stated:

I would like to emphasize the importance of the principles underlying the legislation.

The impact of private investment decisions is a matter of national public concern.

These decisions must factor in economic and social costs to workers and their communities. The workers should not bear the brunt of economic decisions that benefit investors and the whole country, and that labor should not be as mobile as capital.

10. See *infra*, text accompanying notes 140-154.

11. See McKenzie, *The Case For Plant Closings*, POL'Y REV. 119, 126 (1981). See also *infra*, text accompanying note 207.

12. See *The National Employment Priorities Act: Hearings on H.R. 13541 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93rd Cong., 2d Sess. 74-80 (1974) (excerpts from U.A.W. Legal Dept. Memorandum, entitled *Worker's Rights and Plant Shutdown* (1972) [hereinafter cited as *October 1974 Hearings*]; *The National Employment Priorities Act: Hearings on H.R. 76 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. 118-26 (1975) (report of the Library of Congress, entitled *Plant Closure and Relocation Laws in Western Europe* (1975)) [hereinafter cited as *May 1975 Hearings*]; *National Employment Priorities Act: Hearings on H.R. 76 Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 95th Cong., 2d Sess. 48, 54-60 (1978) (statement of Marc Stepp, Vice-President, U.A.W.) [hereinafter cited as *August 1978 Hearings*]; *National Employment Priorities Act: Joint Hearings on H.R. 5040 Before the Subcomm. on Employment Opportunities and the Subcomm. on Labor-Management Relations of the House Comm. on Education and Labor*, 96th Cong., 2d Sess. 78-126 (1980) (Joint Report of the Labor Union Study Tour Participants, entitled *Economic Dislocation* (1979)) [hereinafter cited as *January 1980 Hearings*]; Hekman & Strong, *Is There a Case for Plant Closing Laws?*, NEW ENG. ECON. REV., July/Aug., 1980, 34, at 47-51; Note, *Plant Closings and the Duty to Consult Under Britain's Employment Protection Act of 1975: Lessons for the United States*, 5 B.C. INT'L AND COMP. L. REV. 195 (1982).

13. See authorities cited, *supra* note 12.

edgment of employee rights to be transferred with the relocating plant.¹⁴ In most Western European countries, a corporation cannot relocate a factory without prior governmental approval.¹⁵ In West Germany, for instance, a company cannot relocate a plant unless it is deemed to be "socially justified."¹⁶ Furthermore, most of these governments will withhold such approval if the corporation's sole reason for moving is to reduce production costs.¹⁷

These laws go much further than H.R. 2847 in regulating the corporate decision to close a plant.¹⁸ On the other hand, most of these governments have also traditionally involved themselves in regulating their economy and providing social welfare to a much greater extent than has the United States Government.¹⁹

ALTERNATIVES TO FEDERAL PLANT CLOSING LEGISLATION

Federal regulation of plant closings represents one approach to mitigating the effects of such closings. Other approaches have been suggested as well. Before the efficacy of H.R. 2847 can be judged, these options should be evaluated. Prominent among these options are collective bargaining laws and state plant closing legislation.

Protection of Workers Through Collective Bargaining

House bill 2847 is predicated on the finding that "plant closings . . . can be averted through the cooperative efforts of government, labor, and business."²⁰ Collective bargaining between the workers and management is one vehicle for such efforts. If collective bargaining is successful in preventing a plant closing, the entire community benefits from the saving of jobs for the local economy. Consequently, collective bargaining over plant closing decisions is one alternative to federal plant closing legislation.

14. See, e.g., *January 1980 Hearings, supra* note 12, at 116-123 for a translation and presentation of West German plant closing laws.

15. See *October 1974 Hearings, supra* note 12, at 80 (excerpts from U.A.W. Legal Dept. Memorandum, entitled *Workers Rights and Plant Shutdown* (1972). The memorandum reported: In most of the Western European nations, a company may not relocate without the permission of the government. The standards used by the agency in reviewing the decision include "the effect on overall unemployment," "in the public interest," and "socially justified."

Several nations go even further and require that the company must secure government permission for any decision which would result in unemployment—even a temporary layoff.

Id. at 80. For a fuller description of these provisions see *id.* at 74-80.

16. *October 1974 Hearings, supra* note 12, at 74-75.

17. *Id.* at 74.

18. House bill 2847 would impose severance pay and prenotification requirements upon companies seeking to close a plant, but it would not bar a plant closure or relocation. While under H.R. 2847, the Secretary of Labor would investigate the closing, the purpose of the investigation would be to find ways, through cooperation, to avert the closing or mitigate the effects of the closing. For a fuller description of H.R. 2847, see text accompanying notes 80-109.

19. See P. KAIM-CAUDLE, *COMPARATIVE SOCIAL POLICY AND SOCIAL SECURITY*, 1973; *SOCIAL SECURITY IN INTERNATIONAL PERSPECTIVE* (S. Jenkins ed. 1969).

20. H.R. 2847, *supra* note 5, § 102(a)(2).

One third of collective bargaining agreements provide for restrictions on the closing or relocating of plants.²¹ These provisions, however, are generally only included in the agreements with larger bargaining units.²² Consequently, collective bargaining contracts do not protect even organized workers in many cases.

The National Labor Relations Act (NLRA)²³ provides that employers have a duty to bargain which extends to all "terms and conditions of employment."²⁴ In *Fibreboard v. NLRB*,²⁵ the U.S. Supreme Court held that an employer must negotiate with the employees' union over a decision to subcontract work previously performed by the employees. The Court stated that "[t]he subject matter of the present dispute is well within the literal meaning of the phrase 'terms and conditions of employment.'"²⁶

The National Labor Relations Board (the Board) found *Fibreboard* dispositive in *Ozark Trailers, Inc.*²⁷ In *Ozark Trailers*, the employer had closed one of its plants for economic reasons.²⁸ The Board found that the company's failure to negotiate with the union prior to the closure constituted a violation of section 8(a)(5) of the NLRA.²⁹ The Board rejected the employer's argument that economic investment decisions were within the sole prerogative of management:

For, just as the employer has invested capital in the business so the employee has invested years of his working life, accumulating seniority, accruing pension rights, and developing skills that may or may not be salable to another employer. And, just as the employer's interest in the protection of his capital investment is entitled to consideration in our interpretation of the Act, so is the employee's interest in the protection of his livelihood.³⁰

In *First National Maintenance Corp. v. NLRB*,³¹ the U.S. Supreme Court limited the applicability of the *Ozark Trailer* decision. The employer in *First National Maintenance Corp.* had ceased its custodial service contract with a nursing home and terminated the employees assigned under that contract without consulting the employees' union. In ruling for the employer, the Court admitted the phrase "terms and

21. Note, *Easing the Hardship of Plant Shutdowns*, MONTHLY LAB. REV. (March 1982) at 43.

22. Mick, *Social and Personal Costs of Plant Shutdowns*, 14 INDUS. REL. 203, 207 (1975).

23. Act of July 5, 1935, ch. 372, 49 Stat. 449 (1935), amended by Labor Management Relations Act, ch. 120, 61 Stat. 136 (1947) (codified at 29 U.S.C. §§ 151-169 (1976 & Supp. V 1982)).

24. 29 U.S.C. § 158(d) (1976). For discussion of employers' duty to bargain with employees see Morales, *The Obligation of a Multiplant Employer to Bargain on the Decision to Close One of Its Plants*, 30 LAB. L.J. 709 (1979); Note, *Partial Closings: The Scope of an Employer's Duty to Bargain*, 61 B.U.L. REV. 735 (1981); Comment, *Collective Bargaining Over Plant Relocation Decisions: Let's Make a Deal*, 18 NEW ENG. L. REV. 715 (1983).

25. 379 U.S. 203 (1964).

26. *Id.* at 210.

27. 161 N.L.R.B. 561 (1966).

28. The employer cited excessive worker hours for production, defective workmanship, and inefficient plant facilities as reasons for the closing. *Id.* at 567-68.

29. 29 U.S.C. § 158(a) (1976).

30. 161 N.L.R.B. at 566.

