

# The Fair Labor Standards Act at 80: Everything Old Is New Again

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# THE FAIR LABOR STANDARDS ACT AT 80: EVERYTHING OLD IS NEW AGAIN

Kati L. Griffith†

*On the eightieth anniversary of the federal wage and hour statute, the Fair Labor Standards Act of 1938 (FLSA), critics warn that it cannot keep pace with shifting business trends. More and more individuals engage in “contract work,” some of which takes place in the much publicized “gig economy.” These work arrangements raise questions about whether these workers are “employees,” covered by U.S. labor and employment law, or “independent contractors.” Subcontracting arrangements, or what some call domestic outsourcing, are also expanding. Indeed, more and more workers in the U.S. economy engage with multiple businesses, raising questions of which of these businesses are “employers” responsible for the payment of wages. These are pressing questions for the judiciary, policymakers, scholars of work, and the U.S. Department of Labor because many of these individuals work in low-wage sectors and do not make minimum wages or overtime premiums for the hours they work. This Article uses a systematic study of thousands of pages of legislative-history documents to bring a historical lens to the independent contractor and joint employer debates that are raging on Capitol Hill and in the courts. It concludes that Congress broadly and flexibly worded this New Deal legislation with foresight about the need to cover evolving business relationships regardless of business formalities. It calls for a narrow reading of the independent contractor category and a broad interpretation of employment relationships that should help the FLSA to serve its statutory purpose of ensuring “a fair day’s pay for a fair day’s work” in the twenty-first century.*

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† Associate Professor of Labor & Employment Law at Cornell’s ILR School. I would like to thank Cornell ILR’s Undergraduate Research Program for providing Geoffrey Rosenthal with funding for the legislative history research. This Article benefitted enormously from Geoffrey’s diligence, careful eye, and sharp intellect. It was a true pleasure to work with him on this project over several years. The Article would not have happened without him. The Article also benefitted from the insightful comments I received from Andrew Elmore, Leslie Gates, Nicole Hallett, Michael Harper, Christopher Ioannou, Wilma Liebman, Patricia Kakalec, Patrick Oakford, and Mark Pedulla. Conversations about joint employment and theories of control with Caro Achar, Rose Batt, Deandra Fike, Michael Harper, Michael Iadevaia, Christopher Ioannou, Tashlin Lakhani, Wilma Liebman, and Seth Lutsic also shaped my thinking. I appreciate Christopher Ioannou, Steven Saltz, and the editors of the *Cornell Law Review* for their able research and editorial assistance in the final stages. All errors and omissions are the responsibility of the author.

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#### INTRODUCTION

*You reach the practice rather than the type of business.*

– Robert H. Jackson, U.S. Assistant Attorney General  
(1937)<sup>1</sup>

Born during the Depression-era in the United States, the Fair Labor Standards Act of 1938 (the FLSA or the Act) was an unprecedented governmental effort to demand that businesses across the country eliminate the practice of child labor and provide minimum wages for regular hours<sup>2</sup> and overtime premiums for long hours.<sup>3</sup> When advocating for this New Deal legislative initiative in 1937, President Franklin D. Roosevelt said that there is no justification for child labor and that there is no satisfactory “economic reason for chiseling workers’ wages or stretching workers’ hours.”<sup>4</sup> Centrally embedded in this legislation is the now-somewhat-radical notion that power imbalances between mighty employers and dependent workers created injustices that necessitated the federal government’s

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<sup>1</sup> *Fair Labor Standards Act of 1937: Part 1: Hearing on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. and Labor and the H. Comm. on Labor*, 75th Cong. 25 (1937) (statement of Robert H. Jackson, Assistant Att’y Gen., Department of Justice) [hereinafter *FLSA, Hearing Part 1*].

<sup>2</sup> 29 U.S.C. § 206 (2018).

<sup>3</sup> 29 U.S.C. § 207 (2018).

<sup>4</sup> S. REP. NO. 75-884, at 2 (1937).

establishment of a baseline floor on wages.<sup>5</sup> Without this governmental intervention, the Roosevelt administration argued, desperate workers would accept working conditions that fell below what a “self-supporting and self-respecting democracy” could tolerate.<sup>6</sup> These views ultimately propelled New Deal legislators to pass the FLSA over eighty years ago, in June of 1938.

Eighty years after its passage, the FLSA remains a central element of U.S. employment law. The U.S. Department of Labor (DOL), the executive agency that enforces the FLSA, estimates that the FLSA currently covers more than 132.8 million employees.<sup>7</sup> Federal minimum wage and overtime complaints are on the rise in recent years, surpassing even the number of employment discrimination complaints in some states.<sup>8</sup> While there is extensive praise for the FLSA,<sup>9</sup> analysts have pointed

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<sup>5</sup> *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697, 706–07 (1945) (“[The FLSA] was a recognition of the fact that due to the unequal bargaining power as between employer and employee, certain segments of the population required federal compulsory legislation to prevent private contracts on their part which endangered national health and efficiency and as a result the free movement of goods in interstate commerce.”).

<sup>6</sup> S. REP. NO. 75-884, at 2; see also *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 32 (Cal. 2018) (referring to the FLSA and state law and stating that wage and hour laws “were adopted in recognition of the fact that individual workers generally possess less bargaining power than a hiring business and that workers’ fundamental need to earn income for their families’ survival may lead them to accept work for substandard wages or working conditions”).

<sup>7</sup> 29 C.F.R. § 541 (2004); see also *Resources for Workers*, U.S. DEP’T OF LAB.: WAGE & HOUR DIVISION, <http://www.dol.gov/whd/workers.htm> [<https://perma.cc/GU4N-XLAQ>] (last visited Feb. 15, 2018) (explaining the enforcement reach of the DOL Wage and Hour Division).

<sup>8</sup> Charlotte S. Alexander, *Litigation Migrants*, 3 (June 29, 2018), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3205435](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3205435) [<https://perma.cc/AT5G-Q2DR>] (noting 400% rise in FLSA litigation between 2000-2016 and stating, “[a]s of 2016, the FLSA had overtaken employment discrimination as the most frequently filed type of workplace lawsuit in federal court in Florida, New York, and Texas, and was coming close in Illinois”); Sameer M. Ashar, *Public Interest Lawyers and Resistance Movements*, 95 CALIF. L. REV. 1879, 1895 (2007) (discussing revival of FLSA); Kati L. Griffith, *U.S. Migrant Worker Law: The Interstices of Immigration Law and Labor and Employment Law*, 31 COMP. LAB. L. & POL’Y J. 125, 146 (2009) (“[The] FLSA, which has been described as a ‘wallflower’ because of its obscurity behind the better known Title VII, has been experiencing a renaissance as low-wage migrant worker advocates and private counsel increasingly bring FLSA suits.”); see also David Borgen & Laura L. Ho, *Litigation of Wage and Hour Collective Actions Under the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POL’Y J. 129, 156 (2003) (noting the growth in “large scale” FLSA litigation involving collective actions).

<sup>9</sup> See, e.g., Benjamin I. Sachs, *Employment Law as Labor Law*, 29 CARDOZO L. REV. 2685, 2687 (2008) (considering the failures of labor law to protect collective activity and “a hydraulic effect” of two seemingly separate statutory regimes, whereby workers are turning to the FLSA and other employment laws); Hina B.

out that this New Deal statute faces an “uncertain future.”<sup>10</sup> It has been disparaged as an outdated “geriatric piece of legislation in need of updating and rejuvenation”<sup>11</sup> to keep pace with twenty-first century business realities.<sup>12</sup> For some, the FLSA is “firmly planted” in the manufacturing context of the 1930s<sup>13</sup> and cannot easily reach modern work arrangements, such as remote and/or virtual work.<sup>14</sup>

The trend of businesses mislabeling workers as “independent contractors,” rather than “employees,” is one reality that challenges FLSA enforcement. Studies have confirmed that independent contractor misclassification is widespread in the U.S. economy.<sup>15</sup> As such, many businesses are not providing

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Shah, *Broadening Low-Wage Workers' Access to Justice: Guaranteeing Unpaid Wages in Targeted Industries*, 28 HOFSTRA LAB. & EMP. L.J. 9, 44 (2010) (praising FLSA for providing damages for aggrieved plaintiffs).

<sup>10</sup> Jefferson Cowie, *The Future of Fair Labor*, NY TIMES (June 24, 2013), <https://www.nytimes.com/2013/06/25/opinion/the-future-of-fair-labor.html> [<https://perma.cc/8ENY-6EFR>] (“Despite this noble history, today the act faces an uncertain future, thanks to a series of disconcerting shifts in the way we think about work in America.”). The FLSA’s exemptions, such as its “white collar exemption” are often critiqued as confusing. Charlotte S. Alexander & Nathaniel Grow, *Gaming the System: The Exemption of Professional Sports Teams from the Fair Labor Standards Act*, 49 U.C. DAVIS L. REV. 123, 130 (2015); L. Camille Hébert, “Updating” the “White-Collar” Employee Exemptions to the Fair Labor Standards Act, 7 EMP. RTS. & EMP. POLY J. 51, 128 (2003). In 1943, legal scholar Malcolm Davisson referred to the FLSA’s coverage as “a problem of statutory delineation in [its] application.” Malcolm M. Davisson, *Coverage of the Fair Labor Standards Act*, 41 MICH. L. REV. 1060, 1060 (1943); see also *id.* at 1060–61 (noting, six years after the FLSA’s passage, that the variation in business organizational structures is an enforcement challenge).

<sup>11</sup> L. Camille Hébert, *Forward to Symposium on the Fair Labor Standards Act*, 7 EMP. RTS. & EMP. POLY J. 1, 1 (2003).

<sup>12</sup> See, e.g., Timothy B. Glynn, *Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation*, 15 EMP. RTS. & EMP. POLY J. 201, 206–12 (2011) (explaining “enterprise disaggregation” and subsequent limitations on legal liability for employers); Brishen Rogers, *Toward Third-Party Liability for Wage Theft*, 31 BERKELEY J. EMP. & LAB. L. 1, 18–27 (2010) (highlighting the ways in which the current FLSA scheme fails to deter contractor wage and hour violations); Mitchell H. Rubinstein, *Employees, Employers, and Quasi-Employers: An Analysis of Employees and Employers Who Operate in the Borderland Between an Employer-and-Employee Relationship*, 14 U. PA. J. BUS. L. 605, 610 (2012) (highlighting judicial incoherence in defining “employee” and “employer”); Katherine V.W. Stone, *Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers*, 27 BERKELEY J. EMP. & LAB. L. 251, 255–69 (2006) (listing various contemporary workplace structures and the FLSA’s failure to keep up with them).

<sup>13</sup> Ernest N. Votaw, *The Professional Exemption in the Fair Labor Standards Act*, 5 VAL. U. L. REV. 511, 523 (1971).

<sup>14</sup> Miriam A. Cherry, *Working for (Virtually) Minimum Wage: Applying the Fair Labor Standards Act in Cyberspace*, 60 ALA. L. REV. 1077, 1092–95 (2009).

<sup>15</sup> See U.S. GOV’T ACCOUNTABILITY OFF., GAO-15-168R, *CONTINGENT WORKFORCE: SIZE, CHARACTERISTICS, EARNINGS, AND BENEFITS* (2015); CONG. RESEARCH SERV.,

employees with minimum wage and overtime protections.<sup>16</sup> There are many incentives for businesses to classify a worker as an independent contractor. Such a classification reduces employers' costs and their susceptibility to regulation and litigation.<sup>17</sup>

It is not always easy, however, to identify independent contractor misclassification. The DOL alters its standards based on which political party is in office. Courts have done little to clarify things. They have been inconsistent in the ways that they have drawn the line between independent contractors and employees under the FLSA. Further complicating matters, new trends raise complicated questions about who is a true independent contractor excluded from the Act's protections. Most notably, the recent growth in workers who depend on freelance or "contract work," has received a lot of attention.<sup>18</sup> For exam-

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R40807, TAX GAP: MISCLASSIFICATION OF EMPLOYEES AS INDEPENDENT CONTRACTORS (2011); U.S. GOV'T ACCOUNTABILITY OFF., GAO-09-717, EMPLOYEE MISCLASSIFICATION: IMPROVED COORDINATION, OUTREACH, AND TARGETING COULD BETTER ENSURE DETECTION AND PREVENTION (2009).

<sup>16</sup> See *Misclassification of Employees as Independent Contractors*, U.S. DEPT. OF LABOR WAGE & HOUR DIVISION, <https://www.dol.gov/whd/workers/misclassification/> [<https://perma.cc/QLZ5-5BXZ>]; see also *Administrator's Interpretation No. 2015-1, The Application of the Fair Labor Standards Act's "Suffer or Permit" Standard in the Identification of Employees Who Are Misclassified as Independent Contractors*, U.S. DEPT. OF LABOR WAGE & HOUR DIVISION (July 15, 2015), [https://web.archive.org/web/20170110070514/www.dol.gov/whd/workers/Misclassification/AI-2015\\_1.pdf](https://web.archive.org/web/20170110070514/www.dol.gov/whd/workers/Misclassification/AI-2015_1.pdf) [<https://perma.cc/PS78-9PSS>].

<sup>17</sup> *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 5 (Cal. 2018) ("[T]he risk that workers who should be treated as employees may be improperly misclassified as independent contractors is significant in light of the potentially substantial economic incentives that a business may have in mischaracterizing some workers as independent contractors. Such incentives include the unfair competitive advantage the business may obtain over competitors that properly classify similar workers as employees and that thereby assume the fiscal and other responsibilities and burdens that an employer owes to its employees. In recent years, the relevant regulatory agencies of both the federal and state governments have declared that the misclassification of workers as independent contractors rather than employees is a very serious problem, depriving federal and state governments of billions of dollars in tax revenue and millions of workers of the labor law protections to which they are entitled.").

<sup>18</sup> See Lawrence F. Katz & Alan B. Krueger, *The Rise and Nature of Alternative Work Arrangements in the United States, 1995-2015*, at 6-8 (Nat'l Bureau of Econ. Research, NBER Working Paper No. 22667, 2016), [https://krueger.princeton.edu/sites/default/files/akrueger/files/katz\\_krueger\\_cws\\_-\\_march\\_29\\_20165.pdf](https://krueger.princeton.edu/sites/default/files/akrueger/files/katz_krueger_cws_-_march_29_20165.pdf) [<https://perma.cc/3N6J-MZUT>] (noting the significant rise of on-call, contract, and freelancing between 1995 and 2015). A recent NPR/Marist poll suggested that one in five workers engages in some contract work. *NPR/Marist Poll January 2018: Picture of Work*, MARIST POLL (Jan. 22, 2018), [http://maristpoll.marist.edu/wp-content/misc/usapolls/us171204\\_KoC/NPR/NPR\\_Marist%20Poll\\_National%20Nature%20of%20the%20Sample%20and%20Tables\\_January%202018.pdf#page=3](http://maristpoll.marist.edu/wp-content/misc/usapolls/us171204_KoC/NPR/NPR_Marist%20Poll_National%20Nature%20of%20the%20Sample%20and%20Tables_January%202018.pdf#page=3) [<https://perma.cc/KQM7-NNNG>]. Data based on the Bureau of Labor Statistics questions this number. See Bureau of Labor Statistics,

ple, the rise of work procured through online platforms, such as Uber and TaskRabbit, has raised questions about whether those who contract to perform services for such companies are statutory employees or independent contractors not covered by the Act.<sup>19</sup> Seth Harris and Alan Krueger's provocative work boldly contends that gig economy jobs "do not fit" traditional definitions of employee under the FLSA.<sup>20</sup> A recent *New York Times* article proclaimed that legal questions surrounding Uber drivers "highlights outdated worker protections."<sup>21</sup> These assertions about the current law's failure to keep pace with modern work arrangements notwithstanding, given the prevalence and diversity of such work, it will take federal courts and the DOL decades to sort out which of these workers are true independent contractors under the FLSA's regime.<sup>22</sup>

The growth of workplaces involving multiple business entities is another formidable challenge to the eighty-year-old FLSA. In fact, some researchers argue that the proliferation of subcontracting and outsourcing arrangements, rather than the growth of the gig economy, is the central dynamic to understanding changes in the nature of work.<sup>23</sup> In this vein, David Weil, a management professor who served as DOL Wage and

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*Contingent and Alternative Employment Arrangements – May 2017*, U.S. DEPT OF LAB. (June 7, 2018), <https://www.bls.gov/news.release/pdf/conemp.pdf> [<https://perma.cc/S8XA-PFMC>] (illustrating that workers provided by contract firms, temporary help agency workers, on-call workers and independent contractors combined make up just over 10% of the U.S. workforce).