31. 452 U.S. 666 (1981).

conditions of employment” could be subject to various interpretations. Nonetheless, it stated that “Congress had no expectation that the elected union representative would become an equal partner in the running of the business enterprise in which the union’s members are employed.”³² In *First National Maintenance Corp.*, however, the Court itself sought to limit the applicability of its holding. The Court noted that the employer “had no intention to replace the discharged employees or to move that operation elsewhere.”³³ The Court argued that in this particular case, the situation was one not amenable to the collective bargaining process since the terms of a contract with a third party over which the “union had no control or authority”³⁴ were disputed. These differences, the Court argued, adequately distinguished the case from the Court’s earlier decision in *Fibreboard*.³⁵

By reaffirming its holding in *Fibreboard*, while holding for the employer in *First National Maintenance Corp.*, the Court left the extent of an employer’s duty to bargain with employees facing a plant closing or plant relocation unresolved.³⁶ In its subsequent decisions, the NLRB initially held that a management decision to relocate a plant was subject to collective bargaining.³⁷ More recently, however, the NLRB, with new members appointed by the Reagan Administration, reconsidered its earlier decision in *Milwaukee Springs I*³⁸ and reversed itself. In *Milwaukee Springs II*,³⁹ the NLRB held that while the NLRA requires the employers to bargain with the union over its decision to relocate, this does not require the employer to “obtain a union’s consent on a matter not contained in the body of a collective bargaining agreement.”⁴⁰

In light of the *First National Maintenance Corp.* and *Milwaukee Springs II* decisions, the efficacy of relying on collective bargaining laws to deter plant closings is questionable.⁴¹ While plant closings or relocations motivated by anti-union animus violate the NLRA,⁴² these recent decisions indicate that relocating plants merely to find lower labor costs does not necessarily constitute anti-union animus. Hence,

32. *Id.* at 676.

33. *Id.* at 687.

34. *Id.*

35. *Id.* at 688.

36. For a discussion of the effect of *First Nat. Maintenance Corp.*, see Comment, *supra* note 24, at 740-46.

37. See, e.g., Tocco Div. of Park-Ohio Industries, 257 N.L.R.B. 413 (1981); Milwaukee Springs, 265 N.L.R.B. No. 28, 1982-83 NLRB Dec. (CCH) ¶ 15,317 (1982).

38. 265 N.L.R.B. No. 28, 1982-83 NLRB Dec. (CCH) ¶ 15,317 (1982).

39. Milwaukee Springs, 268 N.L.R.B. No. 87 (filed Jan. 27, 1984).

40. *Id.*, slip op. at 7. See also Otis Elevator Co., 269 N.L.R.B. No. 162 (filed Apr. 6, 1984).

41. Furthermore, in *NLRB v. Bildisco*, 52 U.S.L.W. 4270 (Feb. 22, 1984), the Court held that employers filing for bankruptcy can reject their collective bargaining agreements if “the debtor can show the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.” *Id.* at 4274.

42. See *Textile Workers Union of America v. Darlington Manufacturing Co.*, 380 U.S. 263 (1965).

workers and their communities should consider legislative solutions to the problem of plant closings.

State Plant Closing Legislation

State plant closing legislation presents an alternative to federal legislation. Only a few states have enacted plant closing laws,⁴³ although several state legislatures have considered such legislation.⁴⁴

Compared to H.R. 2847, those states that have enacted plant closing legislation impose rather mild restrictions on business relocations. South Carolina, for example, requires that employers give employees two weeks notice before a shutdown,⁴⁵ but this requirement applies only to employers who require that employees give them notice prior to quitting.⁴⁶ Wisconsin requires that employers planning a shutdown or relocation give employees sixty days notice,⁴⁷ but this requirement is only imposed on employers of 100 persons or more.⁴⁸ In addition to requiring that firms give sixty days notice to both their employees and the municipality of the plant's locale, Maine law requires payment of one week's severance pay to employees.⁴⁹ With the exception of Maine, no state requires companies to give advance notification to municipalities or otherwise directly afford the community protection.

Several other states have considered plant closing legislation.⁵⁰ Nevertheless, several factors deter states from enacting legislation that provides protection for workers and communities comparable to that of H.R. 2847. The first serious impediment to state legislation is economic in nature. States, fearful of losing industry to other states or discouraging companies from establishing new plants in their state, are reluctant to impose stricter requirements on companies than the states competing with them for industry impose.⁵¹ Because of this competition, plant closing legislation must be national in scope.⁵²

Second, in addition to the economic deterrent, states face additional

43. ME. REV. STAT. ANN. tit. 26, §§ 625, 625-B (West Supp. 1983-1984); WIS. STAT. ANN. § 109.07 (West Supp. 1983-1984); S.C. CODE ANN. § 41-1-40 (Law. Co-op. 1977); MICH. COMP. LAWS ANN. §§ 445.60-445.606 (West 1967).

44. Ohio, Delaware, Oregon, New York, New Jersey, Illinois, California, Pennsylvania, Montana, New Hampshire and Indiana have all had plant closing laws formally proposed in their legislatures. For a discussion of the efforts to enact state plant closing legislation, see GORDIES, JARLEY & FERMAN, *PLANT CLOSINGS AND ECONOMIC DISLOCATION*, 58-64 (1981) [hereinafter cited as GORDIES]; Arnold, *Existing and Proposed Regulation of Business Dislocation*, 57 U. DET. J. URB. L. 209, 229-37 (1980).

45. S.C. CODE ANN. § 41-1-40 (Law. Co-op 1977).

46. *Id.*

47. WIS. STAT. ANN. § 109.07 (West Supp. 1983-1984).

48. *Id.*

49. ME. REV. STAT. ANN. tit. 26, § 625-B (West Supp. 1983-1984).

50. See Arnold, *supra* note 44. See also GORDIES, *supra* note 44.

51. See, e.g., Note, *supra* note 12, at 197. This problem facing states is not isolated to plant closing legislation, but arises any time a state considers enacting stricter health, safety, or labor regulations or increasing taxes.

52. *Id.* See also a resolution of the Connecticut State Senate, S. Res. 57, (adopted April 18, 1978), reprinted in *August 1978 Hearings*, *supra* note 12, at 76.

constitutional hurdles not facing the Federal Government in regulating plant closings.⁵³ For instance, state plant closing legislation has been challenged⁵⁴ as a violation of the Contract Clause. The Contract Clause of the United States Constitution provides that “[n]o State shall . . . pass any . . . Law impairing the Obligation of Contracts.”⁵⁵ In *Allied Structural Steel Co. v. Spannaus*,⁵⁶ the U.S. Supreme Court invoked the Contract Clause to strike down a Minnesota statute⁵⁷ which imposed a “pension funding charge” on those employers providing pension benefits⁵⁸ to employees and subsequently terminating the pension plan or closing the establishment. The Court held this charge to be violative of the Contract Clause in that “[t]he company thus had no reason to anticipate that its employees’ pension rights could become vested except in accordance with the terms of the plan.”⁵⁹

It is unclear whether the *Spannaus* decision would apply to state plant closing legislation if the legislation imposed a severance payment requirement. In *Spannaus*, the statute interfered with the pension contract between the company and its employees, while a severance payment requirement does not interfere with any such contract, especially since employers often consider employees “terminable at will.” Furthermore, the Court in *Spannaus* differentiated⁶⁰ the pension statute from an earlier Minnesota statute upheld in *Home Building & Loan Association v. Blaisdell*.⁶¹ In *Blaisdell*, the Court upheld a state law which extended the date of the foreclosure sale beyond that in the mortgage contract. In *Spannaus*, the Court argued that the pension statute did not affect “every Minnesota employer . . . but at only those who had in the past been sufficiently enlightened as voluntarily to agree to establish pension plans for their employees,”⁶² while the statute upheld in *Blaisdell* was “enacted to deal with a broad, generalized economic or social problem.”⁶³ Most proposed state plant closing legislation more nearly resembles the statute upheld in *Blaisdell*, because it would apply to all employers, above a given size, within the state. In short, the Contract Clause does not engender a serious constitutional challenge to state plant closing legislation.

A more serious legal challenge⁶⁴ to plant closing legislation at the

53. For a detailed analysis of the legal impediments to state plant closing legislation, see Arnold, *supra* note 44.

54. *Id.* at 242-45.

55. U.S. CONST. art. I, § 10, cl. 1.

56. 438 U.S. 234 (1978).

57. MINN. STAT. § 181B.01 (1974).

58. The statute applied to benefits provided under section 401 of the Internal Revenue Code, I.R.C. § 401 (1976).

59. 438 U.S. at 245-46.