<sup>19</sup> See Richard A. Bales & Christian Patrick Woo, *The Uber Million Dollar Question: Are Uber Drivers Employees or Independent Contractors?*, 68 *MERCER L. REV.* 461, 472–77 (2017) (explaining Uber's arguments in favor of independent contractor status, and its drivers' arguments in favor of employee status); see also Omri Ben-Shahar, Opinion, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, *FORBES* (Nov. 15, 2017, 11:24 AM), <https://www.forbes.com/sites/omribenshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#5c46c1675e55> [<https://perma.cc/3GWF-LFW8>] (noting recent litigation over Uber's employer status).

<sup>20</sup> Seth D. Harris & Alan B. Krueger, *A Proposal for Modernizing Labor Laws for Twenty-First-Century Work: The "Independent Worker,"* in *WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR*, 67 (Kati L. Griffith & Sam Estreicher eds., 2015).

<sup>21</sup> Steven Davidoff Solomon, *Uber Case Highlights Outdated Worker Protection Laws*, *N.Y. TIMES*, Sept. 16, 2015, at B-4.

<sup>22</sup> James Reif, *'To Suffer or Permit to Work': Did Congress and State Legislatures Say What They Meant and Mean What They Said?*, 6 *N.E. U. L.J.* 347, 362–79 (2014).

<sup>23</sup> Annette Bernhardt et al., *Domestic Outsourcing in the U.S.: A Research Agenda to Assess Trends and Effects on Job Quality* 1–3 (Inst. for Res. on Lab. and Emp., Working Paper No. 102-16, 2016), <http://irle.berkeley.edu/workingpapers/102-16.pdf> [<https://perma.cc/V9KD-78KP>]; see also Glynn, *supra* note 12, at 204 (arguing that business splintering or outsourcing will continue to grow in post-recession America).

Hour Administrator under President Obama, has brought attention to the FLSA enforcement challenges that arise from recent growth in what he dubs the “fissuring” of businesses. His book, *The Fissured Workplace*, draws on case studies and statistical analyses of administrative data to make a compelling argument that we can no longer assume the “vertically-integrated” business model.<sup>24</sup>

Weil’s work illustrates that enforcement of the FLSA has become more difficult, in part because businesses have “shed” aspects of their company such as accounting services,<sup>25</sup> human resources management,<sup>26</sup> janitorial tasks,<sup>27</sup> and maintenance.<sup>28</sup> Instead of keeping these functions “in house,” many businesses are engaging separate business entities to provide these services through subcontracting, licensing, and franchising arrangements.<sup>29</sup>

According to Weil and others, this fissuring muddles the legal boundaries of employment relationships because multiple businesses have effects on wages and working conditions.<sup>30</sup> The expanded use of temporary agencies, for instance, often raises questions about whether the company where the temporary agency places an individual is an employer, along with the temporary agency.<sup>31</sup> The FLSA holds that each entity qualifying as an “employer” is responsible for minimum wage and overtime violations, even if it exists alongside other employers (sometimes referred to as “joint employers”).<sup>32</sup>

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<sup>24</sup> DAVID WEIL, *THE FISSURED WORKPLACE: WHY WORK BECAME SO BAD FOR SO MANY AND WHAT CAN BE DONE TO IMPROVE IT* 3–4 (2014).

<sup>25</sup> *Id.* at 52.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 90.

<sup>28</sup> *Id.* at 55.

<sup>29</sup> *Id.* at 99.

<sup>30</sup> *Id.* at 9.

<sup>31</sup> In the agricultural context, these questions are not new. Farmworkers’ interactions with growers and intermediaries, often referred to as “farm labor contractors,” raise questions about whether they have one or two employers. See Annie Smith & Patricia Kakalec, *Joint Employment in the Agricultural Sector*, in WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR, *supra* note 20, at 379, 380–81; see also *Barfield v. N.Y. City Health & Hosps. Corp.*, 537 F.3d 132, 153 (2d Cir. 2008) (holding that a certified nursing assistant had joint employment with a hospital and a referral agency that referred her to work at the hospital); *Pfohl v. Farmers Ins. Group*, No. CV03-3080, 2004 WL 554834, at \*7 (C.D. Cal. Mar. 1, 2004) (holding that an insurance company employer, along with the temporary agency, was not a “joint employer”); *Catani v. Chiodi*, Civ. No. 00-1559 (DWF/RLE), 2001 U.S. Dist. LEXIS 17023, at \*20 (D. Minn. Aug. 13, 2001) (holding that a temporary staffing agency, which only conducted payroll services, was not a joint employer).

<sup>32</sup> See 29 C.F.R. § 791.2 (2018); see also 29 U.S.C. §§ 206–207 (2018).



The growth of contracting and other forms of splintered business arrangements in recent years challenges policymakers, the courts, and the DOL.<sup>33</sup> These challenges to the FLSA, as well as others, have led many to call for reform of the FLSA's language<sup>34</sup> and to offer new theories of liability<sup>35</sup> that, ostensibly, would fit better with evolving working arrangements. Some have even called for a new "independent worker" regulatory category that would incorporate some aspects of the employment relationship and some aspects of the independent contractor relationship.<sup>36</sup>

On the other end of the spectrum, business allies have challenged the FLSA, not for its failure to broadly cover evolving business relationships, but because it has reached too broadly. These concerns stem from a recent FLSA court case and a

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<sup>33</sup> See also W. Jonathan Martin II et al., *Labor and Employment Law*, 68 MERCER L. REV. 1061, 1070 (2017) (citing *Garcia-Celestino v. Ruiz Harvesting, Inc.*, 843 F.3d 1276 (11th Cir. 2016)). See generally David Borgen, *Advanced Issues in FLSA Collective Actions: Joint Employment*, 10 EMP. RTS. & EMP. POL'Y J. 447 (2006) (discussing developments in joint employer law).

<sup>34</sup> Professor Mack Player, for example, argues that the language is confusing and thus leads to excessive litigation. Player contends that Congress should amend the FLSA to cover all the employers that affect commerce. Mack A. Player, *Enterprise Coverage Under the Fair Labor Standards Act: An Assessment of the First Generation*, 28 VAND. L. REV. 283, 346–47 (1975). For other critiques, see Scott D. Miller, *Work/Life Balance and the White-Collar Employee Under the FLSA*, 7 EMP. RTS. & EMP. POL'Y J. 5, 7, 33, 46 (2003) (suggesting amendments to the FLSA to promote healthy work life balance in the United States).

<sup>35</sup> See, e.g., Geoffrey A. Mort, *Beyond Joint Employers: Other Theories of Franchisor Liability*, in WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR, *supra* note 20, at 397, 397–407; Alan Hyde, *Nonemployer Responsibility for Labor Conditions*, in WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR, *supra* note 20, at 409, 409–17; Matthew T. Bodie, *Participation as a Theory of Employment*, 89 NOTRE DAME L. REV. 661, 665 (2013) (arguing that, to consider employment status, decision-makers should "differentiate between members and nonmembers of an economic firm" and whether the workers are "participants in a common economic enterprise organized into a business entity"); Lynn M. LoPucki, *Toward a Trademark-Based Liability System*, 49 UCLA L. REV. 1099, 1103 (2002) ("Trademark owners who authorize franchisees, subsidiaries, affiliates, and other licensees to use the owners' trademarks to identify themselves or their products to customers should be jointly and severally obligated for the licensees' liabilities to those customers."); Benjamin Means & Joseph A. Seiner, Essay, *Navigating the Uber Economy*, 49 U.C. DAVIS L. REV. 1511, 1514 (2016) (arguing that the focus should be on how much flexibility workers have in defining the contours of their work lives).

<sup>36</sup> Harris & Krueger, *supra* note 20, at 37. For critique of this category see Lawrence Mishel & Ross Eisenbrey, *Uber Business Model Does Not Justify a New "Independent Worker" Category*, WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR, *supra* note 20, at 109, 109–11. For a call for rights for "dependent contractors" see Elizabeth Kennedy, Comment, *Freedom from Independence: Collective Bargaining Rights for "Dependent Contractors"*, 26 BERKELEY J. EMP. & LAB. L. 143 (2005).

recent decision from the National Labor Relations Board (NLRB). In 2017, the U.S. Court of Appeals for the Fourth Circuit expansively portrayed the FLSA's joint employer reach as applying when two or more business entities "share, agree to allocate responsibility for, or otherwise codetermine—formally or informally, directly or indirectly—the essential terms and conditions of the worker's employment."<sup>37</sup>

This formulation of the employment relationship means that businesses that indirectly determine essential terms and conditions of employment are "employers" responsible for wage and hour violations, along with the businesses that directly make these determinations. In its August 2015 *Browning-Ferris* decision, the NLRB stated that two or more employers can be joint employers of the same employees if they "share or codetermine those matters governing the essential terms and conditions of employment."<sup>38</sup> This formulation of the boundaries of the employment relationship, similar to the Fourth Circuit's, would extend to businesses that "codetermine" terms and conditions of employment even if they do not have direct control over the terms and conditions.

As a result of these broad interpretations of the boundaries of the employment relationship, Congress is currently considering a bill that would amend the FLSA and the NLRA in an

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<sup>37</sup> *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017). For critique, see *Bill Summary, Save Local Business Act*, COMMITTEE ON EDUC. & WORKFORCE (July 27, 2017), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401930> [<https://perma.cc/C54R-ZRTZ>] ("Unfortunately, unelected NLRB bureaucrats, federal regulators, and activist judges have taken steps to dramatically change what constitutes a 'joint employer,' creating uncertainty for America's job creators and entrepreneurs. . . . In January 2017, the U.S. Court of Appeals for the Fourth Circuit adopted an expansive new joint employer standard under the FLSA in *Salinas v. Commercial Interiors, Inc.* The new test finds joint employer status under the FLSA where 'two or more persons or entities are not completely disassociated . . .' with respect to their separate workplaces. The Fourth Circuit's test seems to make any relationship or collaboration between two businesses a joint employment relationship because the two entities will not be completely disassociated. To make matters worse, *Salinas* states that 'one factor alone can serve as the basis for finding that two or more . . . entities are not completely disassociated.' This test is even broader than the joint employer test under *Browning-Ferris*, and has contributed to a growing patchwork of joint employer standards across the country.").

<sup>38</sup> If a common-law employment relationship exists between the parties, the Board will then inquire "whether the putative joint employer possesses sufficient control over employees' essential terms and conditions of employment to permit meaningful collective bargaining." It will also "no longer require that a joint employer not only possess the authority to control employees' terms and conditions of employment, but also exercise that authority." *Browning-Ferris Indus. of Ca., Inc.*, 362 N.L.R.B. No. 186, at 6–7. (Aug. 27, 2015) (3–2 decision) *aff'd in part, rev'd in part and remanded*, No. 16-1028 (D.C. Cir. Dec. 28, 2018).

effort to restrict regulation of secondary businesses. If this legislation is successful it would narrow the definitions of the employment relationship to only apply where a business has “direct and immediate” control over a worker’s activities.<sup>39</sup> This proposed bill, currently entitled the Save Local Business Act, H.R. 3441, has provoked heated arguments among legislators on both sides of the aisle and would constitute a major change in the FLSA’s reach.<sup>40</sup>

This Article uses a historical analysis of the FLSA’s legislative beginnings to contend that the FLSA’s expansive and flexible definitions of employment were intentional and provide courts and administrators with what they need to help the FLSA thrive in the twenty-first century. It also reveals that evolving business relationships and structures, including business splintering, are not unprecedented. In 1944, six years after the FLSA’s enactment, the U.S. Supreme Court observed the “[m]yriad forms of service relationships, with infinite and subtle variations in the terms of employment, [that] blanket the nation’s economy.”<sup>41</sup> In the late 1930s, when enacting the FLSA, Congress acknowledged and foresaw the challenges of varied business forms and sought to address them with broad and pliable statutory language defining the employment relationship. This legislative foresight is quite remarkable and it is what prompted me to include in the title of this Article, the

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<sup>39</sup> Save Local Business Act, H.R. 3441, 115th Cong. § 2(a)(B) (2017) (“A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline.”). Rep. Bradley Byrne (R-AL) introduced H.R. 3441 in the House of Representatives on July 27, 2017. The same day, Congress referred it to the House Committee on Education and the Workforce. On September 13, 2017, the Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor, and Pensions held hearings on the bill. On November 7, 2017, the House passed it with a vote of 242–181. The Senate received H.R. 3441 on November 8, 2017. The Senate has not yet taken further action on the bill.

<sup>40</sup> See generally Hassan A. Kanu & Tyrone Richardson, *Lawmakers in Alternate Universes on Joint Employer Issue*, BLOOMBERG BNA (July 12, 2017), <https://www.bna.com/lawmakers-alternate-universes-n73014461636> [<https://perma.cc/TQ5R-TG4W>] (noting Democrat and Republican arguments on joint employer liability); Tyrone Richardson & Hassan A. Kanu, *Congress: Republican Lawmakers Plan Rollout of Joint Employer Bill*, BLOOMBERG BNA (July 6, 2017), <https://www.bna.com/republican-lawmakers-plan-n73014461289> [<https://perma.cc/HP8U-R9L7>]; Ben Penn & Chris Opfer, *DOL Changes Course on Worker Classification, Joint Employers*, BLOOMBERG BNA (June 7, 2017), <https://www.bna.com/dol-changes-course-n73014452985> [<https://perma.cc/DSV3-MKSQ>].

<sup>41</sup> *NLRB v. Hearst Publs., Inc.*, 322 U.S. 111, 126 (1944).

saying that “Everything Old is New Again.” By bringing this historical lens, the Article provides a new perspective to the independent contractor and joint employer debates that are currently raging on Capitol Hill and in the courts.<sup>42</sup> The historical viewpoint calls for a narrow reading of the independent contractor category and a broad interpretation of employment relationships—including joint employer relationships—that should help the FLSA to serve its New Deal-era statutory purposes of ensuring minimum wages and overtime premiums to low-wage workers.

The Article proceeds as follows. In Part I, the Article analyzes Congress’ purposes with respect to the FLSA’s application to employment relationships through an intensive study of the FLSA’s legislative history. The Article’s systematic review of the FLSA’s legislative path in 1937 and 1938 included the hearings (4 total), reports (6 total), and debates (14 total) that took place before the bill’s enactment in June of 1938. As Part I will flesh out further, this examination illustrates that the framers of the FLSA, concerned about enforcement challenges, intentionally used broad and malleable language. Even though they did allow notable and problematic exemptions for such areas as agricultural labor and domestic work,<sup>43</sup> New Deal legislators

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<sup>42</sup> There has been partisan disagreement regarding H.R. 3441’s impact on the FLSA. Rep. Bobby Scott (D-VA), ranking member of the House Committee on Education and the Workforce, heavily criticized the bill and its disruption of the FLSA in a Fact Sheet released on September 8, 2017. *Fact Sheet, H.R. 3441: The “Save Local Business Act of 2017”*, COMMITTEE ON EDUC. & WORKFORCE DEMOCRATS (2017), <https://democrats-edworkforce.house.gov/imo/media/doc/2017-09-08%20Joint%20Employer%20Fact%20Sheet.pdf> [<https://perma.cc/T2TJ-KP85>] (“H.R. 3441 replaces almost a century of law with chaos, creating uncertainty for workers and enabling unscrupulous employers to evade obligations under . . . the *Fair Labor Standards Act* (FLSA). . . . When Congress passed the FLSA . . . it sought to ensure that client employers who control the economic realities of their subcontracted employees will be legally responsible for their subcontractors’ compliance. This bill enables joint employers to escape liability by narrowing the definition of who is a joint employer to only those who exercise direct control over all aspects of the employment relationship, even if the client employer establishes the economic realities of the employment relationship.”). Unsurprisingly, Republicans take a different view of H.R. 3441, as outlined in a Fact Sheet released by the Republican-led House Committee on Education and the Workforce. *Fact Sheet, Save Local Business Act*, COMMITTEE ON EDUC. & WORKFORCE (2017), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=401927> [<https://perma.cc/GS7G-RPK2>] (“Hiring. Work schedules. Pay increases. These are all decisions that take place between an employer and employee. . . . During the Obama administration, regulators and activist judges also expanded the joint employer scheme under the FLSA. Although the Trump administration has taken steps to provide some relief, further action is needed to provide certainty for America’s job creators and prevent future federal overreach.”).

<sup>43</sup> See *Fair Labor Standards Act of 1938*, Pub. L. No. 718-676, 52 Stat. 1060, 1067 (carving out an exclusion for agricultural workers); see also 82 CONG. REC.

and administrators feared that too much specificity in the definition of employment would make it unadaptable to evolving business relationships and structures. They feared the specificity would encourage some businesses to splinter off parts of their business organizations in an effort to evade the FLSA's reach. They did not want formalities such as labels, contracts, place of work, or manner of payment to dictate who is in and who is out when it comes to the FLSA's coverage of employment relationships.

While twenty-first century businesses are certainly different from their vertically-integrated New Deal counterparts, the idea that some business arrangements would make it difficult to enforce the FLSA is not a new dynamic of our twenty-first century economy. In fact, one of the first proposed versions of the FLSA, introduced in 1937, explicitly recognized that a major enforcement challenge would be that some businesses would misclassify true employees as "independent contractors," thereby erroneously depriving workers of the FLSA's wage-and-hour protections.<sup>44</sup>

In Part II, the Article uses Part I's historical analysis to reconsider the FLSA's viability in the face of recent growth in contracting and other forms of business fissuring. It contends that courts, the DOL, and policymakers need to embrace this past in order to improve the FLSA's viability and stated purposes in the twenty-first century. Similar to what some schol-

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1,469 (1937) (statement of Rep. Emmanuel Celler) ("Frankly, what is all the shooting for? This bill excludes agricultural workers, domestic workers, those engaged in dairy farming, cotton processors, as well as those in the canning industries; salesmen, both on the inside as well as those working on the outside, are excluded; and all workers involved in seasonal industries are outside of the provisions of the bill."); Kati L. Griffith, *The Power of a Presumption: California as a Laboratory for Unauthorized Immigrant Workers' Rights*, 50 U.C. DAVIS L. REV. 1279, 1309–15 (2017) (describing legislative history behind agricultural exclusion and the view that the exclusion was a political compromise to get the bill passed); Deborah C. Malamud, *Engineering the Middle Classes: Class Line-Drawing in New Deal Hours Legislation*, 96 MICH. L. REV. 2212, 2289 (1998) ("As signed by Roosevelt on June 25, 1938, the Fair Labor Standards Act contained a broad definition of 'employee,' but exempted from the statute's maximum-hour provisions 'executive, administrative, and professional' employees."). For a recent Court case allowing for a broader reading of exemptions, see *Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1142 (2018) ("Because the FLSA gives no 'textual indication' that its exemptions should be construed narrowly, 'there is no reason to give [them] anything other than a fair (rather than a 'narrow') interpretation.'").

<sup>44</sup> S. 2475, 75th Cong. § 2(7) (1937) ("The Board shall have power to . . . determin[e] the number of employees employed by any employer to prevent the circumvention of the Act . . . through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premises employees, or by any other means or device").

ars have shown in the National Labor Relations Act context,<sup>45</sup> the FLSA's legislative history reveals that courts and the DOL have too often interpreted the reach of the FLSA too narrowly.<sup>46</sup>

The FLSA's past reminds us that Congress intended the FLSA's minimum wage and overtime protections to reach all businesses that allow work to be performed on their behalf and have the power to affect wage and hour compliance, regardless of indirect business relationships and business formalities. In the words of then Assistant Attorney General Robert Jackson represented at the outset of this Article, the FLSA reaches those entities that bear responsibility for the failure to pay baseline wages, regardless of the "type of business." This legislative history examination serves as support for legislators, courts, bureaucrats, and scholars who call for an expansive reading of the FLSA's reach and to those who promote a revitalization of the FLSA to address the evolving nature of work relationships. Only then can the eighty-year-old FLSA serve its statutory purpose of ensuring "a fair day's pay for a fair day's work"<sup>47</sup> in the twenty-first century.

## I

### HISTORICAL LESSONS: THE FLSA'S LEGISLATIVE HISTORY

Since the Article relies mainly on legislative history for the analysis that follows, it is worth noting at the outset the strengths and limits of legislative history as an interpretive tool. The main sources of "legislative history" are the reports, debates, and hearings that occur as a bill makes its way through the legislative process before enactment. There is significant debate about whether legislative history can tell us anything about the intent behind a piece of enacted legislation. Critics of reliance on legislative history rightly point out that a group of individual legislators simply cannot have a joint intent.<sup>48</sup> Plainly put, it is a fiction to suggest that a group of

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<sup>45</sup> ELLEN DANNIN, *TAKING BACK THE WORKERS' LAW: HOW TO FIGHT THE ASSAULT ON LABOR RIGHTS* 36–37 (2006); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of the Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 318 (1978)).

<sup>46</sup> Keith Cunningham-Parmeter, *From Amazon to Uber: Defining Employment in the Modern Economy*, 96 B.U. L. REV. 1673, 1704–14 (2016) (noting that judges narrowly construe the meaning of "control" due to lack of a clear standard); Bruce Goldstein et al., *Enforcing Fair Labor Standards in the Modern American Sweatshop: Rediscovering the Statutory Definition of Employment*, 46 UCLA L. REV. 983, 1103 (1999) (critiquing the judiciary's narrow reading of "employ").

<sup>47</sup> S. REP. NO. 75-884, at 2 (1937).

<sup>48</sup> Kati L. Griffith, *When Federal Immigration Exclusion Meets Subfederal Workplace Inclusion: A Forensic Approach to Legislative History*, 17 N.Y.U. J.

people shared the same thoughts when they voted for the legislation. Others draw from public choice theory to argue that the “true intents” behind legislation are brokered deals that result from the pressure of powerful lobbyists and interest groups.<sup>49</sup> Thus, for public-choice theorists, there are no high-minded public-interest-based intents, but rather intents to please influential groups that often do not represent the broader public good.<sup>50</sup> They view a piece of legislation as representative of the efficacy of power and money in politics, not popular will.<sup>51</sup>

These hard-hitting critiques of legislative history notwithstanding, this Article takes the position that legislative history does have useful interpretive value. The Article does not intend to use legislative history to ferret out the true underlying intents of the legislators. Instead, it uses legislative history to help interpret what the stated meanings and purposes of the statute were when it was making its way through the legislative process. Regardless of the “true intents” of individual legislators, the legislative history can illuminate the statutory purposes and interpretations that congressional representatives set forth on the record. While there are certainly skeptics in the judiciary, the stated views of legislators do carry some weight when it comes to law and policy analysis. Judges, when making legal determinations about how to apply a statute to a particular situation, are tasked with determining how Congress would apply the law to the situation. Many judges look to statutory language, case law precedent, and legislative history to inform their determinations of what Congress meant when it used particular statutory language.

We should take care, however, in *how* we use legislative history as an interpretive tool. I find persuasive the critique that many courts and legal scholars have misused legislative history documents by cherry-picking the helpful pieces, rather than looking at the full body of documentation more objectively. This misuse of legislative-history documents fuels those who aim to entirely discredit legislative history as an interpretive tool. To offset the common tendency in legal analysis to cherry-pick, I have developed “a forensic approach to legislative

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LEGIS. & PUB. POL'Y 881, 892 (2014) (describing the various views involved in the debate over reliance on legislative history in legal analysis).

<sup>49</sup> *Id.* at 893.

<sup>50</sup> See, e.g., John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 248, 249 n.133 (2000).

<sup>51</sup> See, e.g., EAMONN BUTLER, PUBLIC CHOICE: A PRIMER, 36-37 (The Inst. of Econ. Affairs ed., 2012), [https://ccs.in/sites/all/books/com\\_books/public-choice-a-primer.pdf](https://ccs.in/sites/all/books/com_books/public-choice-a-primer.pdf) [<https://perma.cc/BY2D-LPBT>].

history.” This approach proposes a more objective, systematic, and comprehensive analysis of legislative history to avoid these pitfalls.<sup>52</sup> The Article uses that approach here. The analysis put forth here emerges from a systematic review of all of the FLSA’s legislative history from 1937 and 1938. It considered all references to employ, employee, and employer in the legislative history, as well as any discussion of the FLSA’s enforcement machinery and coverage.<sup>53</sup> My Research Assistant and I reviewed all reports, debates, and hearings related to the proposed bill.

As the Article will further elaborate upon below, a central theme that emerged from this “forensic” review of the FLSA’s legislative history was a desire to cover businesses who allow work to be done on their behalf and are in a position to prevent wage and hour abuses, regardless of indirect business relationships and business formalities. It also revealed that New Deal congressional and administrative representatives were well aware of the changing nature of business organizations and practices, including the practices of contracting, subcontracting, and other kinds of splintering. Their statements on the record denote that they intended to reach these practices regardless of whether businesses used these intentionally in an effort to avoid the FLSA’s reach, or whether businesses used these practices simply as a non-evasive response to economic circumstances. Nonetheless, the legislative history consistently shows an intent to make sure that the FLSA has blanket-type coverage of the low-wage workforce and that there are not loopholes in coverage that create incentives for businesses to splinter off work. In the subparts that follow, the Article explains three central observations flowing from my comprehensive legislative history review that relate to these overarching themes.

#### A. Covering Indirect Relationships Regardless of Business Form

The FLSA’s legislative history illustrates that the FLSA’s framers intended to reduce incentives for businesses to use intermediaries, or to change form, in order to gain exclusion from the Act’s coverage. In the words of these New Deal legislators and administrators, they intended to restrict businesses

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<sup>52</sup> Griffith, *supra* note 48, at 900–01.

<sup>53</sup> We engaged targeted searches of the documents for these terms, but also read through the documents in their entirety to avoid missing relevant discussions that did not use these specific terms.



from avoiding coverage through “means or device[s]” of evasion<sup>54</sup> that would distance themselves from front-line workers. Moreover, the legislative history overwhelmingly communicates that one of Congress’ purposes was for those interpreting the FLSA to have some leeway to adapt as businesses restructured in response to economic circumstances, or to evade liability under the Act.

The observations presented in this subpart, along with the two that follow it, all relate to discussions that emerged originally from a particular provision that the drafters included in the first version of the wage and hour bill in 1937. Senator Hugo Black (D-Ala.) and Representative William Connery (D-Mass.) first introduced this proposed legislation, then referred to as the Black-Connery bill, on May 24, 1937. It included § 6(a), a provision which would set up a Board to administer the Act. This Board would have the power to establish a coverage threshold for businesses; specifically, it would set a minimum number of employees in a business for purposes of coverage. The purpose of this power was to enable the Board to set the coverage threshold number in ways that would “prevent” businesses from circumventing the Act through tools of evasion. The proposed provision, 6(a), stated in full:

The Board shall have power to . . . determin[e] the number of employees employed by any employer to prevent the circumvention of the [A]ct . . . through the use of agents, independent contractors, subsidiary or controlled companies, or home or off-premise employees, or by any other means or device.<sup>55</sup>

This language shows that from the outset, legislators were well aware that some businesses would use intermediaries to try to evade coverage. It confirms that the FLSA’s framers wanted to render these kinds of tools of evasion ineffective. It specifically called out the misclassification of independent contractors as one type of problematic device. It also referenced the use of separate splintered-off business entities, such as subsidiaries, agents, or “controlled companies,” as common methods of evasion. As the following subpart will elaborate upon, Congress was also concerned about off-premises work, such as industrial homework, as an evasive tactic.

The plain language of this proposed provision § 6(a) exposes that Congress did not want to allow businesses who were

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<sup>54</sup> S. 2475, 75th Cong. § 6(a) (1937).

<sup>55</sup> *Id.*

responsible for wage and hour compliance to escape coverage by changing the way the business was organized or categorized. The words of U.S. Assistant Attorney General Robert Jackson, presented at the outset of this Article, illustrate this point well. Jackson, who later served as U.S. Solicitor General, U.S. Attorney General, and then U.S. Supreme Court Justice, avowed that “it does not make very much difference whether it is a chain store, a group of manufacturing plants, or an individual. You reach the practice rather than the type of business.”<sup>56</sup>

Furthermore, the plain language of this proposed provision exhibits congressional foresight about the evolving nature of businesses, as well as the evolving nature of tools of evasion. It shows an awareness that courts and administrators would need to continually adapt to changing business practices. Notably, the language of § 6(a) represented above, after including a list of specific tools of evasion, also added “or by any other means or device” as a catchall phrase. This open-ended language shows congressional intent to cover evolving business arrangements and employment relationships that may not have been known to Congress in the 1930s.

In the next two subparts, the Article continues to trace how discussions about this initial proposed provision, § 6(a), illustrate that the FLSA’s broad and flexible language resulted from an effort to adapt to evolving business practices and to reduce business incentives to change form, or splinter off work to intermediaries, to avoid the FLSA’s reach. In this way, the Article demonstrates that Weil’s concept of business fissuring, or splintering, has New Deal roots.

## B. Covering Off-Premises Work, Piecework, and Commission Work

Throughout the FLSA’s legislative path, legislators expressed further trepidation about “splintering” and business formalities getting in the way of the FLSA’s purposes in its discussions of off-premises work and piecework. Off-premises work is work that occurs away from workspaces that a business owns or leases.<sup>57</sup> Piecework is work that is compensated by the number of “pieces” completed, rather than by the number of hours worked.<sup>58</sup> Much of, but not all of, the work de-

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<sup>56</sup> FLSA, *Hearing Part 1*, *supra* note 1, at 25 (statement of Robert H. Jackson, Assistant Att’y Gen., Department of Justice).

<sup>57</sup> See 29 C.F.R. §§ 785.11, 785.12 (2018).

<sup>58</sup> See 29 C.F.R. §§ 530.1(d), 778.418; see also *Industrial Homework*, U.S. DEPT. OF LAB., <https://www.dol.gov/general/topic/wages/industrialhomework>

scribed in this regard involved “industrial homework,” clothing, or other types of assembly work performed at home, but which ultimately benefitted a large business.<sup>59</sup> Moreover, much of this work involved big businesses subcontracting with small contractors (jobbers) in the garment/textile industry who then contracted with homeworkers. Other home-based work included such things as assembly of jewelry, tobacco products, and children’s toys.<sup>60</sup> This common New-Deal-era business practice was sometimes referred to as “the sweating system,” because of the small profit margins for contractors, and the often dismal working conditions for those individuals performing the labor.

The use of industrial homework and small “sweatshop” contractors in the textile industry are historical examples of breaking away, or fissuring, pieces of the work from a business’ central operation. Professor Matthew Finkin’s historical work in this area highlights that the question of whether to regulate industrial homework was “hotly contested” in the years leading up to the FLSA’s enactment.<sup>61</sup> As this subpart will elucidate further, the FLSA’s legislative history relating to off-premises work and piecework illustrates congressional purposes to include broad language that would reach some businesses who are responsible for work performed, even if a separate entity directly controls most aspects of the working conditions. It also portrays that Congress wanted to reduce incentives to splinter off aspects of a business for the purpose of evading the Act’s reach.

Section 6(a) of the initial proposed bill, discussed above, explicitly mentioned the use of off-premises employees as a practice that would not make a business immune from the FLSA’s responsibilities. The legislative history is replete with examples of witnesses, administrators, and legislators who worried that the Act would exclude businesses who engage off-premises workers and pieceworkers from the FLSA’s protections. During the FLSA’s path toward enactment, many voices

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[<https://perma.cc/D5WB-82BD>]; *Fact Sheet #24: Homeworkers Under the Fair Labor Standards Act (FLSA)*, U.S. DEPT. OF LAB., <https://www.dol.gov/whd/regs/compliance/whdfs24.htm> [<https://perma.cc/KF7N-YJDZ>].

<sup>59</sup> See *FLSA, Hearing Part 1*, *supra* note 1, at 196–97 (statement of Frances Perkins, Secretary of Labor, Department of Labor) (“The industrial home worker is a person who takes work home into his own house or tenement where he or his family work on it within the confines of their own home.”).

<sup>60</sup> Matthew W. Finkin, *Beclouded Work, Beclouded Workers in Historical Perspective*, 37 *COMP. LAB. L. & POL’Y J.* 603, 607 (2016) (citing Emily Brown, U.S. Dept. of Labor, *Women’s Bureau Bull. No. 79, INDUSTRIAL HOMEWORK* (1930)).