60. *Id.* at 248-50.

61. 290 U.S. 398 (1934).

62. 438 U.S. at 250.

63. *Id.*

64. See Arnold, *supra* note 44, at 251-53.

state level arises from the Commerce Clause.⁶⁵ The Commerce Clause of the United States Constitution provides, in pertinent part, that Congress shall “regulate Commerce . . . among the several States”⁶⁶ Thus, the Commerce Clause limits the power of the individual states to interfere with “interstate commerce.”⁶⁷ Not every state law affecting interstate commerce violates the Constitution; state laws “incidentally or indirectly” burdening interstate commerce are permissible.⁶⁸ Nevertheless, the Court closely scrutinizes any state attempts to impede free movement of trade.⁶⁹ The Supreme Court has long held that a state cannot enact legislation to keep articles of trade out of interstate commerce simply to use them within the state.⁷⁰ “Protectionist measures” by states attempting to insulate themselves from the adverse impacts of free trade between the states constitutes a “per se” violation of the Commerce Clause.⁷¹ Whether a statute is “protectionist” will be determined in view of what legitimate local interests are advanced by the legislation.⁷² A state cannot place an embargo on goods simply on the basis of the need for the goods within the state,⁷³ especially when a less burdensome restraint on trade would protect the legitimate local interests.⁷⁴ On the other hand, state regulations which are intended to protect the welfare of the state residents regarding the production of goods may be permissible,⁷⁵ especially when most of the products are to be consumed within the state.⁷⁶

One objective of plant closing legislation—to deter plants from moving away from their present location—would constitute a “protectionist measure,” inhibiting the free flow of trade between the states. Furthermore, at least with the severance payment provisions, remedies less restrictive of interstate commerce are available because the state could make severance payments out of the state’s general revenue.⁷⁷

State legislation does not appear to be an effective remedy for plant closings. Economic and legal problems deter enactment of strong and comprehensive state plant closing legislation. If a legislative response to plant closings is appropriate, it requires action by the United States Congress.

65. U.S. CONST. art. I, § 8, cl. 3.

66. *Id.*

67. For an authoritative treatment of the Commerce Clause, see J. NOWAK, R. ROTUNDA & J. YOUNG, CONSTITUTIONAL LAW 266-91 (2d ed. 1983) [hereinafter cited as NOWAK].

68. Milk Control Bd. v. Eisenberg Farm Products, 306 U.S. 346, 351 (1939).

69. NOWAK, *supra* note 67, at 284-89.

70. Foster-Fountain Packing Co. v. Haydel, 278 U.S. 1 (1928); Hughes v. Oklahoma, 441 U.S. 322 (1979).

71. City of Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

72. *Id.*

73. H.P. Hood & Sons v. Du Mond, 336 U.S. 525 (1949).

74. Hughes v. Oklahoma, 441 U.S. 322 (1979).

75. Milk Control Bd. v. Eisenberg Farm Products, 306 U.S. 346 (1939).

76. *Id.*

77. For a discussion of this point, see Arnold, *supra* note 44, at 251-52.

**HOUSE BILL 2847:
THE NATIONAL EMPLOYMENT PRIORITIES ACT**

Congressman William Ford (D-Mich.) is the chief sponsor of the National Employment Priorities Act (H.R. 2847) in the House of Representatives.⁷⁸ The Subcommittee on Labor-Management Relations of the House Committee on Labor and Education approved H.R. 2847 without amendments in the first session of the 98th Congress.⁷⁹ The stated purpose of the bill is "to facilitate economic adjustment of communities, businesses, and workers; to require business concerns to give advance notice of plant closings and permanent layoffs; to provide assistance, including retraining to dislocated workers, and for other purposes."⁸⁰

House bill 2847 has four parts, all of which apply to businesses with fifty or more employees.⁸¹ First, H.R. 2847 makes federal assistance available in various forms to workers,⁸² communities,⁸³ and businesses.⁸⁴ Second, the bill imposes various duties upon businesses, including prenotification to workers, communities, and the Secretary of Labor,⁸⁵ and severance pay to workers⁸⁶ and their communities.⁸⁷ Third, the bill creates criminal⁸⁸ and civil penalties⁸⁹ for certain violations of the Act. Finally, the bill would establish a National Employment Priorities Administration to conduct research⁹⁰ and a National Employment Priorities Advisory Council to advise the Secretary of Labor.⁹¹

Under section 201 of the bill, the Secretary of Labor may provide assistance to workers whose jobs were terminated by a plant closing. Assistance may include job training, job placement services, and small payments related to worker expenses incurred in the search for new employment.⁹² The Secretary of Labor would be authorized to estab-

78. See H.R. 2847, *supra* note 5. Various versions of this bill have been before Congress since first being introduced in 1973 by Sen. Walter Mondale, D-Minn. See S. 2809, 93rd Cong., 1st Sess., 119 CONG. REC. 41,364 (1973); H.R. 13,541, 93rd Cong., 2d Sess., 120 CONG. REC. 7013 (1974); H.R. 76, 94th Cong., 1st Sess., 121 CONG. REC. 146 (1975); H.R. 13,100, 94th Cong., 2d Sess., 122 CONG. REC. 9866 (1976); H.R. 76, 95th Cong., 1st Sess., 123 CONG. REC. 128 (1977); S. 1966, 95th Cong., 1st Sess., 123 CONG. REC. 25,743 (1977); H.R. 5040, 96th Cong., 1st Sess., 125 CONG. REC. 21,679 (1979); S. 1608, 96th Cong., 1st Sess., 125 CONG. REC. 21,488 (1979); S. 1609, 96th Cong., 1st Sess., 125 CONG. REC. 21,496 (1979); H.R. 565, 97th Cong., 1st Sess., 127 CONG. REC. H66 (daily ed. Jan. 6, 1981).

79. Approved on Oct. 6, 1983, CONG. INDEX (CCH), 34,508 (Oct. 6, 1983).

80. H.R. 2847, *supra* note 5 (Preface).

81. *Id.* § 103(12).

82. *Id.* §§ 201, 202, 208, 209.

83. *Id.* §§ 206-207.

84. *Id.* §§ 203-205.

85. *Id.* § 301.

86. *Id.* § 402.

87. *Id.* § 407.

88. *Id.* § 501(a) calls for fines of not more than \$1,000 and imprisonment for not more than one year.

89. *Id.* § 502.

90. *Id.* § 510.

91. *Id.* § 511.

92. *Id.* § 201.

lish retraining programs for these workers.⁹³ The bill imposes upon businesses which close plants a duty to give their employees severance pay equal to eighty-five per cent of the employees average wage for fifty-two weeks, but not exceeding \$25,000 per employee.⁹⁴ No business is required to make payments to any employee who refuses comparable employment with the same company at another location "within reasonable commuting distance."⁹⁵ A business closing an operation must offer its employees a position at other establishments operated by the business with wages and benefits comparable to that of the prior position⁹⁶ and must pay the employees "reasonable expenses incurred . . . in connection with moving" in order to begin the new position.⁹⁷

Particularly germane to any discussion of plant closing legislation is the assistance H.R. 2847 makes available to local governments which, as a result of a plant closing, "suffer . . . a substantial decrease in income, . . . a substantial increase in demand for . . . social services, . . . or a substantial increase in the number of unemployed individuals who reside within the jurisdiction of . . . [the] local government."⁹⁸ Available assistance includes "grants, loans, and loan guarantees" to fulfill the increased demand for social services or to create public works projects.⁹⁹ Approval of such assistance is at the discretion of the Secretary of Labor.¹⁰⁰

House bill 2847 also imposes liability on businesses for the loss of local government revenue.¹⁰¹ The amount of the liability would equal eighty-five per cent of one year's revenue loss based on the average tax liability of the business establishment for the three prior fiscal years.¹⁰² Also, if a business transfers an operation outside the United States and the Secretary of Labor finds that "an economically viable alternative to such a transfer existed" within the country, the business would be liable to the Federal Government for three hundred percent of one year's revenue loss based on the average tax liability of the operation for the three prior taxable years.¹⁰³

Another important feature of H.R. 2847 is the prenotification requirement.¹⁰⁴ The bill requires that when a business "determines, or reasonably should have determined," that a "change of operations" will result in a loss of employment of either 100 employees or fifteen

93. *Id.* §§ 201(c)(1), 202.

94. *Id.* § 402(a)(6).

95. *Id.* § 402(a)(8).

96. *Id.* § 404.

97. *Id.* § 402(b).

98. *Id.* § 206.

99. *Id.* § 207(a).

100. *Id.*

101. *Id.* § 407.

102. *Id.*

103. *Id.* § 407(c).

104. *Id.* § 301.

per cent of the plant's workforce, whichever is less, the business must provide notification of the closings to the Secretary of Labor, the employees, the employees' respective unions, and certain local governments.¹⁰⁵ If 100 employees or fewer will be laid off, prenotification must be made six months in advance; but if more than 100 employees will be terminated, at least one year notice must be given.¹⁰⁶ Here, the bill provides an exception for "circumstances" the Secretary of Labor finds "beyond the control of the business."¹⁰⁷

House bill 2847 includes a legislative finding that "plant closings . . . can be averted through cooperative efforts" which are "greatly assisted through" prenotification.¹⁰⁸ Accordingly, the bill requires the Secretary of Labor to conduct an investigation and hold public hearings, to determine the reason for the closing, the effects of the closing, and possible steps to prevent the closing or mitigate its effects.¹⁰⁹

LEGAL ISSUES

Although federal plant closing legislation would not be subject to some of the constitutional problems state legislation faces,¹¹⁰ such as the Contract Clause¹¹¹ and the Commerce Clause,¹¹² questions have been raised about other aspects of its constitutionality.¹¹³ These issues include equal protection¹¹⁴ and the "taking" of private property by the Federal Government.¹¹⁵

Equal Protection and Classification

Professor Thomas Arnold has suggested that H.R. 2847 could be attacked as a violation of the Equal Protection Clause of the fourteenth amendment to the Constitution because it classifies businesses by the number of people employed.¹¹⁶ If enacted, the bill would apply to all business establishments employing fifty or more persons.¹¹⁷ This classification, however, would probably be upheld because courts generally uphold legislative classifications created for economic regulation.¹¹⁸ More specifically, courts generally uphold the classification of busi-

105. *Id.* § 301(a), (b).

106. *Id.* § 301(b)(3)(A).

107. *Id.* § 301(b)(3)(B).

108. *Id.* § 102(a)(2).

109. *Id.* § 302.

110. See *supra* text accompanying notes 53-77.

111. U.S. CONST. art. I, § 10, cl. 1. See discussion *supra* text accompanying notes 54-63.

112. U.S. CONST. art. I, § 8, cl. 3. See discussion *supra* text accompanying notes 64-77.

113. See Arnold, *supra* note 44, at 245-51.

114. U.S. CONST. amend. XIV, § 1 and, by implication through the Due Process Clause, U.S. CONST. amend. V.

115. U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1.

116. See Arnold, *supra* note 44, at 245-47.

117. H.R. 2847, *supra* note 5, § 103(12).

118. See *City of New Orleans v. Duke*, 472 U.S. 297 (1976); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Williamson v. Lee Optical*, 348 U.S. 483 (1955). See also NOWAK, *supra* note 67, at 586-99. Legislative classifications in economic regulations need only be "rationally related to a legitimate state interest." *City of New Orleans v. Duke*, 472 U.S. at 303.

nesses based on the number of persons employed.¹¹⁹

Accordingly, a challenge to the Maine plant closing law¹²⁰ on grounds of an equal protection violation was rejected. In *Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Association*,¹²¹ the court upheld the distinction in the Maine plant closing law between businesses with 100 or more employees and those with fewer than 100 employees. The law's provisions only applied to the former. The Maine Supreme Court found the legislature's choice of 100 not to be arbitrary since "were this to be deemed unconstitutional, no effective regulation by statute could ever be possible in a practical sense."¹²² Furthermore, the court found this classification to be consistent with the purpose of the law:

The problems at which the statute is directed will be solved more easily and effectively by zeroing in on those *large* employers who may voluntarily close a business. The closing of a sizable business will create greater unemployment and other social headaches than will the shutting down of smaller places of business whose effect may be negligible.¹²³

In short, H.R. 2847 probably does not violate equal protection requirements. The application of the legislation's provisions to businesses with fifty or more employees is rationally related to the legitimate purpose of the legislation and, in any event, the courts demonstrate great deference to such legislative classification.¹²⁴

"Taking" Without Compensation

Professor Arnold has also questioned¹²⁵ whether the prenotification requirement of H.R. 2847 poses a threat to its constitutionality because the fifth amendment prohibits a government taking without just compensation.¹²⁶ Although the government may enact reasonable regulations in the exercise of its police powers,¹²⁷ regulation that goes too far will be considered a "taking."¹²⁸

Arnold argues that requiring a business to give notice prior to closing might be a "taking" of the company's property because it would

119. See, e.g., *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495 (1937) where the Supreme Court upheld an unemployment insurance statute applying only to employers with more than eight employees.

120. Act of Sept. 23, 1971, ch. 452, 1971 Me. Laws 917 (codified as amended at ME. REV. STAT. ANN. tit. 26, §§ 625, 625-B (West Supp. 1983-1984)).

121. 320 A.2d 247 (Me. 1974).

122. *Id.* at 257.

123. *Id.* at 256.

124. See, e.g., *City of New Orleans v. Dukes*, 427 U.S. 297 (1976).

125. See Arnold, *supra* note 44, at 247-51.

126. U.S. CONST. amend. V provides, in part, that "[n]o person shall. . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

127. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962); *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978).

128. See, e.g., *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

have to continue operating for the term provided in the prenotification provision even if it were losing money on the operation.¹²⁹ The Supreme Court held, in *Brooks-Scanlon Co. v. Railroad Commission*,¹³⁰ that requiring a business to continue a losing operation against its will constitutes a "taking." This principle coincides with Court holdings that regulated industries must be permitted a "reasonable" rate of return.¹³¹

The government, however, still retains much leeway in combatting plant closings. The Court has long held that property rights are not absolute and that government may restrict such rights when regulating for the public good, even if this hinders the profitability of an enterprise.¹³² Moreover, the Court recently has restricted its holding in *Brooks-Scanlon*. In *New Haven Inclusion Cases*,¹³³ the Court upheld a railroad reorganization order which required certain railroad operations to continue at a loss for the period of the bankruptcy reorganization. The Court rejected the bondholders' argument that the diminution in value of their assets was a compensable taking, since, the Court reasoned, this was a risk they assumed when they invested in the railroad.

Professor Arnold, citing the *Brooks-Scanlon* decision,¹³⁴ argues that any prenotification requirement except those involving a very short period of time, would constitute a "taking."¹³⁵ Not only has *Brooks-Scanlon* been limited by the *New Haven Inclusion Cases*, but also the prenotification requirement of H.R. 2847 is distinguishable from the facts in *Brooks-Scanlon*. In *Brooks-Scanlon*, the Court struck down an order which prohibited the railroad operations from terminating. If the operation continued to lose money the assets would have eventually disappeared entirely. House bill 2847 merely requires six months to one year prenotification,¹³⁶ at the end of which time the assets may be recovered. Rather than "taking" a corporation's property, the prenotification requirement of H.R. 2847 seeks to prevent harm to workers and the community caused by sudden plant closings.

129. See Arnold, *supra* note 44, at 247-51.

130. 251 U.S. 396 (1920). The Court struck down the order of a state commission prohibiting a corporation from ceasing its railroad operations even though it was losing money on them. The Court held that a company could not be compelled to continue at a loss. Four years later the Court reaffirmed the holding of *Brooks-Scanlon* in *Railroad Comm'n of Texas v. Eastern Texas R.R. Co.*, 264 U.S. 79 (1924).

131. See, e.g., *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923); *Board of Pub. Util. Comm'rs v. New York Tele. Co.*, 271 U.S. 23 (1926).

132. See, e.g., *Nebbia v. New York*, 291 U.S. 502 (1934), in which the court upheld the regulation of milk prices. See also *Day-Brite Lighting Co. v. Missouri*, 342 U.S. 421 (1952) in which the Court upheld a Missouri statute requiring employers to permit employees to take up to four hours off work to vote with pay. The Court held that forcing the employer to pay wages for a period in which no services were performed was not unconstitutional since "many forms of regulation reduce the net return of the enterprise." *Id.* at 424.