<sup>61</sup> *Id.*

expressed distress about the poor conditions of work performed at home for the adults and children that were involved in this practice.<sup>62</sup> Civil society voices, such as the National Child Labor Committee, spoke out against industrial homework during the hearings on the legislation.<sup>63</sup> Legislators mirrored these worries in their comments. Representative Arthur Healey (D-Mass.), for instance, recognized the problem of industrial homework. He noted during the hearings that exploitative businesses were turning “homes into sweatshops,” thereby endangering workers’ health in exchange for “pitifully meager wages.”<sup>64</sup> Representative William J. Fitzgerald (D-Conn.) referred to industrial homework as “the biggest industrial cancer on the industrial life of America today[.]”<sup>65</sup> He was apprehensive about the perverse incentives that the legislation would create if its requirements did not reach industrial home-

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<sup>62</sup> See *Fair Labor Standards Act of 1937: Part 2: Hearing on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. and Labor and the H. Comm. on Labor*, 75th Cong. 590 (1937) (statement of Earl Constantine, National Association of Hosiery Manufacturers) [hereinafter *FLSA Hearing, Part 2*] (“If these restrictions in hours and wages are not universally applied . . . you invite a type of home industry, and child labor . . . which I think would be unfortunate.”); *id.* at 521 (statement of Roy A. Cheney, Managing Director, Underwear Institute) (calling for full abolishment of home work); *id.* at 467 (statement of Professor Paul F. Brissenden, Millinery Manufacturing Industry) (recommending that “the definition of ‘employee’ . . . [include] . . . the stringent regulation of industrial home work, if not its outright prohibition”).

<sup>63</sup> *Id.* at 402 (statement of Courtenay Dinwiddie, General Secretary, National Child Labor Committee) (referring to it as “one of the most vicious and persistent practices for sweating labor ever devised. The labor of whole families is secured for starvation pay and child labor is grossly abused in any process that children of any age can perform. Long consideration of this evil has convinced all who know the facts that the only solution is to abolish home work. It cannot be regulated or controlled by any half-way measures. We believe, therefore, that the language of section 6 (a) of the bill on this subject is inadequate and should be modified so that it will clearly give the power to do away with this sweatshop practice”); *id.* at 408–09 (statement of Lucy Randolph Mason, General Secretary, National Consumers’ League) (“We are glad to note that the bill contemplates some regulation of industrial home work.”). *But see id.* at 979 (statement of L.C. Painter, Association for Progressive Political Action) (“Any statute that would dictate what you must or must not do in your own home, in your own private business or with your own private money, is communistic.”).

<sup>64</sup> *Id.* at 832 (statement of Hon. Arthur D. Healey) (“Here whole families, including children of tender years, work into the long hours of the night on tasks beyond their physical stamina, which undermine and endanger health, for pitifully meager wages.”); see also 83 CONG. REC. 7298 (1938) (statement of Rep. Hamilton Fish) (“This bill seeks to put an end to sweatshop wages and hours and to intolerable labor conditions in certain factories, mills, and mines doing interstate business where employees are working long hours and getting starvation wages. . . . We have by this bill a chance to strike a blow for social and industrial justice and a square deal for labor in America[.]”).

<sup>65</sup> *FLSA, Hearing Part 1, supra* note 1, at 77 (statements of Robert H. Jackson, Asst. Att’y Gen., Department of Justice and Rep. Fitzgerald).

work. Along these lines, he warned about the potential for perverse incentives to break off parts of the work. Namely, Fitzgerald expressed that exclusion of industrial homework would encourage “unfair manufacturers” to “extend the home work racket in this country by taking work out of the factory and putting it into the homes at miserable wages[.]”<sup>66</sup>

As Fitzgerald’s comment exemplifies, the FLSA’s legislative history contains extensive expressions of concern that if industrial homework or piecework arrangements were not covered by the statute, some employers would break off parts of their in-house work to avoid coverage. President Roosevelt’s highly regarded U.S. Secretary of Labor,<sup>67</sup> Frances Perkins, admonished that industrial homework was “[a]nother method of evading the provisions of wage and hour legislation.”<sup>68</sup> Perkins was fearful that, if the FLSA did not cover off-premises work, businesses would further split up work into sweatshops and homework arrangements to avoid the Act’s coverage. U.S. Assistant Attorney General Robert Jackson, another key player in the Roosevelt administration, echoed unease about industrial homework. He assured legislators that while families that make a “little commodity which is a homecraft” would be excluded from the bill, “the factory which sends out and makes use of people in their homes are not exempted just because they are using premises they do not pay any rent for.”<sup>69</sup> A number of federal courts have cited this aspect of the FLSA’s legislative history to support the conclusion that the FLSA’s minimum wage and overtime protections cover work performed at home.<sup>70</sup>

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<sup>66</sup> *Id.* (statements of Robert H. Jackson, Assistant Att’y Gen., Department of Justice and Rep. Fitzgerald).

<sup>67</sup> See Hon. Jeanine Ferris Pirro, Essay, *Reforming the Urban Workplace: The Legacy of Frances Perkins*, 26 *FORDHAM URB. L.J.* 1423, 1424 (1999) (“Due to the breadth and fundamental nature of Perkins’ changes to the urban work place, she is, consequently, the most influential person to urban America in the twentieth century.”). See generally KIRSTEN DOWNEY, *THE WOMAN BEHIND THE NEW DEAL: THE LIFE OF FRANCES PERKINS, FDR’S SECRETARY OF LABOR AND HIS MORAL CONSCIENCE* (2009) (discussing Perkins’s contributions to the New Deal).

<sup>68</sup> *FLSA, Hearing Part 1, supra* note 1, at 184 (statement of Frances Perkins, Secretary of Labor, Department of Labor).

<sup>69</sup> *Id.* at 77. For other government voices along these lines see *FLSA, Hearing Part 2, supra* note 62, at 432 (statement of Anne S. Davis, Assistant Chief, Minimum Wage Division, Illinois State Department of Labor) (“I should like to see . . . more definite mention made of industrial home work . . . and the powers given to the Board to control it. Large numbers of children have always been employed in industrial home work . . .”).

<sup>70</sup> See, e.g., *McComb v. Homeworkers’ Handicraft Coop.*, 176 F.2d 633, 638–39 (4th Cir. 1949) (explaining the significance of congressional intent for homeworkers); *Mitchell v. Nutter*, 161 F. Supp. 799, 803–05 (D. Me. 1958) (same).

During debates on the legislation late in 1937, legislators expressed a similar sentiment about the method of payment, rather than the location of work. They feared that the FLSA's baseline wage and hour standards would not reach businesses that paid workers based on the number of pieces that they completed, rather than by the number of hours that they worked.<sup>71</sup> As Representative John Flannery (D-P.A.) noted, pieceworkers "slave all day" in the factories and then "take their material home to work on it all night."<sup>72</sup> Representatives John Ridley Mitchell (D-Tenn.) and Emanuel Celler (D-N.Y.) argued that the exclusion of piecework workers from the FLSA would lead to bad incentives. Specifically, they expressed that an exclusion would lead some employers to transform workers that are currently salaried into piecework workers whose wages did not meet minimum standards.<sup>73</sup> As Representative Celler put it in a succinct statement during the debates: "Do not the proponents of this bill know that the failure to include piece work within its provisions will induce many concerns in interstate commerce to avoid its provisions by putting its workers on piece work?"<sup>74</sup>

Similarly, the debate about a proposal to exclude businesses that pay workers based on a commission basis<sup>75</sup> illustrates a concern about how the formalities of business arrangements might frustrate the enforcement of the Act. Businesses often use commission-based payment systems to increase worker activity. Typically, a worker receives a com-

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<sup>71</sup> Representative Wilcox, for instance, claimed that "the worst labor conditions" exist in industries where workers are paid on a piecework (rather than hourly) basis. 82 CONG. REC. 1404 (1937) (statement of Rep. J. Mark Wilcox). See a similar statement by Representative Dies. *Id.* at 1388.

<sup>72</sup> *Id.* at 1687.

<sup>73</sup> *Id.* at 1689 (statement of Rep. John Ridley Mitchell) ("This measure is . . . a dangerous experiment and un-Democratic in principle. It will affect the prosperity of the whole Nation. . . . It will result in taking millions of jobs out of the salaried class and put the worker on a production basis or piece work, and largely destroy individual enterprise.").

<sup>74</sup> *Id.* at 1794 (statement of Rep. Emanuel Celler) ("The measure before us does not include piece workers. Do not the proponents of this bill know that the failure to include piece work within its provisions will induce many concerns in interstate commerce to avoid its provisions by putting its workers on piece work?").

<sup>75</sup> 81 CONG. REC. 7921 (1937) (statement of Sen. James Davis) ("My amendment would exempt commission men or commission salesmen who are not working for any kind of wage or salary. We know that the time of such a salesman is his own. He can work as he pleases. He can work an hour or two in the morning and then quit for the day. He might make enough in 1 or 2 days to keep him for months. If such salesmen come within the terms of the bill, my amendment would provide an exemption in their case.").

mission when he or she sells a specified amount of a product or service, or receives the commission based on a percentage of those sales. Typically, if there are no sales, there is no commission. Senator Robert M. La Follette Jr. (R-Wis.) voiced his opposition to excluding businesses who use this practice this way:

I am opposed to it lest it might provide a device whereby employers could, through a commission arrangement, take themselves out from under the terms of the bill. . . . What I fear . . . is that through arrangements which may be made by employers[,] persons who are not ordinarily working upon a commission basis may be employed under such arrangements when obviously they should be under the terms of the bill.<sup>76</sup>

Other legislators similarly thought that excluding workers paid through a commission arrangement would lead businesses to change how they paid their workers as means to circumvent the Act's coverage. Senator Lewis Schwellenbach (D-Wash.) stated that the commission exclusion and others of its kind might foster "collusion between employers and employees and thus completely destroy the desired effect of the bill."<sup>77</sup> For Senator La Follette it was important that legislators be "very careful" not to allow "employers who desire to defeat the purposes of the bill [to] avail themselves of devices . . . which will defeat the purposes" of the Act.<sup>78</sup>

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<sup>76</sup> *Id.* (statement of Sen. Robert La Follette) ("Mr. President, I am opposed to the amendment submitted by [Mr. Davis]. I am opposed to it lest it might provide a device whereby employers could, through a commission arrangement, take themselves out from under the terms of the bill. . . . So far as persons who are ordinarily hired upon a commission basis are concerned, I would have no objection to their being exempted from the provisions of the bill. What I fear, however, is that through arrangements which may be made by employers persons who are not ordinarily working upon a commission basis may be employed under such arrangements when obviously they should be under the terms of the bill.").

<sup>77</sup> *Id.* (statement of Sen. Lewis Schwellenbach) ("Would it not be possible under the amendment of the Senator from Pennsylvania to bring about collusion between employers and employees and thus completely destroy the desired effect of the bill?").

<sup>78</sup> *Id.* (statement of Sen. Robert La Follette) ("That is what I fear. . . . We are dealing here, however, with a situation affecting certain classes or kinds of employment which obviously should not come within the terms of the bill. However, as I stated yesterday in connection with an amendment offered by the Senator from North Carolina [Mr. Reynolds], in adopting broad, sweeping exemptions there is grave danger that means may be provided whereby employers who desire to defeat the purposes of the bill may avail themselves of devices of that kind under general exemption amendments. I contend that the board has full power to grant exemptions in cases of this nature, and therefore that in passing on the bill we should be very careful and should reject amendments so sweeping in their

The FLSA's legislative history relating to off-premises work, piecework, and commission-based payment arrangements reinforces the notion that the FLSA's framers thought it was important to target these practices as covered by the legislation. The impact of these types of arrangements is the very worker experience legislators were aiming to address and rectify. It also shows that the FLSA's framers foresaw that some businesses might change certain formalities such as where work is located, or how pay arrangements are structured, in ways that evaded coverage.

Congress eventually rejected this much-discussed list of specified devices of evasion in favor of a much broader and more flexible concept of employment.<sup>79</sup> It provided definitions that could adapt with the times and adapt to new "devices." The broad definition of "employ" that emerged in the final version of this legislation extends the FLSA's coverage to situations when businesses require or allow individuals to work and have power over wages and hours, regardless of where the work occurs, or how the worker is paid.<sup>80</sup> It defines "employ" as "to suffer or permit to work," a phrasing it borrowed from state child labor laws of the time.<sup>81</sup>

As Goldstein and his co-authors established in their comprehensive study of the roots of this definition, state child-labor statutes used this language to ensure coverage of entities that were in a position to know that children were performing work and had the power to prevent that work.<sup>82</sup> In a similarly broad vein, the enacted legislation defines an employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee."<sup>83</sup> Referring to this plain language and the legislative history, courts overwhelmingly characterize the

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nature that they may become a device which will defeat the purposes of the proposed legislation.").

<sup>79</sup> See Reif, *supra* note 22, at 407–08 (citing literature and legislative history to conclude that "the suffer-or-permit-to-work language was inserted into the bill which became the FLSA precisely to bring within the reach of the FLSA all means for attempts at circumvention of the requirements of the Act, and one of those means specifically identified by [6(a)]").

<sup>80</sup> *United States v. Rosenwasser*, 323 U.S. 360, 362 (1945) (noting that a "broader or more comprehensive coverage of employees within the stated categories would be difficult to frame"); *Walling v. Am. Needlecrafts, Inc.*, 139 F.2d 60, 64 (6th Cir. 1943) (stating that "§ 6(a) . . . was eliminated in the Senate Committee as giving too much discretionary power to the Board, the Committee asserting . . . the purpose of original [§] 6(a) was sufficiently served by the expanded definition of the word 'employ' now incorporated as sub-section (g) of the Act").

<sup>81</sup> 29 U.S.C. § 203(g) (2018).

<sup>82</sup> See Goldstein et al., *supra* note 46, at 1015–1102.

<sup>83</sup> 29 U.S.C. § 203(d) (2018).



FLSA's definition of employment as "the broadest definition that has ever been included in any one act."<sup>84</sup> Notably, the definition explicitly uses the term "indirectly" in its characterization of which businesses are FLSA "employers."

Congress's ultimate decision to use expansive language to describe the scope of employment covered by the Act, rather than a specific list of tools of evasion, reflects a desire to protect vastly the low-wage workforce, regardless of business structure or formalities.<sup>85</sup> It also signals an acute awareness that some businesses may change form, or splinter off work, in ways that avoid the FLSA's reach. The New Deal Congress that enacted the FLSA intended it to reach to yet-to-be-seen business practices that may serve as unintended loopholes in the FLSA's minimum wage and overtime coverage. Indeed, the aforementioned practice of industrial homework is an early form of splintering off work from the central business. By moving away from a specific list of tools of evasion, Congress gestured that it did not want to slide into an endless game of whack-a-mole, to preempt different business structures and strategies that might emerge to sidestep the FLSA's coverage. In this way, it is fair to interpret the FLSA's legislative history as strongly suggesting that Congress aimed to ensure that under-regulated aspects of the fissured business model did not take root in the U.S. economy.

### C. Rejecting Numerical Limits to Avoid Splintering

Beyond the tools already discussed, the legislative history signaled congressional desire to nullify another method of evasion that would frustrate the FLSA's purposes. Namely, Congress considered and ultimately rejected proposals specifying threshold limits on the number of employees. This rejection, at

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<sup>84</sup> *E.g.*, *Rosenwasser*, 323 U.S. at 363 n.3 (quoting the legislative history to support its statement that "[a] broader or more comprehensive coverage of employees within the stated categories would be difficult to frame"); *Lucas v. Jerusalem Cafe, LLC*, 721 F.3d 927, 934 (8th Cir. 2013) ("Because the FLSA by its plain terms protects aliens working without authorization, the employers' argument must fail unless the employers can point to a different statutory basis for limiting 'the broadest definition that has ever been included in any one act.'").

<sup>85</sup> Subsequent amendments to the definition of employer or employee have not made relevant changes to these original concepts. See Fair Labor Standards Amendments of 1974, Pub. L. No. 93-259, 88 Stat. 55, 58-61 (codified as amended at 29 U.S.C. § 203(d) (adding states as employers)); Fair Labor Standards Amendments of 1966, Pub. L. No. 89-601, 80 Stat. 830, 831 (codified as amended at 29 U.S.C. § 203(s) (expanding scope of "enterprise" coverage)). See generally, *Wage and Hour Division History*, U.S. DEP'T OF LAB., WAGE & HOUR DIVISION, <https://www.dol.gov/whd/about/history/whdhist.htm> [<https://perma.cc/QLZ5-5BXZ>] (providing overview of all key amendments).

least in part, related to concerns that businesses would splinter off into smaller units to avoid coverage of the FLSA. As mentioned above, § 6(a) of the original proposed bill allowed a Board to set a threshold number of employees, below which businesses would not be covered (referred to for ease here as the “numerical limits proposal”). The legislation that Congress ultimately enacted in June of 1938 did not include any numerical limits on the number of employees for purposes of the FLSA’s coverage. Instead, the statutory language reached all businesses engaged in interstate commerce.<sup>86</sup> As Forsythe’s 1939 seminal work on the FLSA’s legislative history described when recounting the rejection of the numerical limits proposal, Congress designed the legislation “to prevent evasion by cutting large businesses into small units.”<sup>87</sup> Thus, this section describes another way that Congress sought to (a) broadly include businesses responsible for wages paid in relation to work performed on their behalves and (b) reduce incentives for businesses to avoid statutory coverage by splintering (or, in Weil’s terminology, by fissuring).

When Congress was conducting hearings on the numerical limits proposal early in the lawmaking process,<sup>88</sup> two important figures in President Roosevelt’s administration emphasized the enforcement challenges these employee numerical limits might pose. U.S. Secretary of Labor Frances Perkins described the proposed numerical limits on employees as an “unwise” barometer for the FLSA’s coverage.<sup>89</sup> Perkins, widely acknowledged as the administrative architect of the FLSA,<sup>90</sup>

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<sup>86</sup> 81 CONG. REC. 7651 (1937) (statement of Rep. Hugo Black) (“There was a belief on the part of some members of the committee that there should be a limitation. There was a belief on the part of some members of the committee that it should be three or five or eight or some other number. However, the committee, after consideration, included all businesses engaged in interstate commerce without exempting employers who had less than a certain number of employees.”).

<sup>87</sup> John S. Forsythe, *Legislative History of the Fair Labor Standards Act*, 6 LAW & CONTEMP. PROBS. 464, 484 n.114 (1939); see also Goldstein et al., *supra* note 46, at 1095 (citing *id.*).

<sup>88</sup> Congress held extensive hearings on the original Black-Connery Bill. Hearings were held on June 2-5, 7-9, 11, 14-15, and 21-22, 1937.

<sup>89</sup> *FLSA, Hearing Part 1*, *supra* note 1, at 184 (statement of Hon. Frances Perkins, Secretary of Labor, Department of Labor) (“I think it would be unwise to exempt on the ground of a small number of employees.”); *id.* at 181 (“One of the greatest difficulties to be overcome, if legislation of this character is to be successful is that of enforcement. . . . I have grave doubt of the wisdom of including so broad an exemption in the act as that contemplated by section 6 (a) which empowers the Board to grant a blanket exemption to persons employing less than a certain number of employees.”).

<sup>90</sup> See Malamud, *supra* note 43, at 2286 (“In preparation for the seventy-fifth Congress, which met in January 1937, intense activity took place behind the

stated during legislative hearings that numerical limits would “encourage the formation of small units of persons employing less than 20 or less than 15 persons.”<sup>91</sup> In response to a suggestion to lower the numerical limit to 8 or 10 employees, Perkins similarly responded that this limit “would tend to create other small industries . . . .”<sup>92</sup> Perkins and those supporting her position wanted to ensure that the FLSA covered “the sweatshop,” which she described as a small-scale “contractor who takes work from a principal” and typically “hires other people” to do the work.<sup>93</sup> The business entities responsible for a “sweatshop” subcontracting arrangement were precisely the entities that Perkins and her colleagues intended the FLSA to regulate.

Assistant Attorney General Robert Jackson was the second voice from the Roosevelt administration who disapproved of the proposed idea to exclude some businesses based on the number of employees. In a 1937 hearing, Jackson stressed that the form a business is in, or the number of employees a business has, should not be relevant to the FLSA’s enforcement reach.<sup>94</sup> He expressed optimism that removing the numerical limits would reduce enforcement headaches.<sup>95</sup> Similar to Perkins, Jackson noted that the numerical limits proposal would promote the splintering of businesses to circumvent coverage of the FLSA. He declared:

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scenes in the Roosevelt administration (centering on Secretary of Labor Frances Perkins) and between Roosevelt and the chairmen of the House and Senate labor committees.”). See generally DOWNEY, *supra* note 67 (elaborating the key role of Perkins).

<sup>91</sup> *FLSA, Hearing Part 1, supra* note 1, at 184 (statement of Hon. Frances Perkins, Secretary of Labor, Department of Labor). See also *id.* at 192 (another law she has enforced with numerical limits “tended to prevent a man from taking on additional employees that he might have taken on . . . so that he would not have to come within the provisions of that law”).

<sup>92</sup> *Id.* at 192 (statement of Rep. Reuben T. Wood).

<sup>93</sup> *Id.* at 196–97; see also *FLSA, Hearing Part 2, supra* note 62, at 501 (statement of Reverend John A. Ryan) (“I agree with the Secretary of Labor in the opinion that the employers of a small number of workers should not be excepted from the provisions of the bill. After all, it is among small employers that sweated labor conditions are conspicuously prevalent.”).

<sup>94</sup> Jackson stressed that the touchstone of the bill’s jurisdiction was “interstate commerce.” *FLSA, Hearing Part 1, supra* note 1, at 35 (statement of Robert H. Jackson, Assistant Att’y Gen., Department of Justice); see also *id.* at 7 (“Care has been taken to hold the pending bill to a good faith regulation of interstate commerce, and nothing more.”).

<sup>95</sup> *Id.* at 71 (“[T]his law is not going to be so difficult to enforce as it looks on the face of it, because I think when you get this thing started and it is found that the Federal Government means business . . . then I think this law will enforce itself much faster than you might think.”).

[I]f you say that employers of less than 10 would be exempt, some employers might try to split their business up to make 10 different employments, each employing 10, so as to avoid regulation; and so it is necessary to have some flexibility in that rule in order to avoid evasion of the [A]ct.<sup>96</sup>

Unsurprisingly, a group of large businesses and their advocates voiced opposition to the numerical limits proposal throughout the hearings on the legislation.<sup>97</sup> These businesses stood to lose out if the FLSA excluded small businesses. In their view, if the numerical limits proposal prevailed, small businesses would gain an unfair economic advantage in the marketplace. A number of advocates for large businesses stated in the FLSA's hearings that the numerical limits were a problem because they would inevitably promote "unfair competition"<sup>98</sup> with smaller-scale businesses that, in their view, often had the worst labor conditions.<sup>99</sup> Some big-business voices

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<sup>96</sup> *Id.* at 49–50 (emphasis added).

<sup>97</sup> See, e.g., *id.* at 254 (statement of R.C. Kuldell) (stating, as a manufacturer of oil equipment, that all manufacturers in interstate commerce should be covered "irrespective of the number of employees he employs"); *FLSA, Hearing Part 2, supra* note 62, at 467 (1937) (statement of Professor Paul F. Brissenden, Millinery Manufacturing Industry) (resisting numerical limits); *id.* at 960 (statement of A.E. Crockett, Manager, Industrial Management Council of Rochester) (same); *id.* at 603 (statement of Austin T. Levy, Stillwater Worsted Mills) ("If John Jones is being underpaid or overworked, does the fact that he happens to be a member of a group of 10 persons, instead of a group of 10,000, compensate for the underpay or the overwork?"); *id.* at 589–90 (statement of Earl Constantine, National Association of Hosiery Manufacturers) ("No one wants to appear as the enemy of . . . the small . . . employer, but . . . I would like to urge a protest . . . against the [numerical limits] . . . . And this is not said as a friend of the big manufacturer as against the small manufacturer. We have both."). Mid-sized businesses voiced concern as well. See *Fair Labor Standards Act of 1937: Part 3: Hearing on S. 2475 and H.R. 7200 Before the S. Comm. on Educ. and Labor and the H. Comm. on Labor, 75th Cong. 1073* (1937) (statement of B.W. Stonebreaker, Southern Association of Ornamental Metal Manufacturers) [hereinafter *FLSA, Hearing Part 3*].

<sup>98</sup> *FLSA, Hearing Part 1, supra* note 1, at 254 (referring to concern that exempting small businesses could "destroy the price structure"); *FLSA, Hearing Part 2, supra* note 62, at 526 (statement of Roy A. Cheney, Managing Director, Underwear Institute) ("There should be no elimination of a small employer . . . it will mean the transfer of the business from the larger mills to these small concerns . . . ."); *id.* at 509 (statement of Harvey Willson, General Manager, National Upholstery and Drapery Textile Association) ("In our industry there are just enough small manufacturers with only a few employees . . . to constitute difficult competition . . . ."); *FLSA, Hearing Part 3, supra* note 97, at 1002 (statement of Horace Herr, National League of Wholesale Fresh Fruit and Vegetable Distributors) (referring to consequence of "intolerable competitive conditions in this industry"); *id.* at 1063 (statement of John H. Clippinger, President, S.H. Gerrard Co.) ("[E]liminat[ing] the smaller operator . . . will . . . upset the whole wage structure.").

<sup>99</sup> *FLSA, Hearing Part 3, supra* note 97, at 1211–12 (letter of Clarence R. Bitting, Watch Hill, R.I.) (referring to "the establishment of sweatshop conditions"); *FLSA, Hearing Part 1, supra* note 1, at 134 (statement of John G. Paine, Chairman of the Management Group, Council for Industrial Progress) ("[I]f the

went so far as to critique the numerical limits proposal by highlighting the incentives it created for large businesses to splinter into small businesses to avoid coverage. In this way, these voices agreed with those who argued that numerical limits would promote business fissuring. They expressed distress about the unfair competition that this would foster as some, but not all, large businesses would splinter off part of the work in an effort to evade the FLSA. For example, a representative from the National Lumber Manufacturers Association stated during a hearing that if the numerical limits proposal went through, business entities could avoid coverage of the Act "by the easy device of contracting and subcontracting of both logging and milling."<sup>100</sup> Another witness from the business sector noted:

To escape the provisions of the proposed legislation . . . [some businesses] might find it advantageous to break their operations into small units to be operated under some form of contract or agreement with an individual employing one less than the minimum number of employees to which the proposed legislation would be applicable.<sup>101</sup>

After the hearings, Congressional debates on the legislation similarly illustrated a view that numerical limits would encourage business splintering. The numerical limits proposal dropped out of the proposed bill's language after the hearings. During the debates, however, Senator Robert Rice Reynolds (D-N.C.) offered an amendment and made a case for returning to a numerical limit of ten employees.<sup>102</sup> In offering his amend-

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small groups are exempt they invariably develop a situation which gives them a commercial advantage over other larger employers through the exploitation of their labor. . . . We would like to see it all controlled, so that that commercial advantage does not exist. If there is to be an exemption we hope that that exemption will be low so as to cause the least amount of unfair competitive situations existing in any one industry."). Some of the concern focused on the power of the Board, rather than numerical limits as such. *FLSA, Hearing Part 2, supra* note 62, at 851-52 (statement of J.D. Battle, National Coal Association). ("It is safe to say that no past act of Congress has gone so far in delegating powers to a Federal agency with so little definite limitation in the bill upon the use of powers, as is found in the Fair Labor Standards Act . . ."); *cf. id.* at 314 (statement of Isador Lubin, Comm'r of Labor Statistics, Department of Labor) ("I would like to point out incidentally that both in the cotton textiles and in the silk and rayon it was not the small firms that were always the great offenders. . . . You have good and bad among the small just as you have among the big.").

<sup>100</sup> *FLSA, Hearing Part 2, supra* note 62, at 964 (statement of Dr. Wilson Compton, National Lumber Manufacturers Association).

<sup>101</sup> *FLSA, Hearing Part 3, supra* note 97, at 1211 (letter of Clarence R. Bitting, Watch Hill, R.I.).

<sup>102</sup> The numerical limits issue was a subject of debate on July 30, 1937, because Reynolds offered an amendment (to S. 2475) that would limit the FLSA's

ment, Senator Reynolds cited danger for the small sawmills, grist mills, flour mills, and cannery operators in his home state of North Carolina.<sup>103</sup> Reynolds's unease was indicative of a more general, but minority, concern for small business interests evoked throughout the FLSA's legislative process.<sup>104</sup> Nonetheless, Senator Reynolds only received support for his proposed amendment from a small group of senators,<sup>105</sup> who echoed concerns for small business interests that some representatives had previously expressed.<sup>106</sup> In response, some legislators ameliorated worries about small business by pointing out that because the FLSA was enacted pursuant to Congress's Commerce Clause authority, its jurisdictional reach could not

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reach to entities with more than ten employees. 81 CONG. REC. 7863 (1937). Though Reynolds' numerical limit of ten amendments was initially agreed to on July 30, 1937 via a viva-voce vote, *id.* at 7885, Senator Borah successfully entered a motion to reconsider the viva-voce vote since his motion occurred within a two-day limit to reconsider the vote. *Id.* The amendment was subsequently reconsidered and rejected by a roll call vote later the same day. *Id.* at 7888. On July 31, 1937, Reynolds again offered an amendment, this time lowering the numerical limit to 5. At that time the Senate rejected it without debate and without calling it to a vote. *Id.* at 7948.

<sup>103</sup> *Id.* at 7863 (statement of Sen. Robert Reynolds) ("Mr. President, we have in my State, as there are in other States, a large number of portable sawmills and other small enterprises employing less than 10 men. There are flour mills and grist mills, the products of which sometimes go into interstate commerce. There are also small canneries employing 10 or fewer men, and in order that they may be excluded from the provisions of the bill I have offered the amendment which has just been read.")

<sup>104</sup> See, e.g., FLSA, *Hearing Part 2*, *supra* note 62, at 765 (statement of John E. Edgerton, President, Southern States Industrial Council) ("But if a bill such as the one under consideration becomes a law, the South can look forward to the folding-up and bankruptcy of innumerable small manufacturing enterprises which employ the majority of southern workers.")

<sup>105</sup> Senator Borah advocates for some numerical limit but noted that fixing a number is difficult. 81 CONG. REC. 7864 (1937) (statement of Sen. William Borah) ("Mr. President, in view of what the chairman of the committee has said, my personal view is that, unless there is some exemption of those who employ a very small number of persons, it will be practically impossible to administer this measure; but it is a frightful discrimination. My view of the bill would lead me to vote for any provision that would limit the jurisdiction of this board; but this presents the question of discrimination."); see also *id.* at 7865 ("The difficulty I have in this matter is in fixing the number."). Senator Logan similarly supported the amendment, citing a concern for small businesses and the negative effect of promoting big business monopolies. *Id.* at 7864-65 (statement of Sen. Marvel Logan). Senator Byrnes similarly raised concerns about small business. *Id.* at 7943-44 (statement of Sen. James Byrnes).

<sup>106</sup> 84 CONG. REC. 1394 (1937) (statement of Rep. Fred Hartley) (concerns for small business); *id.* at 1665 (statement of Rep. Earl Michener) (same); *id.* (statement of Rep. Stephen Pace) (same); *id.* at 1677 (statement of Rep. Paul Shafer) (same); *id.* at 1689 (statement of Rep. John Rankin) (same); *id.* at 1794 (statement of Rep. Emanuel Celler) (same); *id.* at 1831 (statement of Rep. Wade Kitchens) (same); *id.* at 1832 (same); *id.* at 7424 (statement of Rep. Francis Case) (same); 85 CONG. REC. 7424 (1938) (statement of Rep. Francis Case) (same).

(and thus would not) regulate small local businesses that were not engaged in interstate commerce.<sup>107</sup> The amendment's failure meant that the U.S. Supreme Court's jurisprudence on the reach of the Commerce Clause would define the FLSA's reach to "small" businesses, regardless of the number of employees.<sup>108</sup>

The debates around the numerical limits proposal show that senators continued to discuss the concept of business splintering and the consequent perpetuation of poor working conditions and low wages in small subcontracted sweatshops.<sup>109</sup> Senator David Walsh (D-Mass.), for instance, explained that the numerical limits proposal would create incentives for businesses to break into multiple units to avoid the FLSA's coverage.<sup>110</sup> He contended that if a numerical limit of ten existed:

[T]he owners of the business will suddenly and unexpectedly bring about a division of ownership, so that there will be 9 people in 10 different shops, and the legitimate, decent, and respectable employer, who is willing to abide by the terms of

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<sup>107</sup> S. REP. NO. 75-884, at 3 (1937) ("Although a goodly portion of the goods of American industry move in interstate commerce and will be covered by the legislation which we recommend, there are many purely local pursuits and services which no Federal legislation can effectively cover."); H.R. REP. NO. 75-1452, at 9 (1937) ("It applies only to industries . . . directly affecting interstate commerce. It does not affect the purely local intrastate business").