133. 399 U.S. 392 (1970).

134. Arnold, *supra* note 44, at 248.

135. *Id.* at 247-51.

136. H.R. 2847, *supra* note 5, § 301.

*Shapiro Bros. Shoe Co. v. Lewiston-Auburn Shoeworkers Protective Association*¹³⁷ supports this analysis. In *Shapiro Bros.* the Maine Supreme Court upheld Maine's plant closing law. The plaintiff alleged that the one month prenotification requirement constituted a "taking" of its property. The court held the provision to be "a reasonable exercise of the police power"¹³⁸ and found the regulation to be a reasonable attempt to counter "a sure and primary contributing cause of social and economic unrest."¹³⁹ Therefore, the fifth amendment should not be a serious impediment to H.R. 2847.

CRITICISM OF HOUSE BILL 2847

Critics of H.R. 2847 question the need for government action to combat plant closings.¹⁴⁰ Opponents of plant closing legislation believe the free market economy will solve the problem through its own mechanisms.¹⁴¹ Indeed, some opponents of plant closing legislation believe plant closings are essential to a properly functioning economy.¹⁴² They view efforts to prevent such closings as only worsening the plant closing situation by impeding the natural mechanisms of the free market.

Richard McKenzie, a Clemson University economist, has been the most outspoken critic of plant closing legislation. McKenzie argues that plant closing legislation, including H.R. 2847, creates inefficiency in the economy by restricting capital mobility.¹⁴³ McKenzie argues a national plant closing law would:

slow the growth of national income, reduce the rise in real wage rates, contribute to inflation, increase unemployment, and reduce the social mobility of workers—while at the same time reducing business profits and the efficiency of the U.S. economy.¹⁴⁴

According to Professor McKenzie, economic efficiency requires that each region develop its "comparative advantage."¹⁴⁵ Restricting the flow of resources, including capital, prevents resources from being more efficiently used elsewhere.¹⁴⁶ This restriction results in higher production costs and lower national income.¹⁴⁷ Allowing the free flow of capital, on the other hand, permits a more efficient use of resources which, in turn, benefits even those regions losing industry, since they will be able to obtain goods and services at a lower price.¹⁴⁸

Professor McKenzie admits that much of the industrial exodus to

137. 320 A.2d 247 (Me. 1974).

138. *Id.* at 255.

139. *Id.*

140. *See, e.g.*, R. MCKENZIE, RESTRICTIONS ON BUSINESS MOBILITY (1979).

141. *Id.*

142. *Id.*

143. *Id.* at 5.

144. *Id.*

145. *Id.* at 56.

146. *Id.*

147. *Id.*

148. *Id.* at 22, 26.

the sunbelt is motivated by the lower wages employers pay workers,¹⁴⁹ but he argues that this migration is "to be expected in free markets that allocate resources from less productive to more productive uses."¹⁵⁰ McKenzie expects the eventual convergence of wages between the regions and a slowdown of plant movement.¹⁵¹ Restricting capital mobility, McKenzie argues, creates an "excise tax" on the use of labor, producing greater unemployment.¹⁵² Some critics of H.R. 2847 believe that workers and communities should accede to business demands for concessions; they oppose H.R. 2847 because it would inhibit the granting of necessary "adjustments."¹⁵³ McKenzie also argues that requiring companies to make severance payments would threaten their solvency.¹⁵⁴

ECONOMIC ANALYSIS OF HOUSE BILL 2847

Critics of H.R. 2847 argue that the legislation, if enacted, would cause economic "inefficiency."¹⁵⁵ The paradigm that these critics are using in drawing this conclusion is neoclassical economic analysis.¹⁵⁶ While the neoclassical economic model has been heavily criticized by both economists¹⁵⁷ and ethicists,¹⁵⁸ in order to respond to critics of national plant closing legislation, the effects of such a law will be analyzed by the use of their own model.

The Neoclassical Paradigm

In neoclassical economic analysis the primary measure of economic welfare is "efficiency."¹⁵⁹ When economists assess whether or not a policy is "efficient" they ask whether it is "Pareto optimal."¹⁶⁰ A policy

149. *Id.* at 5, 42-45.

150. *Id.* at 5.

151. *Id.*

152. McKenzie, *supra* note 11, at 131.

153. See *May 1975 Hearings*, *supra* note 12 (statement of Mario DiFederico, Executive Vice-President of Firestone). See also MCKENZIE, *supra* note 140, at 60, where he asserts that "the enactment of relocation rules is likely to lead to higher taxes and lower quality services in many jurisdictions." McKenzie cites James Madison for the principle that market competition should exist between government units.

154. McKenzie, *supra* note 11, at 123.

155. See, e.g., MCKENZIE, *supra* note 140.

156. E.g., McKenzie argues that "rising income is to be expected in free markets that allocate resources from less productive to more productive uses," *id.* at 5. See also *id.* at 53, where McKenzie states:

Competition, to the extent that it exists in the marketplace, induces people to produce at their limits, given their preferences and cost constraints. In this sense competition maximizes national output and income. Government policies that restrict trade or the ability of markets to adjust to changes in preferences, prices, and profits restrict not only individual choices but also national produce and income.

157. See, e.g., J. GALBRAITH, *THE AFFLUENT SOCIETY* (1958); M. LUTZ & K. LUX, *THE CHALLENGE OF HUMANISTIC ECONOMICS* (1979); C. WILBER & K. JAMESON, *AN INQUIRY INTO THE POVERTY OF ECONOMICS* (1983).

158. See *infra* text accompanying notes 211-214.

159. The field of economics devoted to the study of society's economic welfare is called "welfare economics."

160. The "Pareto criteria" used by economists is named after Vilfredo Pareto, an early twentieth

is considered economically efficient if no person could be made better off without making any other person worse off.¹⁶¹ The point of Pareto optimality has been reached when three conditions have been met: (1) resources are allocated so that no more of one good can be produced without producing less of another good, or in other words, the best available technology must be used; (2) no possible advantageous grounds for trade exist between consumers; and (3) the rate at which producers supply various goods is equivalent to the rate at which consumers demand various goods. Practically speaking, if the Pareto criteria were strictly applied, the point of efficiency would never be reached since almost any important economic policy or transaction produces both winners and losers. Consequently, economists have modified the test of efficiency so that an efficient policy is one in which the gains to the winners are enough to offset the losses of the losers.¹⁶² Under the neoclassical economic model, the point of Pareto efficiency will be reached in a fully competitive free market economy, providing no market failures, including externalities, exist.¹⁶³

The Pareto criteria themselves do not determine how economic goods should be distributed; distribution is an ethical question left to be decided on some other basis. Essentially, policymaking based on the Pareto criteria would only call for marginal changes in the status quo of present wealth distribution, although some economists have posited that reaching the point of economic efficiency requires more extensive income redistribution.¹⁶⁴ In short, "economic efficiency" as measured

century Italian economist. See V. PARETO, *MANUAL OF POLITICAL ECONOMY* (1909) (A. Schwier trans. 1971).