<sup>108</sup> Marc Linder, *The Small-Business Exemption Under the Fair Labor Standards Act: The "Original" Accumulation of Capital and the Inversion of Industrial Policy*, 6 J.L. & POLY 403, 493 (1998) (recounting floor debate leading up to the vote and stating, "[f]ully aware that the exemption for firms with fewer than 10 or fewer employees would have exempted a large proportion (more than one-half) of the estimated universe of covered employers, employing only about one-twentieth of all covered employees, the Senate, scarcely two months after the original bill had been introduced, rejected the amendment by a vote of 52 to 31").

<sup>109</sup> 81 CONG. REC. 7885 (1937) (statement of Sen. Wagner) ("Would not the effect of the amendment be that the character of competition which we are seeking to prevent, namely, exploitation as against efficiency, would continue, because the small sweatshop, employing just a few persons, would continue to pay low wages in competition with the employer who pays reasonable wages?"). Senator Pat Harrison also expressed trepidation about the numerical limits proposal and doubted the efficacy of the amendment and bill as a whole. His concern was unemployment. As he stated during the debates, if ten is the limit, employers with twelve employees would probably likely discharge two employees. Even if the face of uncertainty over how many small employers would do this, unemployment, according to Senator Harrison, would likely grow if a numerical limit were set. *Id.* at 7874 (statement of Sen. Pat Harrison).

<sup>110</sup> During the debates, Senator Walsh expressed his support for the elimination of numerical limits by sharing an anecdote from the lumber mill industry. He recounted that the numerical limits would have encouraged more small business to "go into the market in large numbers," which would subject lumber mills "in good standing" to "competition with chiselers and sweatshop operators" that were not covered by the FLSA. *Id.* at 7651 (statement of Sen. David Walsh).

this bill, and who employs 75 people will be penalized and be the victim of chiseling by the employer who is in competition with him and who seeks to evade the provisions of this bill, if it shall be enacted.<sup>111</sup>

As the numerical limits aspect of the FLSA's legislative history demonstrates, the FLSA's framers predicted business splintering and the challenges it may pose to the FLSA's purpose to provide broad minimum wage and overtime protections to individuals at the lower end of the labor market. Because of predictions that businesses might have incentives to separate into smaller units in an effort to avoid the FLSA's coverage, the legislation that resulted from this legislative process did not apply only to businesses with more than a specified number of employees. Once again, we see that FLSA enforcement challenges relating to contemporary contracting and other forms of business fissuring are not without historical precedent. We also see that Congress intended to restrict businesses, which are responsible for work performed and are in a position to influence wage payments, from avoiding coverage through fissuring, the formation of "controlled companies," or the implementation of other kinds of business formalities.<sup>112</sup>

## II

### THE FLSA MOVING FORWARD: CONTRACTING AND OTHER "FISSURING"

As the FLSA completes its eightieth year, the FLSA's purposes are as germane today as they were in the New Deal era. The U.S. Court of Appeals for the Ninth Circuit, sitting *en banc*, recently encapsulated the FLSA's underlying policy and legislative history well:

Congress enacted the [FLSA] in 1938 in response to a national concern that the price of American development was the exploitation of an entire class of low-income workers.

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<sup>111</sup> *Id.* at 7885 (statement of Sen. Walsh) ("Unfortunately, while I do not think it is so intended by the Senator from North Carolina, the exemption proposed by him will mean that in the great city of New York and in Boston and Chicago where sweatshops are operated . . . the owners of the business will suddenly and unexpectedly bring about a division of ownership, so that there will be 9 people in 10 different shops, and the legitimate, decent, and respectable employer, who is willing to abide by the terms of this bill, and who employs 75 people, will be penalized and be the victim of chiseling by the employer who is in competition with him and who seeks to evade the provisions of this bill, if it shall be enacted.").

<sup>112</sup> Businesses are responsible regardless of their intent to evade the Act. See *Barfield v. N.Y.C. Health & Hosps. Corp.*, 537 F.3d 132, 145–47 (2d Cir. 2008) (clarifying that a lack of intent to avoid legal obligations is not a safe haven from legal obligations).



President Roosevelt, who pushed for fair labor legislation, famously declared: "The test of our progress is not whether we add more to the abundance of those who have much; it is whether we provide enough for those who have too little." The FLSA thus safeguards workers from poverty by preventing employers from paying substandard wages in order to compete with one another on the market.<sup>113</sup>

A comprehensive review of the FLSA's legislative history portrays an acute awareness that business formalities can frustrate this purpose. It shows a concerted effort to reduce incentives for businesses to splinter, or "fissure," in an effort to avoid the FLSA's grasp. It also illuminates that the FLSA's framers presaged that businesses continuously evolve their organizational patterns and formal structures for a variety of reasons. Thus, it implores the FLSA's enforcers, policymakers, and adjudicators to interpret the notion of "employ," and thus the FLSA's reach, broadly and adaptively in the twenty-first century.

As this Part will elaborate, the message that the legislative history communicates is that the FLSA's regulatory power should reach all businesses responsible, directly or indirectly, for baseline wage standards, regardless of the forms those businesses take, or of the self-serving formalities they impose.<sup>114</sup> The FLSA's legislative history instructs that formalities, like independent contractor labels, that businesses assign to a relationship should not exclude true employment relationships from the Act's coverage. It calls for continued adaptation of the FLSA's notion of "employ" to new organizational forms and practices and for more consistency in joint employer and independent contractor law. If we are to presume anything, it should be that the FLSA *does* apply to businesses engaged in "new" trends in the low-wage economy, such as the growth in contracting, subcontracting, licensing arrangements, and jobs in the "online economy."

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<sup>113</sup> *Marsh v. J. Alexander's LLC*, 905 F.3d 610, 615 (9th Cir. 2018) (en banc) (citing S.Rep. No. 93-690, at 4 (1974)).

<sup>114</sup> See *Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen*, 835 F.2d 1529, 1543-44 (7th Cir. 1987) (Easterbrook, J., concurring) (referring statutory purposes and the suffer or permit language and stating that the "definition, written in the passive, sweeps in almost any work done on the employer's premises, potentially any work done for the employer's benefit or with the employer's acquiescence.").

### A. Taking Seriously Indirect Influence

A key implication of this Article's legislative history analysis is that all three branches of government need to take indirect influence over wages and hours more seriously. Nothing in the FLSA's language or legislative history refers to the common law notion of "control" as the touchstone of the FLSA's scope. Nonetheless, this subpart uses this term because the term "control" is common in existing FLSA jurisprudence and the contours of the contemporary debate. The FLSA legislative history implores decision-makers who use the "control" lens in the FLSA context to take seriously indirect forms of control. To date, there has been too much emphasis on direct forms of control.

Discounting indirect forms of control erroneously pivots the inquiry toward business formalities, which frustrates the FLSA's purposes. The legislative history, especially with respect to § 6(a), depicts that Congress intended to find employment relationships even when the relationship between the lead company and front-line worker was indirect. It listed in its restrictions on "tools of evasion" the use of intermediaries such as agents, independent contractors, and subsidiaries as devices that would not absolve a lead company from ultimate liability under the FLSA. The discussion about this provision persuasively signals that the FLSA's framers intended to cover entities whose only control was indirect. In the final text of the bill, this intent is further underscored by referring to indirect control in the definition of "employer," and by settling on the broader "suffer or permit" language in the definition of "employ."

Thus, one takeaway from the FLSA's legislative history is that courts should take care not to overemphasize the importance of direct forms of control when determining whether a business is an employer for FLSA purposes. As mentioned, a number of courts use a combination of factors in their employment tests that essentially require an entity to have formal or direct control over the employees.<sup>115</sup> The FLSA's legislative history brings to light that courts are reading the FLSA far too

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<sup>115</sup> See, e.g., *In re Enter. Rent-A-Car Wage & Hour Emp't Practices Litig.*, 683 F.3d 462, 469 (3d Cir. 2012) (noting the following factors for joint employment: "(1) authority to hire and fire employees; (2) authority to promulgate work rules and assignments, and set conditions of employment, including compensation, benefits, and hours; (3) day-to-day supervision, including employee discipline; and (4) control of employee records, including payroll, insurance, taxes, and the like").

narrowly when they place too much emphasis on direct-control factors such as whether a business directly controls payroll and other types of employee records. They read the FLSA's reach too restrictively when they focus their joint employer analysis on whether the putative joint employer directly controls hiring, specific work assignments, or work rules.<sup>116</sup> These considerations relate to business formalities. The legislative history shows that business formalities, like the mechanisms some businesses use to determine pay (*e.g.*, through a piece rate or commission system), or the locations where the work is performed (*e.g.*, at homes), are mere formalities.

A business can be responsible for wage and hour practices even though a separate business entity cuts the check for that worker at the end of the week. Courts considering whether an entity is an employer should consider whether the business is benefitting from the labor and has power, either directly or indirectly, over the wages paid. In this way, the legislative history is more in line with the Fourth Circuit's recent characterization of the FLSA's joint employer reach to businesses that codetermine "informally" or "indirectly" the essential terms and conditions of workers' employment.<sup>117</sup> It is consistent with those federal courts that have utilized legal tests that require an entity only to have functional or indirect forms of control over the workers to achieve the status and responsibilities of an "employer."<sup>118</sup> It also echoes the FLSA's definition of "em-

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<sup>116</sup> For a court that takes this more narrow approach in the joint employer context, see *id.*

<sup>117</sup> *Salinas v. Commercial Interiors, Inc.*, 848 F.3d 125, 141 (4th Cir. 2017). For critique, see COMM. ON EDUC. & WORKFORCE, *supra* note 37 ("Unfortunately, unelected NLRB bureaucrats, federal regulators, and activist judges have taken steps to dramatically change what constitutes a 'joint employer,' creating uncertainty for America's job creators and entrepreneurs. . . . In January 2017, the U.S. Court of Appeals for the Fourth Circuit adopted an expansive new joint employer standard under the FLSA in *Salinas v. Commercial Interiors, Inc.* The new test finds joint employer status under the FLSA where 'two or more persons or entities are not completely disassociated . . .' with respect to their separate workplaces. The Fourth Circuit's test seems to make any relationship or collaboration between two businesses a joint employment relationship because the two entities will not be completely disassociated. To make matters worse, *Salinas* states that 'one factor alone can serve as the basis for finding that two or more . . . entities are "not completely disassociated."' This test is even broader than the joint employer test under *Browning-Ferris*, and has contributed to a growing patchwork of joint employer standards across the country.").

<sup>118</sup> See, *e.g.*, *Zheng v. Liberty Apparel Co.*, 355 F.3d 61, 72 (2d Cir. 2003) ("The factors . . . are (1) whether [the putative employer's] premises and equipment were used for the plaintiff's work; (2) whether the Contractor Corporations had a business that could or did shift as a unit from one putative joint employer to another; (3) the extent to which plaintiffs performed a discrete line-job that was integral to [the putative employer's] process of production; (4) whether responsibility under

ployer,” which plainly uses the word “indirectly” to describe which businesses are FLSA employers.

Furthermore, the FLSA’s legislative history provides an illuminating perspective for policymakers who are currently engaged in efforts to change the FLSA’s definitions. It shows that any effort to narrow the FLSA’s coverage of employment relationships to “direct” relationships between parties flies in the face of the central goals of the FLSA’s New Deal framers. As mentioned in the Introduction, the proposed Save Local Business Act, H.R. 3441, would extend the FLSA’s responsibilities only to businesses that have direct and significant control “over essential terms and conditions of employment,” like hiring, firing, and determining pay.<sup>119</sup> Pro-business interests, mostly prompted by the National Labor Relations Board’s *Browning-Ferris* joint-employer decision,<sup>120</sup> refer to current developments in joint employer law as causing “harm” to the franchise system of organizing businesses,<sup>121</sup> and to construction companies

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the contracts could pass from one subcontractor to another without material changes; (5) the degree to which the [putative employer] or their agents supervised plaintiffs’ work; and (6) whether plaintiffs worked exclusively or predominantly for the [putative employer].”); see also *Salinas*, 848 F. 3d at 141 (listing the Fourth Circuit’s factors for determining who is a joint employer).

<sup>119</sup> Save Local Business Act, H.R. 3441, 115th Cong. § 2(a)(B) (2017) (“A person may be considered a joint employer in relation to an employee only if such person directly, actually, and immediately, and not in a limited and routine manner, exercises significant control over essential terms and conditions of employment, such as hiring employees, discharging employees, determining individual employee rates of pay and benefits, day-to-day supervision of employees, assigning individual work schedules, positions, and tasks, or administering employee discipline.”). Rep. Bradley Byrne (R-AL) introduced H.R. 3441 in the House of Representatives on July 27, 2017. The same day, Congress referred it to the House Committee on Education and the Workforce. On September 13, 2017, the Subcommittee on Workforce Protections and the Subcommittee on Health, Employment, Labor, and Pensions held hearings on the bill. On November 7, 2017, the House passed the bill with a vote of 242–181. The Senate received H.R. 3441 on November 8, 2017. The Senate has not yet taken further action on the bill.

<sup>120</sup> *Browning-Ferris Indus. of Cal., Inc.*, 362 N.L.R.B. No. 186 (2015).

<sup>121</sup> John T. Bender, *Barking Up the Wrong Tree: The NLRB’s Joint-Employer Standard and the Case for Preserving the Formalities of Business Format Franchising*, 35 FRANCHISE L.J. 209, 233–35 (2015) (“The standards proposed by the [Office of General Counsel] and adopted by the Board in *Browning-Ferris* pose a substantial risk of fundamentally altering the business of franchising.”); David L. Steinberg et al., *Uncertainty Abounds: The Joint Employer Doctrine and the Franchise Business Model*, 96 MICH. BAR J. 26, 28 (2017) (“Direct and indirect control imposed by the franchisor over employment matters is not what either party desires and is contrary to the entire franchise business model of establishing businesses owned and operated by independent entities. It is not an overreaction to say that the general public will be the loser if some franchises are regulated out of business.”); COMM. ON EDUC. & WORKFORCE, *supra* note 37 (“Small business owners may have less freedom to operate their businesses. If a franchisor is responsible for the employment decisions of its franchisees, the franchisor will have no choice

and other industries that rely on contracting.<sup>122</sup> In contrast, others, often citing the historically expansive reach of the FLSA, refer to the Save Local Business Act as “radical” and as rolling back century-old protections for low-wage workers.<sup>123</sup> The FLSA’s legislative history supports this latter notion. Concerns about effects on how businesses organize themselves notwithstanding, a business’s use of formalities that insulate it from direct forms of control was not, is not, and should not be

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but to exert greater control over the franchise small business. Fewer individuals will have the opportunity to own their own business. Concerns have been raised that the new joint employer standard will upend successful business models that have empowered countless Americans to achieve the American Dream of owning a business. There are also concerns that employers will be discouraged from contracting with small businesses for various services. Higher costs for consumers and fewer jobs for workers. If a franchisor is suddenly responsible for managing the daily operations of its franchisees, the franchisor will face higher administrative costs that will be passed onto the franchisee and ultimately result in higher prices for consumers or fewer jobs for workers. According to the American Action Forum, the new joint employer standard could result in 1.7 million fewer jobs.”).

<sup>122</sup> Letter from Competitive Enterprise Institute to Congress (Oct. 3, 2017). In another letter supporting passage of H.R. 3441, dated October 3, 2017, a joint employer coalition, including the Small Business and Entrepreneurship Council, wrote “This bill . . . is urgent and necessary to fix a problem—caused by the National Labor Relations Board (NLRB)—that is negatively impacting countless small businesses and their employees nationwide. . . . Employers that have contractual arrangements with franchisees and other small businesses could be forced to take greater control of their operations to mitigate the nearly unlimited liability to which the new joint employer standard could expose them.” Letter from Small Business and Entrepreneurship Council to House of Representatives (Oct. 3, 2017). In a letter dated February 14, 2017, the Small Business and Entrepreneurship Council, undersigned by employer and business trade associations such as the National Federation of Independent Business and the National Franchisee Association, wrote of the joint employment standard and the FLSA: “In the months since August 2015, joint employer lawsuits have been brought primarily under the FLSA . . . . The joint employment jeopardy created by the NLRB is reaching all levels of business from franchise employers to construction companies to service providers and their business partners. The unlimited joint employer liability standard will continue to harm businesses in numerous industries under multiple federal and state statutes until Congress enacts a permanent, legislative solution . . . .” Letter from Small Business and Entrepreneurship Council to House of Representatives (Feb. 14, 2017).

<sup>123</sup> Lynn Rhinehart, *A Radical Republican Proposal to Roll Back Worker Protections*, HILL, (Sept. 19, 2017), <https://thehill.com/blogs/congress-blog/labor/351249-a-radical-republican-proposal-to-roll-back-worker-protections> [<https://perma.cc/B2T3-5J78>] (“In fact, as a practical matter the legislation would eliminate joint employment under . . . the Fair Labor Standards Act. This would make it easier for employers to cheat workers out of their wages . . . . It is radical, far-reaching legislation that would roll back worker protections. The bill establishes a whole new definition of ‘joint employer’ that is far narrower than agencies, courts and the common law have ever used. It would reverse decades of precedent and weaken worker protections established by Congress in the 1930s under the Fair Labor Standards Act . . . .”).

relevant when it comes to the FLSA's reach. The FLSA reaches the practice, not the form.

In sum, the FLSA's legislative history dictates forcefully that the statute must reach even those entities that benefit from the labor and have indirect power over the payment of minimum wage and overtime premiums, regardless of formalities. This is sound policy. The FLSA broadly holds responsible companies that require or allow work on their behalf, regardless of the label businesses put on the work, the business structure, the methods of pay, or the location of the work. As Professor Michael Harper puts it, the proposed Save Local Business Act would mean that "employers could escape liability for wage and hour violations . . . for which they have primary responsibility."<sup>124</sup> Because the new language would require "significant control," some businesses would simply use indirect means to control wage practices related to the employees of the subordinate businesses they work with.<sup>125</sup> Moreover, Harper rightfully warns that the new language "could lead to greater misclassification of some employees as independent contractors."<sup>126</sup> As the discussion above illustrates, if Con-

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<sup>124</sup> Michael C. Harper, *The Restatement of Employment Law's 'Independent Business Person-Entrepreneurial Control' Test for Employee Status*, in WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR, *supra* note 20, at 45.

<sup>125</sup> *Post-hearing Questions for the Record from Ranking Member Bobby Scott: Redefining Joint Employer Standards: Barriers to Job Creation and Entrepreneurship*, 115 Cong. 2-3 (2017) ("First, employers could escape liability for wage and hour violations as well as unfair labor practices for which they have primary responsibility. H.R. 3441 would require that to be considered a joint employer, a person must 'directly, actually, and immediately, and not in a limited and routine manner, exercise [] significant control over the essential terms and conditions of employment.' This easily could be interpreted to exclude employers that cause illegal practices by inducing independent but subordinate other employers to engage in illegal practices, perhaps by exercising control over managers employed by the subordinate employers. Furthermore, the requirement that 'significant control' over 'rates of pay' and 'work schedules' be the rates or schedules of 'individual' employees could mean that a controlling employer could set illegal pay and work schedules as long as it did not assign individuals to particular slots in the schedules.").

<sup>126</sup> *Id.* ("[P]assage of H.R. 3441 would have the perhaps unintended consequence of confusing the law governing the definition of single as well as joint employment relationships. This confusion could lead to the greater misclassification of some employees as independent contractors. The Supreme Court has directed that the common law definition of employee should govern the scope of federal employment law statutes. This common law definition reflects the wisdom of generations of judicial decisions. Using undefined and ambiguous words such as 'directly, actually, and immediately' and 'limited and routine' and 'significant', H.R. 3441 offers governing language to depart from the common law in an uncertain manner. Furthermore, the inclusion of this language in the definitions of employer in the NLRA and the FLSA may be interpreted by the courts to express

gress passes this legislation it would be in direct contradiction to the purposes of the FLSA's New Deal framers to broadly protect low-wage workers. Through formalities that foster indirect linkages between the workers and the lead company, some businesses, which should be responsible for the payment of wages in the low-wage economy, would find themselves outside of the FLSA's domain.

### B. Disregarding Business' Self-Serving Labels

In a similar vein to the above, the FLSA's legislative history compellingly portrays that businesses' self-serving labels and contractual terms are not relevant to the FLSA's reach. This is a key observation in the contemporary context given that misclassification of true employees as "independent contractors" is widespread in the low-wage economy.<sup>127</sup> The Congress that enacted the FLSA feared that business formalities would unintentionally push some businesses out of the FLSA's regulatory zone. Thus, the mere labeling, or existence of a contractual term indicating that a worker is an "independent contractor," carries no weight in the determination of whether a FLSA-recognized employment relationship exists.<sup>128</sup> New Deal legislators and administrators, for instance, interrogated the use of self-serving devices like off-premises work, piecework, or commission payment arrangements. Courts, and administrators, are too often relying on labels and business formalities despite this history and the broad language of the FLSA.

A recent federal district court case serves as an example of this failing. The court did not consider congressional intent as expressed in the FLSA's legislative history.<sup>129</sup> Instead, the court considered the business' self-serving formalities as relevant to employment determinations under the FLSA. The case involved Uber's luxury service, called UberBLACK. The court concluded, on summary judgment motion, that UberBLACK drivers were not FLSA employees of Uber as a matter of law. The court stated that the facts "weigh[ ] heavily in favor of 'inde-

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Congressional intent that if no individual employer can meet the more rigorous standard, the worker should be treated as an independent contractor, even in cases where the employers together exercise sufficient control to deny the worker the discretion of an independent contractor.").

<sup>127</sup> See *supra* note 15 and accompanying text.

<sup>128</sup> See *Brock v. Superior Care, Inc.*, 840 F.2d 1054, 1059 (2d Cir. 1988) ("Though an employer's self-serving label of workers as independent contractors is not controlling, an employer's admission that his workers are employees covered by the FLSA is highly probative." (citations omitted)).

<sup>129</sup> *Razak v. Uber Techs., Inc.*, Civ. No. 16-573, 2018 U.S. Dist. LEXIS 61230, at \*19-21 (E.D. Pa. Apr. 11, 2018) (omitting any mention of legislative history).

pendent contractor' status."<sup>130</sup> It placed too much emphasis on contractual terms in general, especially with respect to self-serving terms that disavowed control. Indeed, the consideration the court elaborated upon "at the outset" was Uber's "lack of control," exhibited in "the written agreements."<sup>131</sup> It noted that the black letter of the written agreements stated that Uber does not control drivers, that Uber did not dictate when drivers needed to be on the app, and that Uber did not require drivers to use Uber logos or particular colors on their vehicles.

While the court's analysis widely embraced the formalities in the agreements that showed less control, it all but ignored the formalities that suggested more control. The written agreements explicitly gave Uber power to deactivate drivers, to "block" certain drivers from a line "at major transportation hubs," to reduce the number of hours a driver may work consecutively, and to make deductions from a driver's earnings.<sup>132</sup> The court acknowledged that Uber does have substantial control over the drivers "when they are online with the Uber app," but found it relevant that the drivers decide when to turn the app on (when to work), that the workers are formally allowed to work for other companies, and that drivers can hire "helpers."<sup>133</sup> Acknowledging that Uber had deactivated one of the driver-plaintiffs for driving while he was intoxicated, the court concluded that this "does not suggest 'control'" over the driver's working conditions and instead related this to "a sense of responsibility for the safety" of the passengers.<sup>134</sup>

Given the FLSA legislative history analysis developed here, courts should not be dismissing these kinds of cases on summary judgment motions to dismiss. They should not be relying on self-serving formalities, such as the written agreement be-

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<sup>130</sup> *Id.* at \*44.

<sup>131</sup> *Id.* at \*38–39 ("At the outset, the Court notes that the written agreements entered into by the Plaintiffs and their transportation companies point to a lack of control by Uber. For example, the Services Agreement states, 'Uber does not, and shall not be deemed to, direct or control Customer or its Drivers generally or in their performance under this Agreement.' (Uber SOF ¶ 22). These agreements, however, go beyond merely characterizing the extent to which Uber can control drivers. They also specifically detail the many ways that Uber is not entitled to control UberBLACK drivers. (See, e.g., *id.* ('Customer and its Drivers retain the sole right to determine when, where, and for how long each of them will utilize the Driver App or the Uber Services'; 'Uber shall have no right to require Customer or any Driver to [ ] display Uber's or any of its Affiliates' names, logos or colors on any Vehicle(s)[.] or [ ] wear a uniform or any other clothing displaying Uber's or any of its Affiliates' names, logos or colors.')).").

<sup>132</sup> *Id.* at \*39–40.

<sup>133</sup> *Id.* at \*39–42.

<sup>134</sup> *Id.* at \*42.



tween Uber and its UberBLACK drivers.<sup>135</sup> These cases, which admittedly do present new sets of factual circumstances given innovations in technology, at minimum call for a full review of the record beyond self-serving labels or contractual terms, rather than outright dismissals on summary judgment. The district court in the UberBLACK case put an outsized burden on the plaintiff drivers that is out of step with the FLSA's purposes. Its holding goes against the overwhelming thrust of the legislative history's message to read independent-contractor exclusions extremely narrowly.

### C. Encouraging Adaptations in the Twenty-First Century

Courts, policymakers, and administrators need to pick up the calls for continued adaptation to hold true to the FLSA's purposes in the twenty-first century. The FLSA's framers foresaw that the types of formalities associated with business organizational practices would shift over time.<sup>136</sup> They predicted that splintering, or "fissuring," would continue to be an enforcement challenge. They intended to reduce incentives for splintering that was motivated by an effort to evade wage and hour responsibilities. Indeed, a major reason that Congress removed an exclusion for small businesses that did not reach a threshold number of employees was a concern that some businesses would break off parts of themselves to fall outside of the Act's influence. By opting for broad and adaptable language, congressional representatives sought to cover off-premises work, misclassification of independent contractors, piecework arrangements, splintered-off business forms, and other practices that sidestepped the FLSA's reach. They wanted to reduce the incentives for businesses to engage in "unfair competition" by paying workers below the FLSA's baseline standards.

These historical lessons call for creative adaptation in the twenty-first century. The history urges critical consideration of "fissured" or splintered employment arrangements in the twenty-first century, which some courts have already started to

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<sup>135</sup> Contracts, and other formalities, however can indicate control over an employee. When they are not self-serving they can show a business' power over an individual's work life. In *Hall v. DIRECTV*, for instance, the court found a contractual arrangement relevant, stating that DIRECTV mandated that plaintiff workers "obtain their work schedules and job assignment through DIRECTV's centralized system" and that they use "particularized methods and standards of installation." *Hall v. DIRECTV, LLC*, 846 F.3d 757, 772 (4th Cir. 2017).

<sup>136</sup> See *supra* subpart I.C & Part II.

do explicitly.<sup>137</sup> It invites policymakers to think about the extent to which contemporary splintering is motivated by evasion of wage-and-hour-law requirements and what the law can do moving forward to hold true to the FLSA's purposes. It compels creative thinking about how new "devices" of twenty-first century technology apply in the FLSA context. Tippet, Alexander, and Eigen recently made precisely this type of recommendation to the U.S. Department of Labor.<sup>138</sup> They specified the kinds of wage and hour violations that result from a business's use of particular software for payroll and timekeeping and then creatively recommended such things as enhanced data transparency and the prohibition of "rounding" when calculating hours of work.<sup>139</sup> The FLSA was built for just this kind of adaptation to new business trends, with an eye toward its ultimate purposes to hold a floor on the low-wage labor market. It allows and invites its enforcers to innovate the regulatory machinery when necessary to accommodate economic and technological change. In the long run, what is important in these adaptations is that courts and administrators consider the FLSA's broad remedial purposes to provide blanket wage protections for the low-wage workforce in the United States.

#### D. Calling for a Blanket, Rather than Swiss-Cheese Touchstone

The FLSA's legislative history shows how much promise the legislation has to serve as a safeguard for the bottom of the labor market. The current unpredictable state of joint employer and independent contractor law is a problem that needs remedying. It creates loopholes for businesses and unpredictability for all parties involved. We need the FLSA to be more like a blanket, and less like Swiss cheese. If there were too many holes in coverage, the FLSA's framers knew that some businesses would quickly find ways to squeeze through them. Yet, the DOL's and the courts' inconsistent enforcement of the FLSA in independent contractor and joint-employer cases has

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<sup>137</sup> See *Hall*, 846 F.3d at 772 (referring to the plaintiff's allegation that defendant DIRECTV "operated a fissured employment scheme, governed by a web of provider agreements, that endured throughout Plaintiffs' periods of employment as DIRECTV technicians and was essential to the installation and repair of DIRECTV's own products. DIRECTV was the principal—and, in many cases, only—client of the lower-level subcontractors, and DIRECTV often infused capital into or formally 'absorb[ed]' the subcontractors when necessary.").

<sup>138</sup> Elizabeth Tippet, Charlotte S. Alexander & Zev J. Eigen, *When Timekeeping Software Undermines Compliance*, 19 YALE J.L. & TECH. 1, 55–61 (2017).

<sup>139</sup> *Id.* at 55, 60–61.

created holes in coverage. As Congress predicted in the 1930s, many businesses are trying to fit through these holes. We need an identifiable touchstone, or some type of easy-to-apply presumption of employment status, if we are to reduce this inconsistency and achieve the FLSA's purposes.

The most recent example of the unpredictability that plagues these areas of FLSA law was the interpretive guidance provided by the DOL's Wage and Hour Administrator on both independent contractor law and joint employer law. The Administrator issued the guidance in 2015 and 2016 under President Obama's administration, but subsequently rescinded the guidance in 2017 under President Trump's administration.<sup>140</sup> President Obama's DOL made it a priority to target businesses engaged in independent contractor misclassification. It recovered almost \$80 million for employees in misclassification cases involving construction, hospitality and other low-wage industries.<sup>141</sup> In 2015 alone, the DOL Wage and Hour Division recovered over \$23 million in unpaid minimum wages and overtime premiums on behalf of FLSA-covered employees.<sup>142</sup> In contrast, given the rescission of the Obama-era administrative guidance, it is highly unlikely that President Trump's DOL will make independent contractor misclassification enforcement a top priority.<sup>143</sup>

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<sup>140</sup> See, e.g., U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2015-1 (July 15, 2015) (the Obama Administration's guidance regarding independent contractors); see also U.S. Dep't of Labor, Wage & Hour Div., Administrator's Interpretation No. 2016-1 (Jan. 20, 2016) (the Obama Administration's guidance regarding joint employment). *But see* Press Release, U.S. Dep't of Labor, US Secretary of Labor Withdraws Joint Employment, Independent Contractor Informal Guide (June 7, 2017) (the Trump Administration's recent removal of this guidance). Congress has attempted to weigh in as well. See Save Local Business Act, H.R. 3441, 115th Cong. (2017) (noting a Congressional attempt to clarify joint employment).

<sup>141</sup> Press Release, U.S. Dep't of Labor, California Court Rulings Send Clear Message to Employers Who Misclassify Workers as 'Independent Contractors' (Aug. 19, 2015) (noting that in 2014, the Wage and Hour Division recovered over \$79 million for workers in low-wage industries).

<sup>142</sup> David Weil, *Strategic Enforcement in the Fissured Workplace*, in WHO IS AN EMPLOYEE AND WHO IS THE EMPLOYER?: PROCEEDINGS OF THE NEW YORK UNIVERSITY 68TH ANNUAL CONFERENCE ON LABOR, *supra* note 20, at 19; see Press Release, U.S. Dep't of Labor, Halliburton Pays Nearly \$18.3 million in Overtime Owed to More Than 1,000 Employees Nationwide after US Labor Department Investigation (Sept. 22, 2015); see also Press Release, U.S. Dep't of Labor, California Court Rulings Send Clear Message to Employers Who Misclassify Workers as 'Independent Contractors' (Aug. 19, 2015) (detailing a court judgment requiring \$5 million to be paid to misclassified courier drivers).