161. For a more detailed and technical explanation of economic efficiency, see A. BRAFF, *MICROECONOMIC ANALYSIS* 259-72 (1969); Bator, *The Simple Analytics of Welfare Maximization*, 47 *AM. ECON. REV.* 22 (1957); R. MUSGRAVE & P. MUSGRAVE, *PUBLIC FINANCE IN THEORY AND PRACTICE* 62-68 (3d ed. 1980); R. TRESCH, *PUBLIC FINANCE: A NORMATIVE THEORY* 20-35 (1981); E. MANSFIELD, *MICROECONOMICS: THEORY AND APPLICATIONS* 356-69 (abr. 3d ed. 1979); J. HENDERSON & R. QUANDT, *MICROECONOMIC THEORY* 286-93 (3d ed. 1980). Neoclassical economic analysis measures utility ordinally rather than cardinally; in other words, it assumes that the one dollar an affluent member of society needs to purchase an imported beer is equivalent in social welfare terms to the one dollar a poor person needs to purchase food or medicine. See MANSFIELD, at 54-56. This assumption is quite controversial. See, e.g., LUTZ & LUX, *supra* note 157.
162. This modification is known as the compensation principle. See Hicks, *The Foundations of Welfare Economics*, 49 *ECON. J.* 696-712 (1939); Kaldor, *Welfare Propositions in Economics and Interpersonal Comparisons of Utility*, 49 *ECON. J.* 549-52 (1939). Tibor Scitovsky proposed a stricter compensation requirement in Scitovsky, *A Note on Welfare Propositions in Economics*, 9 *REV. OF ECON. STUDIES* 77-88 (1941-1942).
163. See BRAFF, *supra* note 161, at 271-72.
164. See Hochman & Rodgers, *Pareto Optimal Redistribution*, 59 *AM. ECON. REV.* 542-57 (1969); Goldfarb, *Pareto Optimal Redistribution: Comment*, 60 *AM. ECON. REV.* 994-96 (1970). Hochman, Rodgers and Goldfarb explain that if "interdependent utility" exists, the Pareto criteria requires redistribution. Interdependent utility exists if certain members of society receive utility from the enhanced economic well-being of other members of society. Goldfarb justified the progressive income tax on this basis. For a mathematical treatment of the interdependent utility function see HENDERSON & QUANDT, *supra* note 161, at 297-98. See also Markovits, *A Basic Structure for Microeconomic Policy Analysis in our Worse-Than-Second-Best World: A Proposal and Related Critique of the Chicago Approach to the Study of Law and Economics*, *Wis. L. REV.* 950, 977-88, 1069-70 (1955); Markovits, *The Causes and*

by Pareto optimality does not mean social welfare is maximized since that determination can only be made through normative judgments.

The economic concept of "externalities" is acutely relevant for the analysis of plant closing legislation. Divergence between private and social costs of an economic transaction creates externalities.¹⁶⁵ When externalities exist, economic efficiency cannot be attained.¹⁶⁶ Therefore, a policy requiring economic decisionmakers to internalize the costs of externalities they are imposing upon others moves toward greater, not less, efficiency.

Plant Closings and Externalities

A review of the effects of plant closings indicates that closings do, in fact, produce many externalities. Since these externalities are borne by workers and their communities and not the corporate decisionmakers producing the externalities, the divergence between the private and social costs is economically inefficient.¹⁶⁷ This analysis focuses primarily on the cost imposed on communities, rather than workers. These costs are both pecuniary and nonpecuniary in nature.

Pecuniary Costs of Plant Closings

External pecuniary costs imposed upon communities and local governments by plant closings include lost tax revenue, increased budget

Policy Significance of Pareto Resource Misallocation: A Checklist for Micro-Economic Policy Analysis, 28 STAN. L. REV. 1, 8 (1975). Markovits argues:

The inequality of the distribution of income associated with the pattern in which final goods (income) are distributed may also indirectly affect the extent of Pareto resource misallocation by influencing the extent to which current adults (as well as children) engage in allocatively undesirable criminal behavior or make misallocative purchasing decisions, such as purchasing polluting, breakdown-prone cars or renting disease and fire-spreading housing.

Id. at 8. In other words, economic policies which might otherwise appear to be Pareto efficient (based on ordinal utility comparisons), yet allocate fewer resources to lower-income persons, might not be efficient when the externalities created by that reallocation are considered. Markovits posits that the economic efficiency of a policy cannot be properly evaluated without considering the policy's redistributive effects. Markovits proposes to weight dollar gains and losses according to the income levels of the persons receiving the gains and losses. These arguments lend support to plant closing legislation, since the legislation would, to some degree, transfer wealth from the owners of capital to the workers.

165. For a more detailed and technical explanation of externalities, see TRESCH, *supra* note 161, at 90-177; HENDERSON & QUANDT, *supra* note 161, at 302-04; MANSFIELD, *supra* note 161, at 372-74.
166. But for a view that government intervention is not required to achieve efficiency even in the face of externalities, see Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960). Coase argues these externalities can be internalized through bargaining between the affected parties. Bargaining will produce economic efficiency if two criteria are met: 1) these negotiations can be done at little or no cost, and 2) the property rights of the parties must be well-defined. While perhaps theoretically accurate, the Coase Theorem is of limited relevance since very few situations satisfy both criteria. In the case of plant closings, for example, many parties are involved thus driving up the negotiation costs, while the property rights of the workers at stake in plant relocations are highly disputed rather than well-defined.
167. See Adams, *The Flight of Jobs and Capital: Prospects for Grassroots Action* in COMMUNITY AND CAPITAL IN CONFLICT 18-19 (J. Raines, L. Berson & D. Gracie eds. 1982); Sclar, *supra* note 7, at 235.

outlays, and decreased business activity. The loss in a local government's tax revenue occurs simultaneously with an increased demand for the local government's services, especially its social services.¹⁶⁸ The loss of employment and business activity caused by a plant closing creates "secondary shocks" to the local economy, multiplying the loss beyond the initial cost of the plant closing itself.¹⁶⁹ Such a downward spiral discourages long term capital investment in a community.¹⁷⁰

Furthermore, local governments often sell long-term bonds to finance their physical infrastructure—roads, sewers, schools, and parks, for example. These plans are made in reliance on long-term investment in the community. When corporations make short-term use of the community's infrastructure in accordance with their own profit-maximization plans, but leave before the debt on the bonds is paid, the rest of the community must absorb the cost.

Non-Pecuniary Costs of Plant Closings

While the pecuniary costs imposed on communities are extensive, nonpecuniary costs are even more severe. These costs include disruption of the local labor market, increases in the number of health problems, and a breakdown of the cohesiveness of the community.

Plant closings disrupt the local labor markets because they disproportionately affect women, minorities, and older workers. Minorities are disproportionately affected because they are more heavily concentrated in northern states as blue collar workers.¹⁷¹ Plant closings disproportionately affect women since women typically have less mobility.¹⁷² Yet the adverse effect on older workers is even greater.¹⁷³ Many plant closings occur in long-declining industries and, as a result, the workers laid off by plant closings tend to be older,¹⁷⁴ which makes their reemployment more difficult.¹⁷⁵ This result could be attributed both to age

168. See GORDIES, *supra* note 44, at 50; BLUESTONE, *supra* note 1, at 67, 72-78. But see Hekman & Strong, *supra* note 12, at 36. Hekman and Strong argue that the loss in revenue and increased costs for services facing communities "is not an external cost in a true sense" but rather "is a loss only from the local point of view, not from the national point of view." However, this is analogous to arguing that lakes destroyed by acid rain do not constitute an externality since polluting factories employ workers in some other region. Furthermore, even if the revenue shortfall was not itself an externality, the disruption caused to local government in their fiscal planning by "regional rotation" certainly is. See *infra* text accompanying notes 195-206.

169. BLUESTONE, *supra* note 1, at 67.

170. See, e.g., *Plant Closings and Relocations: Hearings Before the Senate Comm. on Labor and Human Resources*, 96th Cong., 1st Sess. 3 (1979) (statement of Kenneth Gibson, Mayor of Newark, N.J.).

171. See Squires, *Runaway Factories are Also a Civil Rights Issue*, IN THESE TIMES, May 14-20, 1980), at 10; Adams, *supra* note 167, at 20. At least one lawsuit has been filed alleging a violation of Title VII of the 1964 Civil Rights Act by a plant closing disproportionately affecting minority employees. *Id.*

172. Adams, *supra* note 167, at 20-21.

173. See GORDIES, *supra* note 44, at 67-95.

174. *Id.* at 68.

175. *Id.* at 74, 81-82.

discrimination¹⁷⁶ and to the strong personal attachments older workers have toward their community.¹⁷⁷ Their attachment decreases their mobility.¹⁷⁸ By adversely affecting women, minorities, and older workers, plant closings contravene the public policy of providing affirmative action for these groups.¹⁷⁹

Increased unemployment caused by plant closings can have a severe impact on the physical and mental health of community members.¹⁸⁰ Higher unemployment leads to increased suicide, mental illness, cirrhosis of the liver, cardiovascular disease, and overall mortality.¹⁸¹ Plant closings have also been found to increase the number of cases of ulcers, arthritis, hypertension, and alcoholism.¹⁸²

Physical and mental health problems are only a part of the social cost attributable to plant closings. Higher unemployment has been found to lead to increased criminal aggression as measured by homicide and imprisonment rates.¹⁸³

The increase in illness, suicide, and crime is only symptomatic of the larger problem: the breakdown of the community. Business relocations destroy the sense of community in two ways. First, mobility of capital necessitates mobility of labor. A highly mobile labor force produces alienation in society.¹⁸⁴ Second, the community in which the plant is closed often loses its own cohesion, depending on the magnitude of the plant closing. One case study on a plant closing concluded that residents of the community

lost more than their economic core; they lost the central focus which had long held the community together—its reason for existence—a focus which was held almost as community property, one which pro-

176. *Id.*

177. *Id.*

178. *Id.*

179. For an illustration of this public policy see 29 C.F.R. §§ 1608.1-12 (1983). These regulations state that employers "should take voluntary action to correct the effects of past discrimination. . . ." *Id.* § 1608.1(c).