<sup>143</sup> See, e.g., Carmen N. Couden & Scott T. Allen, *United States: Top Labor And Employment Issues In Automotive To Watch In 2018*, MONDAQ (Feb. 5, 2018), <http://www.mondaq.com/unitedstates/x/670544/employeeights+labourrelations/>

Administrators and courts struggle to identify a touchstone in these cases that would lead to more consistency and predictability. Generally speaking, decision-makers often list a number of legal “factors,” state that they are looking at the “totality of the circumstances,” that no one factor is dispositive, and that the overarching inquiry is the “economic realities” of the situation, but the ultimate touchstone is difficult to parse. It is common for courts to translate the touchstone as an ultimate question of whether the worker is economically dependent on a business.<sup>144</sup> If the answer is yes, the worker is an “employee” of that business. But, what does “economic dependence” mean in the twenty-first century U.S. economy? Here, the Article begins to flesh out some answers, but it is beyond the scope of the Article to comprehensively synthesize all proposals.

In the independent contractor area, the *Restatement Third of Employment Law* provides a helpful framework for grounding multi-factored tests and making sense of the economic dependence touchstone.<sup>145</sup> While it is intended to apply more broadly than the FLSA, once applied to the FLSA it could help to decipher true economic dependence in the FLSA context. Its framing cautions that the “independent contractor” distinction should apply only to an individual who is truly in business for himself or herself. It should apply narrowly. True independent contractors, unlike FLSA employees, have the freedom to make “important” labor and capital allocation decisions in their own interests. Professor Michael Harper, reporter and author of this section of the *Restatement Third*, refers to its touchstone as the “independent business person entrepreneurial control test.”<sup>146</sup> Harper acknowledges that the FLSA’s definition of employment is uniquely broader than the definitions included in other employment and labor statutes.<sup>147</sup> He notes, however, that despite this broad definition, courts often mistakenly de-

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Top+Labor+And+Employment+Issues+In+Automotive+To+Watch+In+2018 [https://perma.cc/6NKF-WS8F] (discussing labor issues under the Trump administration).

<sup>144</sup> *Bartels v. Birmingham*, 332 U.S. 126, 130 (1947) (“[I]n the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service.”).

<sup>145</sup> RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 (AM. LAW INST. 2015).

<sup>146</sup> See Harper, *supra* note 124, at 45–55.

<sup>147</sup> *Id.* at 49. The Court has often remarked that with the FLSA Congress used broad language to include relationships as “working relationships” that wouldn’t have been found to be employer-employee relationships under common law right-to-control standards. See *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 729 (1947).

fault into the narrower common law control criteria in cases involving the FLSA.<sup>148</sup> The *Restatement Third* brings more clarity to the notion of economic dependence by implicitly defining economically dependent employees as people who do not make important labor and capital allocation decisions in their own interests.

Applying this touchstone to a recent FLSA case involving an alleged independent contractor brings additional perspective on this distinction. In that case, a federal district court did not follow the *Restatement Third's* guidance or the broad and adaptable definitions of employment that pervade the FLSA's language and legislative history.<sup>149</sup> Instead, the court signaled that low-wage plaintiff car washers, who worked for a single car-wash business, may indeed be independent contractors in business for themselves.<sup>150</sup> In that case, the district court judge concluded that the car washers might not be entitled to the FLSA's minimum wage and overtime protections if they have some control over their schedules and have some opportunities to solicit their own clients.<sup>151</sup> Based on the facts presented on the motion for summary judgment, if the car washer plaintiffs were efficient and finished their specified work for the day early, the car wash would allow them to solicit their own clients to make some extra money.<sup>152</sup> Denying the motion for summary judgment on the question of the car washers' status as FLSA employees, the court found that this opportunity to gain their own profits could be a strong indicator of an independent business.<sup>153</sup> In the court's words, if the car wash allowed this it would mean that the workers "had opportunities for judgment-driven performance and could realize gains from their greater efficiency."<sup>154</sup>

Given the FLSA legislative history analysis and the *Restatement Third's* formulation, however, courts should find eco-

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<sup>148</sup> Harper, *supra* note 124, at 47–49; see also *Alberty-Velez v. Corporación de Puerto Rico Para La Difusión Pública*, 361 F.3d 1, 10 (1st Cir. 2004) (television host was presumed to be an independent contractor); *Speen v. Crown Clothing Corp.*, 102 F.3d 625, 638 (1st Cir. 1996) (burden on sales representative to prove that he was not an independent contractor).

<sup>149</sup> RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01(3) (AM. LAW INST. 2015).

<sup>150</sup> *Rounds v. Phil's Kar Kare*, No. 16-13170, 2018 U.S. Dist. LEXIS 30170, at \*10–11 (E.D. Mi. Feb. 26, 2018); Lawrence E. Dube, *Car Washers May Be Independent Contractors, Court Decides*, DAILY LAB. REP. (Feb. 27, 2018), <https://bna.news.bna.com/daily-labor-report/car-washers-may-be-independent-contractors-court-decides> [<https://perma.cc/6F5W-LZR8>].

<sup>151</sup> *Rounds*, 2018 U.S. Dist. LEXIS 30170, at \*13–22.

<sup>152</sup> *Id.* at \*18–19.

<sup>153</sup> *Id.* at \*15–16.

<sup>154</sup> *Id.* at \*16.

conomic dependence and thus employee status based on these kinds of facts; cases involving low-wage workers who work primarily for one company and have little discretion over the majority of their work, or work under the direction of a business, should come out the other way.<sup>155</sup> The low-wage car washers used the car wash's tools, location, and materials for the solicitation of extra work, were only allowed to do this after they completed their primary work for the car wash, and did not have a separate business entity. Allowing workers to solicit their own business only after they finished their required work is simply not the mark of an individual who is truly in business for herself or himself. If the car washers could alter how the majority of work is done during the workday, or over how to invest capital in the car wash's future, that would be different. Soliciting business at the end of a shift if, and only if, they work fast does not constitute control over important capital allocation decisions.<sup>156</sup>

The legislative history analysis counsels that, in cases involving these kinds of undisputed economic-dependency related facts, federal courts should find that low-wage car wash workers are not independent contractors as a matter of law. Judge Easterbrook, in a concurring opinion, made an argument along these lines in a FLSA case involving a question of whether low-wage migrant farmworkers were "independent contractors" of a cucumber farmer. According to Easterbrook, "migrant farm hands" should be considered employees of the farmer as a rule of decision. He argued that this would be consistent with the FLSA's purposes and would provide the parties with more predictability. As he puts it, "Why keep cucumber farmers in the dark about the legal consequences of their deeds?"<sup>157</sup> In Easterbrook's view, there are hard independent contractor cases, but "this is not one of them."<sup>158</sup> To crystallize the point, he stated, "migrant workers are selling nothing but their labor. They have no physical capital and little human capital to vend."<sup>159</sup> Simply put, if courts and the DOL

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<sup>155</sup> For a view along these lines, see Sec'y of Labor, U.S. Dep't of Labor v. Lauritzen, 835 F.2d 1529, 1544 (7th Cir. 1987) (Easterbrook, J., concurring) (calling for a presumption that farmworkers are not "independent contractors" and stating that "the statute was designed to protect worker without substantial human capital, who therefore earn the lowest wages. No one doubts that migrant farm workers are short on human capital").

<sup>156</sup> See RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 1.01 cmt. d (AM. LAW INST. 2015).

<sup>157</sup> *Lauritzen*, 835 F.2d at 1539 (Easterbrook, J., concurring).

<sup>158</sup> *Id.* at 1545.

<sup>159</sup> *Id.*

embrace the historical legacies of the FLSA, and the concomitant *Restatement Third's* touchstone, independent contractor law would be more consistent and predictable because the independent contractor exception would be used sparingly. It would, thus, move us closer to avoiding the pitfalls of “various unstructured, multifactored tests”<sup>160</sup> and attaining blanket-like coverage for low-wage workers.

In subcontracting joint-employer cases, and cases involving multiple business entities, the economic dependence touchstone needs further specification as well. In cases where the worker is an “employee,” and the question is “whom” is his or her “employer,” the analysis no longer turns on whether the employee makes important labor and capital allocation decisions. The question is on whom (which business or businesses) is the employee economically dependent. Scholars and some courts<sup>161</sup> have called for deeper consideration of the early child labor cases, from which the broad “suffer or permit” language emerged. Drawing from a review of this extensive history, Goldstein et al. argue that economic dependence is met when a business knew or had reason to know that work was performed and the business was in a position to prevent the harm.<sup>162</sup> This interpretation is consistent with the FLSA’s broad language, remedial purposes, and legislative history presented here. As the Supreme Court has noted, the FLSA’s definitions have “striking breadth” that “stretches” beyond “traditional agency law principles.”<sup>163</sup> Along similar lines, Pro-

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<sup>160</sup> See Harper, *supra* note 124, at 45. FLSA independent contractor cases have varied results. Compare *McFeeley v. Jackson St. Entm't, LLC*, 825 F.3d 235, 240 (4th Cir. 2016) (exotic dancers were employees), and *Castillo v. Givens*, 704 F.2d 181, 195 (5th Cir. 1983) (farmworkers were employees), and *McComb v. Homeworkers' Handicraft Coop.*, 176 F.2d 633, 635 (4th Cir. 1949) (piecework home workers were employees), and *W. Union Tel. Co. v. McComb*, 165 F.2d 65,73 (6th Cir. 1947) (agents were employees), with *Saleem v. Corp. Transp. Grp., Ltd.*, 854 F.3d 131, 149 (2d Cir. 2017) (drivers were independent contractors), and *Speen v. Crown Clothing Corp.* 102 F.3d 625, 634 (1st Cir. 1996) (sales representative was an independent contractor), and *Lodge 1858, Am. Fed'n of Gov't Emps. v. Webb*, 580 F.2d 496, 513 (D.C. Cir. 1978) (technical service workers at NASA were independent contractors).

<sup>161</sup> See, e.g., *Dynamex Operations W., Inc. v. Superior Court*, 416 P.3d 1, 21 (Cal. 2018) (“Courts applying such statutes before 1916 had imposed liability, for example, on a manufacturer for industrial injuries suffered by a boy hired by his father to oil machinery, and on a mining company for injuries to a boy paid by coal miners to carry water.”).

<sup>162</sup> See Goldstein et al., *supra* note 46, at 1037, 1041, 1043, 1048. Some scholars go even further and argue for strict liability. See Glynn, *supra* note 12, at 227–28 (arguing that if a business buys, sells, or distributes goods or services it should be held strictly liable for any wage and hour abuses that occur related to those goods or services).

<sup>163</sup> *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 326–27 (1992).

fessor James Reif formulated a test that would hold lead companies liable when the work performed by front-line workers is “integral” to the company’s mission, the company “knew or had reason to know” of the work performed, and the company had the ability to remedy the problem but did not.<sup>164</sup> These broader, more blanket theories of employment in the FLSA context could help courts and administrators to make more sense of the outer limits of the “economic dependence” touchstone. The legislative history communicates that if a business allows work to be performed, is the ultimate beneficiary of that work, and has the power to affect wages and hours, that entity is an employer.

#### CONCLUSION

In 1937, U.S. Labor Secretary Frances Perkins stressed to the legislators voting on the FLSA that overcoming challenges to effective enforcement would be key to the FLSA’s success.<sup>165</sup> U.S. Assistant Attorney General Jackson stressed the importance of focusing on “practices” of businesses, rather than business form. These observations still ring true today. The increased prevalence of many forms of contracting, subcontracting, and outsourcing, or what Weil and others call “fissuring” of the formerly vertically-integrated corporation, is often cited as a significant challenge to the eighty-year-old FLSA. As this Article has contended, however, these dynamics are not entirely unexpected.

The Act’s framers intentionally structured it to provide leeway for courts and administrators to confront just such challenges, both old and new. Congress broadly and flexibly worded this legislation in 1938 with foresight about the need to target diverse and evolving business relationships over time.

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<sup>164</sup> See Reif, *supra* note 22, at 409–10 (2014) (arguing that a company that outsources work should be liable under FLSA when “that work was an integral part of the company’s process of production of goods or provision of services, the company knew or had reason to know that individuals hired by the contractor were performing its outsourced work but did not prevent that performance despite its ability to do so, and performance of that work did not require any specialized expertise or experience such that it could not be performed by individuals directly employed by the company.”); see also Rubinstein, *supra* note 12, at 611 (“Quasi-employers are not employers in the traditional sense; however, the law considers them to be employers because they may significantly interfere with an employment relationship, may have been delegated a significant amount of responsibility with respect to terms and conditions of employment, may be joint or single employers, or otherwise have effective control over employees.”).

<sup>165</sup> FLSA, *Hearing Part 1*, *supra* note 1, at 181 (statement of Hon. Frances Perkins, Secretary of Labor, Dept. of Labor) (“One of the greatest difficulties to be overcome, [if the FLSA] is to be successful is that of enforcement.”).



Moreover, they foresaw and sought to reduce incentives to splinter off parts of the business, or to impose new business formalities that evade the FLSA's blanket reach.

On the FLSA's eightieth birthday, this Article proposes that the FLSA's broad and flexible language, while not without problems, should help courts and FLSA enforcers apply it to a continuously evolving business environment.<sup>166</sup> In other words, Congress intended the FLSA to have an extensive reach and for it to be highly adaptable to shifting winds in business organizational patterns. While scholars and the three branches of government are the primary audiences for this Article, the FLSA's legislative history informs public discourse on this pressing subject as well. As new forms of business arrangements pop up through online platforms and other means, the public discourse too often starts with an assumption of exclusion from the FLSA's coverage. For instance, when referring to Uber drivers, many headlines somewhat incredulously read "Are Uber Drivers Really Employees?,"<sup>167</sup> as opposed to "Are Uber Drivers Really in Business for Themselves?"<sup>168</sup> The New Deal spirit of the FLSA's legislative history strongly advises us that we should start with the latter presumption, rather than the former. The FLSA's straightforward statutory purpose is as weighty now as it was in the 1930s; entities that directly or indirectly engage low-wage workforces

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<sup>166</sup> See Robert N. Willis, *The Evolution of the Fair Labor Standards Act*, 26 U. MIAMI L. REV. 607, 608 (1972) (praising the FLSA's ambiguous language as allowing it to be applied broadly and stating, "[i]t is under the guise of the broad commerce powers that the gradual, consistent extension of the coverage of the Fair Labor Standards Act has been and will continue to be accomplished.").

<sup>167</sup> E.g., Omri Ben-Shahar, *Are Uber Drivers Employees? The Answer Will Shape the Sharing Economy*, FORBES (Nov. 15, 2017), <https://www.forbes.com/sites/omribensshahar/2017/11/15/are-uber-drivers-employees-the-answer-will-shape-the-sharing-economy/#6da10dee5e55> [<https://perma.cc/3GWF-LFW8>]; Alison Griswold, *Are Uber Drivers Employees? The Trial That Could Devastate the "Sharing Economy"*, SLATE (Mar. 12, 2015), [http://www.slate.com/blogs/moneybox/2015/03/12/uber\\_lyft\\_employment\\_cases\\_juries\\_could\\_decide\\_the\\_legal\\_fate\\_of\\_the\\_sharing.html](http://www.slate.com/blogs/moneybox/2015/03/12/uber_lyft_employment_cases_juries_could_decide_the_legal_fate_of_the_sharing.html) [<https://perma.cc/U9ES-SHXM>]; Yuki Noguchi, *Gig Economy Renews Debate Over Whether Contractors Are Really Employees*, NPR (Mar. 7, 2018), <https://www.npr.org/2018/03/07/589840595/gig-economy-renews-debate-over-whether-contractors-are-really-workers> [<https://perma.cc/7HWR-8LTB>]; Michelle Quinn, *Are Uber and Lyft drivers Employees?*, SAN JOSE MERCURY NEWS (Jan. 28, 2015), <https://advance.lexis.com/api/permalink/ce14074d-4cff-488a-86c0-6c74aca938b2/?context=1000516> [<https://perma.cc/6JQY-XZW7>].

<sup>168</sup> A similar search for news article titles phrasing the question as whether Uber or ridesharing drivers are really in business for themselves, or are really independent contractors, turned up zero articles.

to provide work on their behalf should use their power over workers' wages and hours to ensure that these workers receive legally mandated compensation for the work they perform.