180. See JOINT ECONOMIC COMM. OF THE U.S. CONGRESS, 94TH CONG., 2D SESS., ESTIMATING THE SOCIAL COST OF NATIONAL ECONOMIC POLICY, IMPLICATIONS FOR MENTAL AND PHYSICAL HEALTH AND CRIMINAL AGGRESSION (Comm. Print 1976) (by Harvey Brenner, Associate Professor of Johns Hopkins University) [hereinafter cited as the SOCIAL COST OF NATIONAL ECONOMIC POLICY]; NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, DEP'T OF HEALTH, EDUCATION, AND WELFARE, TERMINATION: THE CONSEQUENCES OF JOB LOSS, (1977) (S. Cobb & S. Kasl); *January 1980 Hearings, supra* note 12, at 274-75 (statement of Joe Willis, member of the U.A.W.).

181. See SOCIAL COST OF NATIONAL ECONOMIC POLICY, *supra* note 180, at 65-74; Table 2 at VII in the "Letter of Transmittal" from Sen. Humphrey, D-Minn.

182. See NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH, *supra* note 180.

183. See SOCIAL COST OF NATIONAL ECONOMIC POLICY, *supra* note 180, at 70-73.

184. See D. YANKELOVICH, NEW RULES, (1980). Yankelovich notes his "Search for Community" index, which measures the number of persons feeling "an intense need to compensate for the impersonal and threatening aspects of modern life by seeking mutual identification with others," increased from 32% in 1973 to 47% in 1980—a period of rapid increase in the rate of labor mobility. *Id.* at 251. See also E. DURKHEIM, SUICIDE (1897) (J. Spaulding & G. Simpson trans. 1951). Durkheim demonstrates how mobility causes alienation through the breakdown of the family and community, and in turn, increases suicides. See also Catalano & Dooley, *The Behavioral Costs of Economic Instability*, in PUBLIC POLICIES FOR DISTRESSED COMMUNITIES (F. Redburn & R. Buss eds. 1982).

vided not only for economic needs but also meaning, incentive and a sense of natural order and continuity to their existence, a structural framework which gave coherence and cohesion to their lives.¹⁸⁵

Another cost imposed on both workers and their communities is the disruption of their labor market. Plant relocations work against the public policy of providing workers an equitable share of the earnings of production.¹⁸⁶ Congressional proponents of H.R. 2847 have expressed concern over the increasingly widespread corporate policy of fleeing to non-unionized regions.¹⁸⁷ Unemployment caused by plant closings often remains longer than unemployment caused by other economic decisions.¹⁸⁸ Faced with a prospective closing, workers and their unions are often forced to make severe concessions. According to economist Barry Bluestone, "capital mobility (or merely the threat of disinvestment) has become the most powerful mechanism available to employers for extracting concessions from organized workers"¹⁸⁹

Plant relocations do not simply affect the labor market prospects of the unemployed, but also weaken the labor market for all workers in the community. Economists Barry Bluestone and Bennett Harrison note that

The swelling of the ranks of the unemployed creates a reserve of malleable workers and even potential strikebreakers. The memory of such drastic dislocation can have what labor experts call a 'chilling effect' on future labor-management negotiations.¹⁹⁰

Besides upsetting the bargaining equilibrium between corporations and unions, plant relocations produce weakened state and local health, safety, and environmental regulations and a diminution of available social services. Those jurisdictions with the weakest regulations and the fewest social services often find themselves rated as the areas with the best "business climate."¹⁹¹ Corporations, in turn, use these ratings to pressure progressive state and local governments to cut back on regulations and social services.¹⁹² Consequently, plant relocations militate against decentralized governmental functions because the need for federal regulation of health, safety, labor, the environment, and social services becomes more acute.

185. *August 1978 Hearings, supra* note 12, at 138 (statement of Professor Walter Strange).

186. *See, e.g., National Labor Relations Act, supra* note 23, which attempts to provide workers a voice in determining their wages through the collective bargaining process.

187. *See, e.g., October 1974 Hearings, supra* note 12, at 18 (statement of Rep. Conyers, D.-Mich.) Rep. Conyer's stated: "I think we need to nationalize the employment situation so that we don't have that situation where people are going south or going where there is no unionized labor force to beat the cost and increase the profits."

188. *See* BLUESTONE, *supra* note 1, at 51-52. Workers also often lose their pensions. *Id.* at 58.

189. Bluestone, *Deindustrialization and the Abandonment of Community*, in *COMMUNITY AND CAPITAL IN CONFLICT* 54 (J. Raines, L. Berson & D. Gracie eds. 1982).

190. BLUESTONE, *supra* note 1, at 79-80.

191. GOODMAN, *supra* note 3, at 21.

192. *See* BLUESTONE, *supra* note 1, at 18.

Plant Closings and Economic Efficiency

Plant closings create externalities resulting in economic inefficiency. Therefore, a policy to internalize the social cost of plant closings is economically efficient. Yet even if plant closings did not create these externalities, plant relocations would be inefficient for other reasons.

As previously mentioned, the neoclassical paradigm requires that the "best available technology" must be implemented to attain efficiency. In other words, resource inputs must be fully used to maximize production.¹⁹³ Since the neoclassical paradigm treats human beings as just another resource input, their long-term unemployment is inefficient because they could be employed to produce more goods and services. Therefore, the present American corporate practice of relocating plants to lower labor costs, while leaving behind decimated communities and unemployed workers, is economically inefficient. This hypercapital mobility reduces the stability of the labor market and increases aggregate unemployment.¹⁹⁴

Urban planner Robert Goodman refers to unimpeded capital mobility as the game of "regional rotation":

Regional rotation is not a cheap system. As more regions are created, more welfare costs are necessary to maintain them. The more the cities and regions compete with each other, the more they duplicate each other's infrastructure facilities. As winner cities and regions build new roads, schools, and sewers, the losers must still maintain the debt and upkeep costs of the ones they already have. Maintaining underused facilities and services in the loser cities and regions, while creating similar ones in the winners, adds to the financial burden of the entire nation.¹⁹⁵

Besides allowing much of the nation's resources to go unused, the system of regional rotation wastes state and local government resources that are used to lure corporations to move their plants around the country.¹⁹⁶ Goodman notes that there "are more than 15,000 promotional agencies whose major function is to entice jobs from each other's state and local government."¹⁹⁷ This economic warfare is leading to the erosion of state and local governments' tax bases and a diminution of social services.¹⁹⁸

Regional rotation might have some redeeming value if it could demonstrably improve the situation of those regions on the receiving end of the plant relocations. Unfortunately, the evidence indicates these benefits are mixed. First, the rapid economic growth rate associated with receiving new plants does not result in a lower rate of unemploy-

193. See *supra* notes 160-164 and accompanying text.

194. See *infra* note 199 and accompanying text.

195. GOODMAN, *supra* note 3, at 84.

196. *Id.* at xiv.

197. *Id.*

198. See *August 1978 Hearings*, *supra* note 12, at 53 (statement of Marc Stepp, Vice-President, U.A.W.).

ment, since rapid growth can create labor market instability.¹⁹⁹ Second, this rapid growth places great stress on the local governments to expand the community's physical infrastructure, and yet meet the increased demand for other services.²⁰⁰ Furthermore, this increased demand for government money occurs at the same time the government may have given the corporation a significant tax break to enable it to keep up in the competitive game of "regional rotation."²⁰¹ The illusory gains from attracting new industry may have a short-term payoff for certain politicians, but it threatens the fiscal health of state and local governments.²⁰² Third, the social costs to communities receiving industry too quickly mirror the problems of communities losing industry. Bluestone and Harrison note that "both the physical and emotional health consequences of boomtown developments turn out to be similar to those found in communities like Youngstown and Akron that experience acute capital loss."²⁰³ Bluestone and Harrison urge debate on the appropriate rate of what they call "capital velocity."²⁰⁴ They argue that the rate at which new investment can be absorbed at an optimal social cost is lower than the present growth rate of many communities.²⁰⁵ Bluestone and Harrison also note that the reindustrialization of the north carries with it social costs, including greater inequality in the distribution of income.²⁰⁶

In short, widespread plant relocations waste both human and financial resources. The prevalence of long-term unemployment in many communities indicates plant closings and relocations have contributed to inefficiency in the American economy. Therefore, even examined from the perspective of the neoclassical paradigm, unimpeded capital mobility has been inefficient, and H.R. 2847, which would slow the rate

199. See Motlack, *The City as a Growth Machine: Toward a Political Economy of Place*, 82 AM. J. OF SOC. 309, 321 (1976). According to Motlack,

the systematic evidence fails to show any advantage to growth: there is no tendency for either larger places or more rapidly growing ones to have lower unemployment rates than other kinds of urban areas. In fact, the tendency is for rapid growth to be associated with higher rates of unemployment.

Id. at 321. See also *August 1978 Hearings*, *supra* note 12, at 53 (statement of Marc Stepp, Vice-President, U.A.W.). Mr. Stepp observed:

Nor has the federal government considered how to stop the ongoing and mutually ruinous competition between states and municipalities for business and jobs. These tax giveaways and other subsidies and enticements constitute a form of industrial piracy, which erode the local tax base everywhere while enriching corporate coffers, without contributing at all to the net number of jobs nationwide.

The effect of this economic warfare has been increased profits to corporations through increased tax avoidance, lower wages and minimal regulation. For the units of government, it has meant depletion of treasuries and curtailment of services; for the country as a whole, it has represented no gain in employment.

200. See BLUESTONE, *supra* note 1, at 91.

201. *Id.*

202. See GOODMAN, *supra* note 3, at 84.

203. BLUESTONE, *supra* note 1, at 91.

204. *Id.* at 105.

205. *Id.*

206. *Id.* at 92-98.

of capital mobility and internalize its social costs, would promote economic efficiency.

NORMATIVE ANALYSIS OF HOUSE BILL 2847

Economic analysis does not itself measure what is in society's best interest or what is ethical; it merely examines how to allocate goods so as to maximize utility. Economic efficiency can only be a measure of justice if utility is a measure of justice. In view of the competing value systems, a public policy encouraging plant closings might not be desirable even if Professor McKenzie is correct in his allegation that they enhance economic efficiency.

McKenzie does not oppose H.R. 2847 solely on the Pareto criteria; rather, he asserts that freedom is an overriding value justifying his position. He argues that the free market best upholds this value:

Individuals know, within tolerable limits, what is best for them in their individual circumstances and they are the ones best qualified to say what they should do and where they should live—how and where they should invest their resources, labor and financial capital. The right of entrepreneurs to use their capital assets is part and parcel of a truly free society; the centralization of authority to determine where and under what circumstances firms should invest leads to the concentration of economic power in the hands of people who run the government. Private rights to move, to invest, to buy, to sell are social devices for the dispersion of economic power.²⁰⁷

Merely asserting freedom as a value does not itself justify exercising control over capital so as to cause widespread unemployment. It must be demonstrated that the corporations have the *right* to use capital solely for their own goals. Opponents of government economic regulation have often based their opposition explicitly or implicitly on a Lockean concept of property rights. John Locke's justification of individual property rights rests on his "labor theory" of value: the person mixing his labor with a good acquires a property right to the good.²⁰⁸ According to Locke, by mixing labor with the good a person excludes the "common right" of other persons to use that property.²⁰⁹ In this highly specialized and technological world in which money serves as a store of value, this Lockean view of property acquisition has lost some of its efficacy. Instead, modern economic libertarians base their position on the premise that the state has only limited *authority* to interfere with the private use of property.²¹⁰

207. McKenzie, *supra* note 11, at 126.

208. See J. LOCKE, AN ESSAY CONCERNING THE TRUE ORIGINAL, EXTENT AND END OF CIVIL GOVERNMENT 32 (1690) (C. Sherman ed. 1937).

209. *Id.*

210. See, e.g., Robert Nozick who posits the "minimal state" as the only just one. R. NOZICK, ANARCHY, STATE AND UTOPIA (1974). See also M. FREIDMAN, CAPITALISM AND FREEDOM (1962). Frederick Hayek formerly posited his support of the neoclassical paradigm on the value of "freedom." See F. HAYEK, THE ROAD TO SERFDOM (1944). More recently Hayek's position appears to be based on Positivism: "the term social justice is wholly devoid of

While "freedom" is important in Western civilization, the concept of absolute property rights is contrary to the Judeo-Christian ethical tradition.²¹¹ The most recent papal encyclical on the subject,²¹² asserts that capital is to be a servant of the worker and not vice-versa,²¹³ and that the philosophical approach favored by proponents of the neoclassical paradigm and laissez-faire ideology, "economism," is morally unacceptable.²¹⁴

The ethical position assumed by proponents of plant closing legislation is hardly unique. These ethical principles have widespread recognition in American public policy. Labor, health, and safety laws are usually based on the assumption that workers are more valued than capital.²¹⁵

An analysis of H.R. 2847 cannot be complete without considering the value conflicts involved in the debate over restrictions on capital mobility. A complete analysis cannot be provided by weighing whether such restrictions are "efficient" or "inefficient." The public policy debate on this issue should refocus its attention on the underlying normative issues.

CONCLUSION

House bill 2847 is a necessary response to the growing problem of plant closings. State legislation and collective bargaining have proven ineffective in curtailing such closings. The corporate decision to close or relocate a plant imposes high social and economic costs upon both workers and community. Congress should act to prevent these costs from being imposed by approving House bill 2847.

House bill 2847 is consistent with the public policy of protecting

meaning or content. . . ." 2 F. HAYEK, *LAW, LEGISLATION AND LIBERTY* 96 (1976). Richard Posner would maintain that the outcome of the free market distribution of goods is just, since in his scheme wealth maximization is itself a principle of "justice." See R. POSNER, *THE ECONOMICS OF JUSTICE* (1981). On the other hand, John Rawls, while not a libertarian, would support the neoclassical paradigm to arrive at an original allocation of goods, but would then redistribute goods from the market outcome as to benefit the least well-off. Despite his support of redistribution, Rawls favors the free market scheme as a method of promoting "efficiency" and free choice of occupation. See J. RAWLS, *A THEORY OF JUSTICE* 258-84 (1971).

211. For a summation of the Roman Catholic position on government intervention in the economy, see R. MCBRIEN, *CATHOLICISM* 1043-49, 1054-55 (1981). For a Protestant view of the government's role, see S. MOTT, *BIBLICAL ETHICS AND SOCIAL CHANGE* (1982).
212. POPE JOHN PAUL II, *LABOREM EXERCENS* (1981).
213. See *id.* See also G. BAUM, *THE PRIORITY OF LABOR* (1982).
214. POPE JOHN PAUL II, *supra* note 212. See also CANADIAN CONFERENCE OF CATHOLIC BISHOPS, *ETHICAL REFLECTIONS ON THE ECONOMIC CRISIS* (1983) in which the Social Affairs Commission of the Canadian Catholic Bishops criticize plant closings and the corporate policy of "profit maximization."
215. See, e.g., *American Textile Manufacturers Institute v. Donovan*, 452 U.S. 490 (1981), in which the Court upheld the Occupational Safety and Health Administration's decision not to conduct a "cost-benefit" analysis before implementing safety standards. Cost-benefit analysis is a common tool of the neoclassical model. The Court held that in enacting the standard of "to the extent feasible" in 29 U.S.C. § 655(b)(5) (1976) instead of cost-benefit analysis, Congress "chose to place pre-eminent value on assuring employees a safe and healthful working environment. . . ." 452 U.S. at 540.

workers against the costs of laissez-faire economic policy. The National Employment Priorities Act would prove an incentive for corporate responsibility and remind management that the corporation is a mere legal and economic invention of the society in which it seeks to profit.

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